The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law

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The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law

by John Valery White

I. INTRODUCTION

This Article argues that the Supreme Court’s recent disparate treatment decisions under Title VII of the Civil Rights Act of 1964 represent a trend toward unifying all civil rights law under an approach most closely akin to traditional equity. This trend explains the curious tension between substance and process in the Court’s most recent decisions, St. Mary’s Honor Center v. Hicks and Reeves v. Sanderson Plumbing. It also explains the Court’s uncommon confidence in its yet undefined notions of what constitutes discrimination on the basis of the several protected categories recognized in Title VII and related statutes. The trend toward equity reveals that the Court regards any precise definition of discrimination “because of the categories” as unnecessary, as it views the law of employment discrimination as applicable only to

* J. Dawson Gasquet Memorial Associate Professor of Law, Paul M. Hebert Law Center. Yale Law School (J.D., 1991). This Article has benefitted from the generous financial support of the Law Center’s summer research program and the able research assistance of Shera’ and Shanta’ Craig, class of 2002. Comments on a previous draft from Professors Michael Zimmer and Michael Selmi were tremendously valuable, as were my regular exchanges with my colleagues, William Corbett and Gregory Vincent. Any mistakes are, of course, my own.

egregious cases. The perils of this approach are outlined, its necessity rebutted, and an alternative offered in succeeding sections.

Once regarded as a simple, even intuitive method of proving discrimination, the Title VII disparate treatment proof structure is now seen as wildly complicated. To commentators who hoped the Supreme Court would simplify the proof structure, the recent decision in Reeves was as disappointing as it was anticipated. Revisiting its 1993 decision in Hicks, the Court seemed poised to abandon one of two somewhat contradictory components of that decision. Instead, the Court in Reeves strongly reaffirmed Hicks on grounds that sustained the tensions inherent in the Hicks decision.⁴

Hicks and Reeves together represent a consistent, though seemingly contradictory approach to understanding proof of discrimination. Both opinions emphasize that in employment discrimination cases, a plaintiff is required to prove that the contested employment decision was motivated by a discriminatory reason.⁵ In this sense, both opinions emphasize a “substantive” approach to defining the parties’ obligations. Notwithstanding intermediary burdens placed on the defendant, the plaintiff bears the burden of proof throughout and discriminatory intent is what the plaintiff must show to prevail. The opinions also embrace a “procedural” approach to structuring disparate treatment proofs. This approach is most closely associated with McDonnell Douglas v. Green,⁶ the Supreme Court’s first disparate treatment decision. In McDonnell Douglas, the procedural approach used emphasized that a party’s failure to produce evidence at various “stages of proof” might result in a decision against that party.⁷ Although this approach’s roots in common law suggest that it is consistent with a substantive definition of the elements of a discrimination cause of action, the McDonnell Douglas structure is widely regarded as artifice, largely disconnected from the question of discrimination vel non.⁸

By emphasizing the substantive requirements of the cause of action, Hicks highlighted the duality of the disparate treatment proof. To the detriment of plaintiffs whose obligations were seen as heightened, Hicks was consequently viewed as a change in the law.⁹ The inertia of Hicks

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4. Id. at 142.
5. Reeves, 530 U.S. at 142-43; Hicks, 509 U.S. at 506.
7. See id.
8. Surely this is an ironic view of a proof structure that has spread throughout employment law. However, recent criticism of the approach is loud and widespread. See infra text accompanying notes 36-43.
9. See Linda Hamilton Kreiger, The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law, 47 Am. J. Comp. L. 89, 121 (1999);
precipitated a shift in lower courts' view of discrimination claims, supporting the view that *Hicks* had circumscribed the cause of action. In the heated debate that *Hicks* generated, most commentators agreed that the artificial nature of the *McDonnell Douglas* proof structure, especially its very light prima facie case, was the root of the problem. Though the debate raged over whether *Hicks* was an appropriate response to the problem it exposed, fewer commentators defended *McDonnell Douglas*. Indeed, even among commentators who saw value in *McDonnell Douglas*, most focused on the need to preserve its "presumption" of discrimination by attaching significance to the third stage of proof, the showing of pretext. Few argued that the indirect, three-step proof was valuable, as such.

In this context, *Reeves* is potentially confusing. Contrary to the expectations of many, *Reeves* reaffirmed the three-step approach of


13. See, e.g., Calloway, supra note 9.
McDonnell Douglas.¹⁴ Reeves also chastened the Fifth Circuit Court of Appeals, restoring a plaintiff’s claims and seeming to break with the conservative spirit of Hicks.¹⁵ As such, Reeves was viewed as a pro-plaintiff’s decision by the journalists covering the Supreme Court.¹⁶ However, Reeves repeats the very language from Hicks which emphasized that, artifice notwithstanding, the core of the disparate treatment proof is the plaintiff’s obligation to prove discriminatory intent.¹⁷ The core confusion, common to both Hicks and Reeves, is the retention of both substantive and procedural requirements in the disparate treatment proof.

This Article will first locate the simultaneous commitment to both the substantive and procedural requirements of disparate treatment proof in the Court’s quiet unification of civil rights law. Though the tension between substantive and procedural proofs is real, this tension is not as important as the Court’s reasons for ignoring it. Specifically, this Article will show that the Court’s approach in Hicks and Reeves articulates an incomprehensible definition of discrimination, wrapped in a veil of coherence provided by the Court’s ambivalent commitment to both substantive and procedural approaches. This ruse is maintained because the Court wishes to reconcile the more powerful antidiscrimination principles of Title VII with the remainder of its civil rights jurisprudence; Hicks and Reeves represent the transformation of antidiscrimination law into a form of old-fashioned equity. Under this view, discrimination cannot be proved by establishing elements, but rather is reserved to the considered judgment of the judge.

This is not to say that the Court should resolve the tension between substance and procedure. This Article instead seeks to demonstrate why the Court’s recent emphasis on substance, an emphasis that has encouraged many to attack McDonnell Douglas, must be viewed with caution. Both Hicks and Reeves are wrong in over-emphasizing

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¹⁴. Although Justice O’Connor puts off deciding whether the Court is bound to apply McDonnell Douglas to ADEA claims, she assumes it is applicable and analyzes the case according to the McDonnell Douglas framework as modified by Hicks. Reeves, 530 U.S. at 142-44.

¹⁵. Id. at 134.

¹⁶. See, e.g., High Court Makes it Easier for Employees to Prove Discrimination, 7 NEW YORK EMPLOYMENT LAW LETTER 8 (Aug. 2000); High Court Decision Eases Burden For Discrimination Plaintiffs, INDIANA L.AW, July 19, 2000, at 4; Risks of Discrimination Suits Increase For Employers Following Supreme Court Ruling in Reeves, 14 EMPLOYMENT LITIGATION Rptr., no. 16, July 11, 2000 at 3; Marcia Coyle, Dismissal of Bias Suits Harder, NAT’L L.J., June 26, 2000, at B1; Tamara Loomis, “Pretext Plus” Rejected: Employment Discrimination Landscape Changed, NEW YORK L.J., June 22, 2000, at 5.

¹⁷. Reeves, 530 U.S. at 148.
plaintiffs' need to prove discrimination *vel non* for the simple reason that the requirements of such a proof cannot be defined. In emphasizing this requirement, the Court's recent decisions ask plaintiffs to guess what a judge's definition of discrimination might be, provide evidence sufficient to satisfy the judge's view of such actions, and anticipate any excuses the judge may harbor for discriminatory behavior. Neither plaintiffs nor defendants can know what they must show or defend; rather they are left to trade in the very stereotypes and prejudices that the act presumably bans from the workplace in the hope that they can trigger the judge's sympathy to their cause. In showing why discrimi-

18. The *Hicks* and *Reeves* majorities proceed on an erroneous view of the necessity of the McDonnell Douglas construct. The justification for *McDonnell Douglas* ought be found in the relative incoherence of the categories protected by Title VII. As a discrimination claimant must prove the adverse employment decision was based on one of the protected categories, those categories are presumed to be coherent and easily understood. In reality, however, none of the categories are so clear. Rather they represent shifting and overlapping concepts as much defined by the troublesome and stereotyped behaviors the act seeks to ban from use in employment decisions as by "objective," necessary and sufficient criteria. The consequence is a potentially circular argument: one must prove use of the category, the category being defined in substantial part by stereotyped behaviors, but proof of those behaviors does not necessarily constitute proof of the category—unless, of course, proof of the bad behavior is presumed to be proof of the category. In the absence of such a presumption, the very stereotypes that are related to the protected categories can be proof that the category was not used!

This is most evident and severe in the context of racial discrimination, but in any case the lack of a general consensus on the definition of the categories makes the development of a proxy-proof structure necessary and *McDonnell Douglas's* particular requirement of rationality in employment decisions especially appropriate.

Ruth Gana Okediji makes a similar argument from a quite different presumption. Okediji, *supra* note 9, at 49. Professor Okediji is critical of procedural mechanisms and sees *Hicks* as subverting substance with procedure, "the *Hicks* decision has a broader substantive effect of sacrificing the struggle for a discrimination-free work environment on the alter of procedure." *Id.* at 51-52. Professor Okediji seems to be referring to the Court's invocation of Rule 301 as a common sense referent of how cases are organized and proved. This is not a problem of procedure over substance, but substance hidden behind procedure, a point on which Okediji and I seem in accord as she argues that discrimination cannot be proved. *Id.* at 52-54. Okediji also believes that the focus on "intent" in disparate treatment cases undercuts the ability to respond to decisions based on stereotypes. *Id.* at 80-83.

19. *Hicks*, therefore, is problematic because it memorializes an approach to identifying discrimination that exaggerates the coherence of the protected categories. The consequence is that judges are empowered to impose their vision of "discrimination" as a finding of law when the fundamental fact question of the existence of improper discrimination is being determined by that judge's embedded and equally important definition of the parameters of the prohibited categories. The effect of this move is the de facto invalidation of the right to a jury trial, which was added by Congress in the Civil Rights Act of 1991. This addition by Congress can reasonably be viewed as a part of a complicated quid pro quo that included
nation cannot be sufficiently defined, this Article highlights the importance of the *McDonnell Douglas* three-step proof structure.

Recognizing that the concerns voiced in *Hicks* about false positives are significant and accepting that the promise of defining "elements" of a disparate treatment cause is illusory, this Article proposes a modified *McDonnell Douglas* proof. Contrary to the language of *Hicks*, a procedural approach to proving discrimination is not foreclosed by Rule 301 of the Federal Rules of Evidence, nor by common-law understandings of burdens of proof and production. Rather the substantial policy concerns that make antidiscrimination law controversial counsel for the very kind of complicated balance the Court attempts in *Hicks* and *Reeves*.

II. THE PROPRIETY OF *MC DONNELL DOUGLAS* AND THE REMEDY OF *HICKS*

*Hicks* and *Reeves* prove to be very confusing decisions because their balancing of the substantive and procedural aspects of disparate treatment veil a policy decision, the significance of which at all times exceeds the debate over substantive and procedural definitions of discrimination. The policy choice is to move employment discrimination law from the "law" to the "equity" side of the bar. Perhaps rooted in the belief that discrimination is relatively rare, this move deliberately remodels employment discrimination law to be more consistent with the Court's recent decisions on civil rights generally. It is problematic because it overlooks the inherent problems in defining discrimination.

*Hicks* and *Reeves* are the Supreme Court's most substantial modifications of disparate treatment since the approach was adopted in 1973. *McDonnell Douglas* first distinguished disparate treatment cases from disparate impact suits, holding that a plaintiff who showed a "prima facie case" of discrimination was entitled to a presumption of discrimination unless the defendant "rebutted" that presumption with admissible evidence of a nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* opinion held, however, that the rebuttal did not end the matter; a plaintiff was to be given an opportuni-

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the preservation of a modified mixed motive defense for employers. If so, *Hicks* disrupts that balance, rendering the justification of the mixed motives defense shaky. However, it appears the Court's intention to promote both *Hicks*'s narrow view of proof requirements and the mixed motives defense, leaves only the most egregious and single-minded employers liable for use of prohibited categories. *Reeves* duplicates this error.

20. 411 U.S. at 802.
ty to show that the rebuttal was pretext, allowing the case to go to the fact-finder on the ultimate question of discriminatory motive. 21

Over the next twenty years two questions proved crucial: courts were forced to define the nature of both the plaintiff's and defendant's showings at the initial stages of the process. In Postal Service Board of Governors v. Aikens, 22 the Supreme Court avoided defining precisely what the scope of the plaintiff's prima facie case was, but implied that the scope of the showing was both light and flexible. 23 Addressing the defendant's burden in Burdine v. Texas Department of Community Affairs, 24 the Supreme Court held that the defendant's burden was only one of production, making that burden rather light as well. 25 Predictably, the key question quickly came to concern the effect of the pretext showing. With the 1991 Civil Rights Act's recognition of compensatory and punitive damages, the question became more crucial, as the consequence of the pretext showing came to represent access to jury determinations.

It is in this context that Hicks was decided. Upholding a judge's verdict for defendant, the Supreme Court rejected the so-called "pretext-only" approach to establishing Title VII liability. 26 It held that a plaintiff's showing that the defendant's rebuttal was unbelievable did not require a decision for the plaintiff. Rather, the key question remained whether the plaintiff had proved discriminatory motivation for the adverse decision in question. 27 This finding was controversial, largely because many believed that plaintiffs would not be able to satisfy that burden. The opinion was also ambiguous. Some language implied that a plaintiff could win on a showing of "pretext-only" (really, a showing of pretext and the evidence used to establish the prima facie case). 28 Other language, however, implied that plaintiffs ordinarily would need to show considerably more to establish discriminatory motivation. 29

Hicks's more restrictive language prompted a number of circuit courts of appeal to reject claims by plaintiffs, either because the plaintiff did not produce "additional" evidence of discrimination, or because the quality of the evidence already produced at the pretext stage did not

21. Id. at 801-06.
23. Id. at 715; see also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-76 (1978).
25. Id. at 255.
26. Hicks, 509 U.S. at 511.
27. Id. at 519, 524.
28. Id. at 519-24.
29. Id.
convince the judges that discrimination was the cause of the adverse decision. In general *Hicks* was blamed for initiating a considerably more suspicious view of Title VII claims and unleashing federal judges to reject claims on summary judgment when the facts were unpersuasive to the judge.

*Reeves* was one of those decisions. The Supreme Court's June 2000 decision in *Reeves* reinstated a jury verdict for plaintiff Roger Reeves, a supervisor at Sanderson Plumbing who was discharged on the basis of his age after forty years of service. The Fifth Circuit had reversed the district court's denial of a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. The Fifth Circuit panel argued that the plaintiff's showing of "pretext," along with the evidence he presented to establish his prima facie case, was insufficient to support the jury verdict in his favor. The Supreme Court's decision that such a showing *might* be adequate was a strong reaffirmation of a position it had implied seven years earlier in *Hicks*, but which lower courts had not fully embraced. Consequently, *Reeves* has been seen as both a strong rebuke of the Fifth Circuit's restrictive requirement of "pretext-plus" and, more generally, a plaintiff-friendly decision meant to facilitate the prosecution of employment discrimination cases.

*Hicks* and *Reeves* save the three-step formula of *McDonnell Douglas* by destroying it. In its place, the Court relies on the more simply stated requirement that plaintiffs prove discriminatory intent in order to prevail. It is apparent that changes made by the decision in *Hicks* place almost unfettered discretion in the hands of federal district court judges to determine what constitutes discrimination, requiring of plaintiffs the impossible burden of proving an undefined fact: intentional discrimination. Although *Reeves* reprimands the Fifth Circuit for a
parsimonious reading of Hicks, it does little to limit the power of the judge as guardian of the fact-finder as it does not articulate a definition of discrimination. It is the emphasis on the requirement that plaintiffs prove discrimination, coupled with the Court's refusal to define discrimination, that is problematic. This emphasis on substance proves irrational in light of the practical impossibility of defining "elements" of discrimination. 36

This irrational turn, vesting judges with largely unchecked power to make equitable judgments, is the product of dissatisfaction with the three-step proof structure established in McDonnell Douglas. The remainder of this Part will outline the root of this dissatisfaction, set out the Court's response in Hicks, and summarize how this turn represents a step toward the unification of Title VII proofs with other civil rights proofs. McDonnell Douglas's very light prima facie case will be shown to be the basic point of contention that Hicks addresses indirectly. As such, Hicks saps the McDonnell Douglas formula of much of its force in an effort to turn disparate treatment litigation toward the substantive question of discriminatory intent. 37 Reeves emphasizes the Court's faith in Hicks, repeating its broad admonitions that plaintiffs must prove discrimination and may use circumstantial evidence. 38 Thus Hicks and Reeves de-emphasize the importance of McDonnell Douglas's technical proof devices relative to the ultimate question of discrimination. But this seemingly innocuous move has had fateful effects because it requires that plaintiffs show adverse decisions are based on protected categories whose definitions are neither coherent, nor widely shared, and for which decisions based thereupon always invoke other decisional grounds. In this way, the Hicks/Reeves framework's seemingly neutral description of the effect of a pretext showing operates as a substantive change in the requirements of the disparate treatment proof toward proving an undefined "wrong"—that is, convincing the presiding judge that an injustice has been done.

36. See infra Part II.
37. Partly this is a disingenuous move as Hicks purports to modify nothing in McDonnell Douglas, but mostly is a modification based on the belief that the McDonnell Douglas three-step formula's artificiality produced false negatives. This view, in turn, rests on the belief that discrimination is not prevalent and that what passes for discrimination complaints are better explained by other motivational factors. See Selmi, Proving Intentional Discrimination, supra note 9, at 340-42 (summarizing these arguments and arguing that they bear burden of showing why the law should be different). See also Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 LA. L. REV. 555 (2001) [hereinafter Selmi, Hard to Win].
38. 530 U.S. at 133-34.
A. McDonnell Douglas in Hicks's Shadow

McDonnell Douglas was the second major Supreme Court opinion interpreting Title VII. Coming to the Court on appeal of a dismissal, the Court took the basic facts as given: Percy Green was an employee at the St. Louis McDonnell Douglas plant and was laid off, along with numerous other workers. Before and after his layoff he had been active in protesting the company's policies regarding black employees. During the time of his layoff, Green and others participated in a "stall in" on the roads leading to the St. Louis plant and a "lock in" of workers at the plant itself. Effectively blocking access to the plant for hours, the "stall in" led to the arrest of the protesters, including Green. When workers were called back from the layoff, Green applied for reinstatement but was not rehired. He initiated a Title VII action, claiming that the company's refusal to recall him from layoff was discriminatory, based on his race and advocacy for racial equality. In its dismissal of the case, the district court held that McDonnell Douglas's refusal to recall Green was nondiscriminatory; rather the court pointed to Green's role in the illegal "stall in" as the basis of the plant's decision. The district judge specifically found that the refusal to rehire was "based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activity."

The Supreme Court disagreed and insisted that the articulation of a nondiscriminatory reason did not end the inquiry. The plaintiff was to be given the opportunity to show that the employer's proffered reason for the decision was pretext or to show additional evidence of discrimination that would allow him to prevail.

39. McDonnell Douglas v. Green, 411 U.S. at 794. Green in fact was affiliated with ACTION, a civil rights group that was active in the St. Louis area. Id. at 795 n.3. Cf. ACTION v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (§ 1985(3) case against ACTION for disruptive reparations demands on St. Louis area white churches).
40. 411 U.S. at 794-97.
41. Id. at 797.
42. Id. at 803-04.
43. Id. at 801-06. The basis for this construct is found in the Eighth Circuit's ruling below. Green v. McDonnell Douglas, 463 F.2d 337, 352 (8th Cir. 1972). The Eighth Circuit held that Green had established a prima facie case, that McDonnell Douglas had responded with a "subjective" explanation of "little weight" (although it seemed to credit the reason as a sufficient response to plaintiff's prima facie showing), and that plaintiff should be given an opportunity to show that defendant's proffered reasons were pretext. Id. The Supreme Court's grant of certiorari was "to clarify these standards." McDonnell Douglas, 411 U.S. at 798. In articulating its holding, the Court in McDonnell Douglas established a distinct basis for proving intentional discrimination, the so-called disparate treatment proof. The Court clarified that an intentional discrimination claim under Title VII was to
On the facts of the case, as well as more generally, the Supreme Court ensured that the plaintiff had an opportunity to advance his case. As a practical matter, McDonnell Douglas made summary judgment unlikely, virtually guaranteeing that the plaintiff received the opportunity to present his case to the fact-finder. But the plaintiff's interests were not all that concerned the Court. The Court expressed significant worry that employers' legitimate business interests would not be applied. The issue was framed as a treacherous balance between creating a regime that intruded into employers' legitimate business concerns, or creating one which made it nearly impossible to show an act of employment discrimination. The formula established in McDonnell Douglas sought to balance these concerns by progressively narrowing the issue, first in terms of the broad parameters of the plaintiff's prima facie case, then in terms of the employer's alleged nondiscriminatory reason. So narrowed, the Court's opinion suggests the question would be reduced to whether there was discrimination.

Missing from this formulation, however, is any definition of discrimination. Certainly the plaintiff's prima facie case is an inadequate

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proceed in three stages. First, the plaintiff was required to show a prima facie case. Id. at 802. This was to be a relatively light showing, in which the plaintiff eliminated the most likely reasons he was not hired—to wit, he did not apply, was not qualified, or did not allege a decision based on the protected category. (“The facts necessarily will vary in the Title VII cases, and specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to different factual situations.” Id. at 802 n.13). See also Furnco Constr. Co. v. Waters, 438 U.S. 567, 575-76 (1978); Int'l Bhd of Teamsters v. United States, 431 U.S. 324, 358 (1977). Such that this showing was made, the court would presume discrimination, absent a showing by the defendant that there was a nondiscriminatory reason for the employment decision. McDonnell Douglas, 411 U.S. at 802-03. The defendant's obligation was tied to the plaintiff's prima facie case in that the defendant was obliged to “meet” the plaintiff's case with admissible evidence. Id. To the extent this burden was met, the presumption "fell away" but the plaintiff was still accorded the opportunity to respond with further evidence of discrimination or evidence that the defendant's reason was pretext. Id. at 804.

45. This worry is in large part why the Court granted certiorari. Questioning the Circuit Court's dismissal of "subjective" responses, the Court says, "the court below seriously underestimated the rebuttal weight to which petitioners reasons were entitled." 411 U.S. at 803.
46. For a critical response to this kind of dichotomy, see the excellent article, David B. Wilkins, On Being Good and Black, 112 HARV. L. REV. 1924 (1999) (book review).
47. Michael Selmi argues that the Court's actual definition is not a definition of discriminatory intent but of causation: "What the Court means by intent is that an individual or group was treated differently because of race . . . . [T]he key question is whether race made a difference in the decisionmaking process, a question that targets
definition of discrimination, a fact the Court seems to acknowledge. But the Court also concedes that the defendant’s response, though a legitimate employment requirement, might not be the actual basis for its decision. In stopping at this stage and talking generally of pretext and additional evidence of discrimination, the Court punts on the question of discrimination as such, leaving the question to the determination of fact in the particular case. The consequence is a free flowing form that allows discrimination to be determined in an ad hoc fashion by the fact-finder.

It seems that the Court’s plan in McDonnell Douglas was to avoid defining both discrimination and the protected categories so that the law might accommodate the many forms of both, while creating a structure within which justice could be administered. While the Court’s three-
step formulation is widely understood to have avoided articulating a
definitive definition of discrimination, the Court never questions
whether there was "race" discrimination in the case. Green's assertions
are taken on their face. To a great degree this is required by the posture
of the case, but even taking his assertions in their best light did not
require the Court to assume that advocacy for better pay and conditions
for black workers constituted a racial act, the response to which was
itself based on race.

against discrimination." Okediji, supra note 9, at 90.
Second, the decision is defended as justified by the prevalence of discrimination in the early days of the post-Jim Crow world. John Donohue summarizes the data on this question

Survey literature exploring the level of antiblack prejudice [shows] that racism
declined steadily in the second half of this century . . . . Although [these] simple
surveys of racial attitudes can provide some insight into the degree of racial
prejudice, the likelihood of truthful reporting diminishes as racial bias becomes
less socially acceptable . . . . As a result, researchers have sought a number of
indirect ways to observe discriminatory behavior as a means of inferring the
presence of prejudiced attitudes . . . . Crosby, Bromley, and Saxe conclude that
"whites still discriminate against blacks in terms of behaviors that lie largely out
of awareness . . . ."

JOHN J. DONOHUE, III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 111 (1997)
(quoting Faye Crosby, Stephanie Bromley & Leonard Saxe, Recent Unobtrusive Studies of
Black and White Discrimination and Prejudice, 87 PSYCHOL. BULL. (1980)). As Professor
Selmi surveys, the declining prejudice hypothesis has been invoked to establish that
discrimination is declining. Selmi, Proving Intentional Discrimination, supra note 9, at
340-42. This is the tacit assumption of Professor Malamud's discussion of the "unitary"
nature of discrimination in Calloway's "basic assumption." Malamud, supra note 11, at
2257-58, referring to Calloway, supra note 9. Any more precise a definition of discrimination, it is
assumed, would have worked as an invitation for nefarious employers to
circumvent the Act, stymying efforts to eliminate discrimination in the workplace "root and
branch." Each of these arguments are met by Malamud but neither is necessary. Rather
the necessity of McDonnell Douglas is the inability to define the protected categories with
sufficient precision. See Malamud, supra note 11; see also infra Part II.

52. Professor Malamud agrees that McDonnell Douglas offered no definition of
discrimination. Malamud, supra note 11, at 2230 ("the Supreme Court has taught us little
in the past twenty-five years about what discrimination is.").

53. The case was dismissed by the district court below. See McDonnell Douglas, 411
U.S. at 797.

54. In subsequent years this very type of argument has been advanced in defense of
discrimination claims and is seized upon by the district court judge in Hicks. Cf. Hazen
obligation, though age-related, is not proof of age discrimination). So while the omission
is a product of the posture of the case and an understandable conflation of the distinct
issues, the combination has had a devastating legacy on the framing of the question of
discrimination under Title VII.
For better or worse the Court in *McDonnell Douglas* seemed to want the fact-finder to be king, transforming all questions into at least mixed questions of law and fact. Malamud and others have criticized this result, noting that near certain access to the fact-finder is not justified by the apparent reason underlying the access—difficulties obtaining evidence of discrimination. This seems to be the strength of Malamud's argument. For sure, the liberalization of procedure manifest

55. Michael Selmi describes all of the Court's discrimination cases in this way: "[T]he Court's models never clearly identified which acts would be classified as discriminatory, but rather offered guidelines concerning what types of evidence provided indicia of discrimination. These guidelines were necessary because a finding of discrimination is ultimately a factual determination—one that generally requires drawing an inference of discrimination based on circumstantial evidence." Selmi, *Proving Intentional Discrimination*, supra note 9, at 283.

56. Ensuring liberal access to the fact-finder is not a compelling justification for the *McDonnell Douglas* approach, but the lack of coherent definitions of the protected categories is. Malamud's point about liberal access is well taken—if the liberal access to the fact-finder is the goal of *McDonnell Douglas* and is sought to be justified by the needs to obtain evidence, Malamud is probably correct that the decision and its byzantine structure is without support—it is just beside the point. Moreover, *McDonnell Douglas* supporters do not rely solely on the liberal access argument to justify the three-step approach. The case's supporters supplement this argument by suggesting that the frequency of discrimination and its insidious nature justify aggressive tools in response. This argument, if true, is difficult to refute, but it seems curious that it is proposed and, further, seems somewhat unbelievable on its face. In any case, Malamud's response to this argument is the second pillar supporting her defense of *Hicks*. See Malamud, *supra* note 11, at 2317-24.

57. Thus Malamud might argue that, with time, ingenuity, and the abandonment of *McDonnell Douglas*, a practicable definition of discrimination might be fashioned and some alternative form conceived to structure the litigation that would require more of the plaintiff, get the court closer to the ultimate question earlier in the litigation, and accord more closely with a common-sense notion of "discrimination" in the end. See also Smith, *supra* note 11, at 372-84. Indeed *Hicks's* suggestion that the plaintiff bears the burden of proving discriminatory intent, Malamud argues, is a first step in this direction. Incremental development of such a notion is perfectly consistent with the common-law tradition. Indeed, what has been "lost in the aftermath of *McDonnell Douglas* is the creation of any meaningful precedent on the definition of discrimination. Thus, providing plaintiffs preferential access to the fact-finder on the basis of presumed barriers to obtaining evidence is both unnecessary and bad policy for Malamud.

However, a practicable definition of discrimination is not possible without a coherent definition of the underlying protected categories. What is missing in Malamud's formulation is that discrimination is not the only key concept that is undefined. Much more consequential is the lack of a satisfactory definition of the protected categories. While much improvement could be gained by jettisoning *McDonnell Douglas*, these benefits attach only if it is presumed that the underlying protected categories are coherent and widely understood. Discrimination is the easy part of the formula.

In this author's view, so many are convinced of Malamud's position because discrimination is easily defined as a distinction producing adverse consequences. But the question
in the Federal Rules, and their particularly generous discovery provisions mean that plaintiffs in all cases have substantial aid in obtaining evidence of discrimination. And while some might be convinced that discrimination is the kind of allegation in response to which deposed persons might hide information, it may be argued that defendants face similar incentives when large sums of money are at stake, or when the defendant's professional reputation is otherwise at risk.

Mcdonnell Douglas is a difficult case, even if the peculiar times in which it took place are not taken into consideration. Fully abstracted, the case presents mutually exclusive reasons for the adverse employment decision in question. In the plaintiff's view, both racially discriminatory and retaliatory motives animate the company's refusal to recall him; in the defendant's argument, the case is a simple one of an employer's response to illegal activity directed at it.

In context, the case is even more difficult.\(^{58}\) It is only the Supreme Court's second major decision on the Act; it takes place at a time when the Court was becoming frustrated with obstructionist responses to its Brown-based desegregation orders.\(^{59}\) It also arose when the public

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\[\text{Title VII} \text{ cases concern more, particularly whether the decision is discrimination in the broader social sense of a nefarious act. This is the significance of "discrimination" being "because of" the protected categories. In this lies the suggestion of evil that makes the allegation of discrimination so powerful and the false allegation so troublesome. It is the iniquitous character of this broader notion of discrimination that leads lay critics especially to the equation of discriminatory intent with malice and which has fueled the Court's recent move toward defining discriminatory intent in this direction. But modern legal sanctions turn less on the ascribed evil of the actor than on the evil associated with certain acts. Title VII's definition of illegal discrimination as discrimination based on the categories, makes the categories the repository of the Act's moral energy. Thus it is the definition of the categories and especially the determination that an act is a category-based act that is the crucial task for the courts.}
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Malamud's concern with the prima facie cases' ability to define discrimination buries this more crucial determination in the less consequential search for an operative understanding of discrimination. As Professor Selmi points out, the definition of discriminatory intent is not as crucial as the causal question of whether discrimination was used. See Selmi, Proving Intentional Discrimination, supra note 9, at 288-94. And, as described below, it is the difficulty, perhaps the impossibility of, developing operative definitions of the protected categories that justifies Mcdonnell Douglas's approach.

58. This context and the Court's opinion lend credence to the view that Mcdonnell Douglas was a pro-plaintiff decision. But as Malamud correctly observes, the Court's decision was hardly a big win for plaintiffs. Moreover, the fact that the Court neither imposed its Griggs analysis nor defined discrimination in the straight-forward way implicit in Brown indicates less than a victory for the plaintiffs. Mcdonnell Douglas was a balancing act and, as such, deeply hedged. Under these circumstances, it should hardly be surprising that the decision and its result are unsatisfactory to many.

seemed to be responding poorly to the Court’s newly aggressive desegregation approach, and further, the decision was rendered when peaceful (but illegal) sit-ins were becoming celebrated for their crucial role in bringing down Jim Crow. Also implicated was the long history of the labor movement’s struggle against powerful and sometimes ruthless industrialists. At the time of McDonnell Douglas, the United States was at the height of its industrial and manufacturing prowess, and labor was at the pinnacle of its strength. Using time-tested labor union tactics in a fashion that resembled sit-ins and echoed the more controversial economic boycotts that had then become fashionable, Green sought to more fully integrate and improve work conditions in the most desirable industrial workplace in the St. Louis area, implicating all of the background themes suggested above. Moreover, Green’s efforts took place at a time when discrimination was regarded as still widespread, as they occur only shortly after the symbolic end of Jim Crow, measured by the effective date of the Civil Rights Act of 1964.

Under these circumstances, the Court’s concern with the illegality of Green’s behavior is often overlooked in favor of an explanation of what the Court did for the plaintiff. After expressing near horror at the possibility that the plaintiff had engaged in illegal protests (what other types are there?), the Court nevertheless upheld his ability to proceed, announcing the famous three-step proof structure. In doing so, the Court undoubtedly diminished the import of the employer’s argument, calling it only a response to the plaintiff’s case. As such, it is not surprising that the Court’s opinion is viewed as pro-plaintiff.


63. Id. at 802-03.

64. This, despite scolding the circuit court for being dismissive of the employer’s concerns with Green’s illegal behavior:

Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer’s factory buildings in an illegal sitdown strike, the Court noted pertinently:

“We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer’s property . . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say
Understanding the times, the Court perhaps understood that the illegal protest argument was not such a simple one and must be contrived. Experienced in the consequences of prohibiting particular protest activities after a half century of labor cases and, even then, twenty years of civil rights protest cases, the Court seemed hardly prepared to announce a hard and fast rule concerning protests. Also, disgusted with recalcitrant school districts in school desegregation cases, the Court was perhaps freely assuming that the defendant here was simply not to be trusted. *Hicks* is a “reminder” that the plaintiff bears the burden of proof throughout the disparate treatment cause of action. On its face, this seems incontestable and consistent with the view that *Hicks* effects no change on the *McDonnell Douglas* three-step formula. But this vision that such a legislative intention should be founded in some definite and unmistakable expression.”

Id. at 803-04 (quoting NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939)).

Whether the balance of *McDonnell Douglas* is ultimately pro-plaintiff or pro-defendant, its balance is disrupted by *Hicks*. Green would most certainly lose his case today, and probably on summary judgment. On the record before the Supreme Court, Green had shown nothing to indicate that the decision itself was “racial” motivated. In failing to address this, Malamud has fallen for the same thinking she seems to reject: to reconcile the cases, she must assume that the Court’s decision in *McDonnell Douglas* to remand for further proceedings indicated that there was something about the times and/or circumstances that indicated racial discrimination. Green had raised and lost retaliation claims below. Only his discrimination claims were before the Court. In this light, Malamud’s argument, like the Court in *Hicks*, is the backhand concession that times were “special” then and are changed now, necessitating a different law for different times. This seems just ridiculous as there is no compelling reason that the law should have been more lax when the cases were presumably more believable and no reason they should be more difficult to prove because valid charges of this type are probably rarer. Reasserted, the argument seems to be that the law should be pro-plaintiff when there are lots of violations and pro-defendant when there are fewer.

65. Cf. *McDonnell Douglas*, 411 U.S. at 803 n.17 (reserving opinion on whether employers could refuse to rehire because of employee’s general criminal behavior).

66. The contrary outcome of the circuit court “disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the ‘ultimate burden of persuasion.’” 509 U.S. at 511 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

67. Malamud’s defense of *Hicks* begins by addressing its apparent incursion on *McDonnell Douglas*, arguing forcefully that *McDonnell Douglas* has been overestimated as a pro-plaintiff decision. See Malamud, supra note 11, at 2264 (“In *McDonnell Douglas*, the Court overturned a pro-plaintiff decision by a court of appeals, a decision that relied heavily on *Griggs*-based principles.”), and had been undercut in any case in *Burdine*. Id. at 2265-69. These conclusions led her to argue that little would be lost and much gained by jettisoning the three-step approach in *McDonnell Douglas*. Id. at 2317. This argument takes issue with the widely held view of *McDonnell Douglas* as providing plaintiffs with
of Hicks is reasonable only to the degree that McDonnell Douglas is seen as establishing only a empty form for the presentation of evidence on the ultimate question of discriminatory intent. However, the decision in

the important benefit of more than likely access to the fact-finder. Malamud understands that this view of McDonnell Douglas is severely undercut by Hicks and seeks to explain why this is of little practical consequence. Indeed, she argues that little is left of McDonnell Douglas after Hicks and that McDonnell Douglas confuses and distorts the basic inquiry into discriminatory intent. The thrust of Malamud's position is both that Hicks is not necessarily an illiberal decision, and that McDonnell Douglas has had a conservative effect on employment discrimination law, even if it was not conceived to have that effect. Her argument implies that “good” cases will have no trouble reaching the fact-finder and that those plaintiffs will benefit from a more streamlined process.

But as Professor Corbett points out, this reads too much into both McDonnell Douglas and Hicks. While Hicks might not be wrong, it certainly distorts the disparate treatment proof, making it more difficult for plaintiffs to advance their cause. “The practical effect of Hicks is likely to be that victims of discrimination will sue less often, and those who do sue are more likely to settle for less or to lose their cases.” Corbett, The Fall of Summers, supra note 12, at 354. Professor Corbett's view seems at least partially borne out by the dramatic rise in summary dismissals of employment discrimination cases in the Fifth Circuit that ultimately led the Supreme Court to accept certiorari in Reeves. Moreover, Professor Corbett persuasively argues that even after Hicks, McDonnell Douglas's formula remains an important check on the incorporation of discriminatory employment decisions into the general justificatory rubric of employment at will. Id. at 331-32 (arguing that the Court has gradually subsumed Title VII under the general rubric of employment at will). In a more complicated fashion, Professor Jones makes the same point. Jones, supra note 9, at 2329-44. Arguing that employment-at-will-like rights are located in the freedom of association and property notions read into the Fourteenth Amendment at the end of the Nineteenth Century, Jones sees this as a frame in which equality notions have been placed. Id. at 2329-32. The consequence is an employment discrimination law overly focused on individual decisions and individual experience of the effects of those decisions. Id. at 2332-44.

68. On its own terms, Hicks is a simple decision, deciding only that disbelief of the defendant's rebuttal reason does not automatically require a verdict for the plaintiff. And while the implications of this change have broad effect, its primary consequence was to dispel the belief that a presumption created by the prima facie case survived throughout the litigation. It is this transformation that has led many to criticize Hicks as antiplaintiff and as a de facto reversal of McDonnell Douglas. This sentiment is conveyed well in an excellent student note:

While the Hicks Court claimed to follow the rules that had been established in McDonnell Douglas and Burdine, Justice Scalia's majority opinion actually represented a sharp departure from the reasoning and policies behind those decisions. The Court relied on selective and embellished quotes from those cases in order to reach its holding . . . . Furthermore, the Court's holding makes virtually meaningless the three-step procedure that was adopted in McDonnell Douglas . . . . This [will result] in fewer satisfied claims for plaintiffs with legitimate complaints . . . .

McPhillips, supra note 51, at 1046-47. See also Selmi, Proving Intentional Discrimination, supra note 9; Corbett, Of Babies, supra note 12; Calloway, supra note 9. Other students have seen it differently. Ronald A. Schmidt, Note, The Plaintiff's Burden in Title VII
McDonnell Douglas seems to have done more: it avoided defining both discrimination and protected categories, thereby never saying when an adverse decision was made "because of" the category. McDonnell Douglas, therefore, never requires the jurists to say that "decisions of this type" are racial and "decisions of that type" are not. Because Hicks and Reeves now require plaintiffs to produce evidence of discriminatory intent, judges must specifically decide what acts constitute race acts and which do not. With neither guidance from above, nor coherent categories with which to work, judges after Hicks are empowered to answer these questions according to their own theories of life. This is a change and one which requires explanation prior to any discussion of Hicks.

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Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 73 Neb. L. Rev. 953 (1993) (approving of Hicks); see also JuLyn M. McCarty & Michael J. Levy, Focusing Title VII: The Supreme Court Continues the Battle against Intentional Discrimination in St. Mary's Honor Ctr. v. Hicks, 14 Hofstra Lab. L.J. 177 (1996) (same). See also Malamud, supra note 11. After Hicks the three-step formula of McDonnell Douglas seems completely superfluous to the litigation.

69. "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." Hicks, 509 U.S. at 515. A contrary statement earlier in the opinion has generated much confusion, as Justice Scalia suggested that pretext alone might suffice to prove discrimination: "Thus, rejection of the defendant's proffered reason will permit the trier of fact to infer the ultimate fact of intentional discrimination . . . ." Id. at 511. But this statement can be easily incorporated into the subsequent statements.

70. Professor Selmi views this as characteristic of the Court's approach to discrimination generally: "[I]t is the Court's expectations that determine what acts will be classified as discriminatory—it is these expectations that give meaning to [its models of discrimination] . . . . As a result, the normative judgments and vision the Court brings to its discrimination cases . . . limits the Court's intentional discrimination doctrine." Selmi, Proving Intentional Discrimination, supra note 9, at 285.

71. Professor Malamud does explode the two main arguments in support of McDonnell Douglas, but both prove to have been straw men. No legal regime deserves special status, benefitting from exceptional rules. Thus, employment discrimination law complainants deserve no special access to the jury, as such; nor does the structure of the proof requirements need to be lightened because of the "special" times or circumstances of the litigation. But neither should complainants be more heavily burdened because the incidents of their harms are said to have changed. Rather, the key question in employment discrimination law ought to concern why the law is structured as it is and what considerations would be unmet if the law were streamlined or otherwise altered. These kinds of questions lie at the heart of the consensus complaint about McDonnell Douglas, which is its light prima facie case.
B. A Consensus Theory of McDonnell Douglas's Inadequacy: The Weak Prima Facie Case

McDonnell Douglas had long been criticized for perceived defects in the three-step formula articulated therein. Some of those concerns were addressed in Burdine v. Texas Department of Community Affairs\(^\text{72}\) where the Court clarified the defendant's burden in the second step, and in Furnco Construction Corp. v. Waters\(^\text{73}\) and Aikens v. United States Postal Service Board of Governors\(^\text{74}\) where the Court addressed the sufficiency of evidence and of the plaintiff's prima facie showing. In all three cases, the Court discussed but did not resolve the issue of the effect of the parties' showings, setting up the issue of the effect of pretext treated in Hicks.\(^\text{75}\) But a more general critique of McDonnell Douglas has been popular in the 1990s. Following the Court's decision in Price Waterhouse v. Hopkins,\(^\text{76}\) a 1989 decision in which the Court created a so-called mixed motives defense in cases involving "direct evidence," commentators began to question the three-step formula itself with substantial vigor. And while most of these concerns remain current, given the preservation of the outlines of the three-step formula in Hicks, they generally reflect the deterioration of the consensus that McDonnell Douglas and the disparate treatment construct it produced was the easiest to understand of the Title VII proofs.\(^\text{77}\)

Prior to Hicks, concern with McDonnell Douglas was associated with the plaintiffs' bar, which saw the case as dangerously complicated. Perhaps because conservative critics' concerns with the disparate impact proof of Griggs v. Duke Power\(^\text{78}\) led them to uphold McDonnell Douglas as an ideal, and perhaps because Burdine had made the disparate treatment proof generally agreeable to the defense bar,\(^\text{79}\) criticisms of McDonnell Douglas from these quarters were subsumed in criticisms of the very existence of an employment discrimination law. With the

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75. Burdine, 450 U.S. at 254-55; Furnco, 438 U.S. at 577-78; Aikens, 460 U.S. at 714-15.
76. 490 U.S. 228 (1989).
77. "'Disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." Teamsters, 431 U.S. at 335 n.15.
79. Burdine reminded that the defendant's burden was only of "explaining clearly the nondiscriminatory reasons for its actions." 450 U.S. at 260.
effective end of affirmative action\textsuperscript{60} and the ultimate legislative reaffirmation of \textit{Griggs} in 1989, concerns with \textit{Griggs} have been replaced largely with conservative criticisms of \textit{McDonnell Douglas}.

Initially, the \textit{McDonnell Douglas} formula was criticized by liberal supporters of vigorous employment discrimination law.\textsuperscript{81} After \textit{Hicks},

\begin{quotation}

\textsuperscript{81} The liberal critique of \textit{McDonnell Douglas} is well represented by George Rutherglen's pre-\textit{Hicks} reaction to the Court's decision in \textit{Price Waterhouse}. Rutherglen, supra note 11, at 43. Rutherglen, argued that \textit{McDonnell Douglas} is fatally flawed because the plaintiff's burden was too light to allow adequate screening of the case. As a consequence, juries were left with the difficult task of trying to make sense of largely unstructured pretext evidence. \textit{Id.} at 45. Seeing in \textit{McDonnell Douglas} a proof structure alternatively too narrow to adapt to the diverse workplace contexts or too light to aid the resolution of the case, Rutherglen views \textit{Price Waterhouse} as completely destroying whatever efficacy \textit{McDonnell Douglas} provided. \textit{Id.} at 60-71. For Rutherglen the fateful flaw was the Court's refusal in \textit{Aikens} to consider the sufficiency of the plaintiff's prima facie case. \textit{Id.} at 73-74. Courts have struggled to make sense of the plaintiff's preliminary showings after \textit{Aikens} and, after \textit{Price Waterhouse}, to make sense of the plaintiff's evidence in general. \textit{Id.} at 73-77. On a more general level, Rutherglen attributes this to the Court's misplaced attempts to adapt the structure of proof for discrimination developed in constitutional law to the employment context. \textit{Id.} at 45.

This problem leaves Rutherglen dissatisfied with the modifications of \textit{Burdine} and suggests that he would find \textit{Hicks} dissatisfying as well. Rather than lightening the defendant's burden and reemphasizing the plaintiff's ultimate burden of proof, Rutherglen would reconsider what each party must show.

The flaw in the . . . ideological structure of \textit{McDonnell Douglas} is that it equates judicial deference to the legislature with judicial deference to the employer. A reason in the abstract, which justifies economic regulation in constitutional law, is wholly inadequate to justify an employment decision. Discovering the employer's actual reasons, and distinguishing good reasons from bad reasons, was the central congressional concern in enacting and in amending Title VII. \textit{Id.} at 52. Rutherglen argues the constitutional law roots of \textit{McDonnell Douglas} distorts the very real objective factors at issue in the employment context.

In employment discrimination law, [the \textit{McDonnell Douglas} focus on proof of the prohibited state of mind] obscures the objective nature of an agent's reasons for her decision by characterizing them as wholly subjective. We are therefore misled into believing that such reasons are inherently uncertain and difficult to prove.

Although there are, of course, difficult cases in which the true reasons for an employer's decision cannot be ascertained, there is no need to exaggerate these difficulties. An employer who offers reasons that he would not apply to individuals of a different race or sex than the plaintiff does not have those reasons. Reasons that the employer would not act upon in other cases, which are otherwise similar to the plaintiff's, are not his reasons at all. \textit{Id.} at 54. See also McGinley, supra note 10.

For Rutherglen, the problem of \textit{McDonnell Douglas} is not ideological, but indicative of a Court reluctant to be creative. His concerns turn neither on the need to open the court to discrimination plaintiffs nor the frequency of discrimination in society. Rather he sees
conservative critics built on Justice Scalia's apparent worry over false positives in Title VII cases and began to suggest that McDonnell Douglas is the carrier of an ideological presumption in favor of plaintiffs that produces irrational results. These commentators have been predominantly concerned with the light prima facie case established in McDonnell Douglas, which has survived Hicks and now Reeves.\textsuperscript{82} The concern is sometimes antagonistic,\textsuperscript{83} but most often has remained

the evolving three-step approach of McDonnell Douglas as creating difficulties of proof for plaintiffs that makes it increasingly difficult for them to carry their burden of proof. It appears that Rutherglen sees Title VII cases as producing false negatives, necessitating modification in the focus of the proof structure.

\textsuperscript{82} Of course, this is not to imply that the criticisms of McDonnell Douglas in the post-Hicks world are "political," as such. It is rather to highlight that, after Hicks, the concerns of commentators take on the doubtful tone previously associated with Title VII's harshest critics. This tone has not come easily to all, either. This is most evident in Professor Malumud's prefatorial remarks. Before setting upon her pointed critique of McDonnell Douglas, Malumud claims affinity for the case's defenders (and Hicks's detractors).

Before undertaking a close analysis of the issue in Hicks, my sympathies were with the dissent. I wanted to be on the side of those who proclaim with moral confidence that the landmark Title VII cases of the early 1970s represented a clear, pro-plaintiff consensus, and that only a Court that no longer believes that race discrimination against nonwhites is—or ever was—a problem in our society would destroy it. But when it comes to McDonnell Douglas-Burdine, I have reluctantly concluded that the nostalgic critique must fail.

Malamud, supra note 11, at 2236. Whatever the commentator's sympathies, the critique of McDonnell Douglas has been unforgiving.

\textsuperscript{83} For example, Mark Schuman, accusing the McDonnell Douglas Court of "an audacious and arbitrary exercise of power," read the creation of a presumption of discrimination as lacking support in the statute, common law or reasoning. Mark A. Schuman, The Politics of Presumption: St. Mary's Honor Center v. Hicks and the Burdens of Proof in Employment Discrimination Cases, 9 St. John's J. Legal Comment. 67, 70 (1993).
constructive. Moreover, this suspicion with the inadequacy of the prima facie case is implicit in other critiques of Title VII.

84. Hannah Furnish dismissed the decision as "excessively formalistic." Furnish, supra note 11, at 372. Kenneth Davis viewed the decision as "cryptic" and the three-step process as an "inapt mold" for assessing facts. Davis, supra note 11, at 704-05: "By erecting artificial evidentiary barriers, each stage restricts the parties from presenting their cases as they see fit." Id. at 744. For Professor Davis, these complexities replace reasoned analysis with confused jury determinations. This character survives the modifications of Burdine and Hicks in Davis's view. "Though laudable, the Court's retreat [from McDonnell Douglas] was too halting. The complicated, three-stage, burden-shifting scheme shifts the burden of incompressibility to the jury. Recognizing this problem, some courts do not even instruct the jury on the McDonnell Douglas approach, fearing that a McDonnell Douglas charge may sabotage the factfinding process by leading jurors 'to seize upon poorly understood legalisms.'" Id. at 706-07 (quoting Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979)).

85. Other criticisms of McDonnell Douglas reflect dissatisfaction with the light prima facie case, albeit indirectly. Quite apart from the changes wrought by Hicks, many commentators on the Title VII disparate treatment formula have criticized its excess formalism which buries the actual experiences of workers under the artificial constructs of the McDonnell Douglas minuet. Still others have pointed to the structure's imposition of specific category definitions on the worker, depriving them of the ability to claim discrimination on their own basis. Criticism has also focused on the single factor, episodic construction of discriminatory decisions.

These concerns are wide ranging, including Professor Vicki Schultz's critique of employment discrimination law as failing to address the ways that jobs are structured to undercut employment opportunity of women. See Vicki Shultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683 (1998), and Vicki Shultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1756 (1990) (arguing that current, episodic approaches to Title VII cases leaves the law incapable of addressing structural characteristics of the workplace that limit women's opportunities); Martha Chamallas, Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences, 92 MICH. L. REV. 2370, 2409 (1994) (recommending a shift from a focus on bigots to one of opportunity). Professor Linda Hamilton Kreiger's observation that the contributions of cognitive psychology indicate that most discriminatory decisions are likely the result of categorization effects that are not constructed in overt racial terms. Linda Hamilton Kreiger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1167 (1995). e. christi cunningham's claim that the problem with disparate treatment proofs is that they impose a definition of self on the plaintiff. e. christi cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 CONN. L. REV. 441, 448-49 (1998) (accessing disparate treatment protection requires plaintiff to show they are a member of a protected category, a move which limits employees' ability to establish how she was disadvantaged by the adverse decision); Jean Calboun Brooks, Note, Employment Discrimination—The Supreme Court Liberates Title VII Mixed-Motives Cases from the Procrustean Bed of the McDonnell Douglas/Burdine Pretext Model—Price Waterhouse v. Hopkins, 25 WAKE FOREST L. REV. 345 (1990). Although not always immediately apparent, these are criticisms of the three-step approach in disparate treatment cases. Particularly, the prima facie case focuses the court specifically on
The most balanced, comprehensive, and devastating critique of the *McDonnell Douglas* three-step formula comes in Stephen Smith's article. Arguing that the three-step formula be replaced with a "Restatement-like" approach, Smith assails the *McDonnell Douglas*

particular decisions with adverse consequences, many of which could be justified on "neutral" grounds established prior to the decision. Thus if a job is defined according to a traditional masculine image, for example, it is likely to include "neutral" criteria in its description, insulating that decision from inquiry in a disparate treatment case. Of course such a circumstance might be amenable to a disparate impact attack, but this only highlights the somewhat forced distinction between discriminatory decisions analyzed under disparate treatment and discriminatory structures to be analyzed under disparate impact.

86. *See* Smith, *supra* note 11.

87. The approach Smith urges is that adopted by courts in retaliation cases and that, though usually described as the plaintiff's prima facie case of retaliation, is properly a Restatement-like representation of what the plaintiff must show to prevail. *Id.* at 395-98. Daniel Zappo elaborates on Smith's suggestion, offering the additional and compelling justification that the three-step approach is misused by courts as a means for dismissing complaints on summary judgment. Daniel Zappo, *Note, A Causal Nexus Approach to Title VII Disparate Treatment Claims*, 50 Rutgers L. Rev. 1067, 1079-82 (1998).

While this is an interesting view, its comfort comes from replacing the judge-created presumption with a natural presumption based on the weight of the evidence. As I explain below, *infra* Part III.A, this is unnecessary. As I have suggested above, problems inherent in defining the protected categories make this undesirable. Particularly, as Zappo's expansion on Smith brings to the fore, the fundamental weakness of this approach is the difficulty identifying discriminatory decisions. *Id.* at 1084-86.

Judge Denny Chin of the Southern District of New York and Jodi Golinsky also offer a proposal for a Restatement-like approach. Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brook. L. Rev. 659 (1998). Chin and Golinsky argue that *McDonnell Douglas* is too formal, that the plaintiff's initial burden is too light, and the pretext showing is confusing, *id.* at 668-69, and that many district court judges have already abandoned the three-step approach by assuming the first two steps have been met. *Id.* at 671-72. As a replacement, the courts urge the focus be on intention while remembering that proof of intention is "elusive." *Id.* at 674. To structure this balance, they propose that plaintiffs first offer evidence of the case in total (perhaps something like Smith proposes), which the judge would evaluate according to the question, "would this prove discrimination?" *Id.* at 674-75. Then the court would evaluate each piece of evidence for probity and strength, excluding defective evidence and returning to the question, "does the remaining evidence, if uncontested prove discrimination?" *Id.* at 675-76. Second, the judge would apply a similar process to the defendant's explanation, holding the defendant to a somewhat higher standard because of the possibility of direct evidence. *Id.* at 676-77. Third, the court would judge the evidence as a whole and, if satisfactory, submit to the fact-finder for a determination. *Id.* at 677-78. Though more formalized and attractive than Hicks, especially with Hicks carrying the baggage of an eviscerated *McDonnell Douglas*, this approach amounts to much the same thing. It demands a relatively coherent protected category and therefore a clearly defined definition of discrimination. Like Smith's proposal it presumes discrimination can be reduced to several easily defined elements.
approach as too weighted to the prima facie case, irrelevant given the nature of litigation, and too complicated to be used to evaluate evidence. The three-step formula's most prominent failing is on the terms it sets for itself; it fails to provide a "practical framework" which provides a 'sensible, orderly way to evaluate the evidence in a Title VII disparate-treatment case, giving both plaintiff and defendant fair opportunities to litigate in light of common experience as it bears on the critical question of discrimination." 88

Smith's concerns warrant further elaboration because Smith did not defend *Hicks* on this ground. Rather he views *Hicks* as inevitable and as an inadequate curative for the deep problems he attributes to *McDonnell Douglas*. 89 Smith would, consequently, be expected to have hoped the Court in *Reeves* would abandon *McDonnell Douglas* and take the substantive implications of *Hicks* to their logical conclusion. It should be expected that, following Smith, many find *Reeves* deeply unsatisfying.

Smith's first objection focuses especially on the *McDonnell Douglas* formula prior to its modification by *Burdine* and *Hicks*. This "old" standard, Smith argues, focuses too much on the prima facie case, which is shifting in nature and thus not especially useful. 90 This "shifting" is rooted in the light and artificial character of the original construction. Overused by litigants, the Court was, Smith persuasively argues, compelled to emphasize the flexible character of the showing. 91 The prima facie case, already light, was diluted over time. The prima facie case soon ceased to have significant utility for defendants. 92 Nor did the prima facie case significantly help the plaintiff, especially after *Burdine*. As Smith indicates, the light nature of the prima facie showing made any connection between it and a factually persuasive case of discrimination tenuous at best. 93 And, because the showing was only "marginally related" to the focus of the case, 94 the key issues in the case remain contested once the defendant meets his burden of production.

This first argument is an attack on the connection between the plaintiff's required initial showing and the proof of the key question of

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88. Smith, supra note 11, at 372 (quoting *Hicks*, 509 U.S. at 525 (Souter, J., dissenting)) (internal quotations omitted).
89. *Id.* at 391-95.
90. *Id.* at 372-77.
91. *Id.* at 373-74.
92. "From a defendant's perspective, the shifting nature of the prima facie case greatly diminished its utility in preparing a defense." *Id.* at 376.
93. *Id.* at 377-78.
94. *Id.* at 377.
discriminatory intent. Smith persuasively reveals that there is no natural connection between these two showings. This criticism is the same found in other critiques: the prima facie case is too "light" and thus should not have any significant impact on the outcome of the case. Given this argument, Smith takes the assessment a step further: if there is no logical connection, what is the utility of the prima facie case? The foreshadowed answer is "none."

However, these arguments presume that there is no policy reason for courts to create a presumption that the decidedly light prima facie showings should be treated as determinative of the question of discriminatory intent. Though pointed and persuasive, Smith's argument fails to allow that, in proper contexts, courts legitimately craft presumptions on artificial grounds to achieve particular policy goals. Just what those goals are and why a court might adopt this approach is absent from Smith's analysis.

Smith's second argument partially fulfills the policy void, but only in the negative. He argues for the rejection of the three-step formula because it is "irrelevant to the order of litigation" and is "overly complicated." In effect he argues that efficiency and simplicity are the guiding policy concerns in this context. Taken on their own terms, these arguments are undeniably compelling, but for the reasons above, there is more to it than that. The ordering of the three-step formula is rather obviously at odds with the way that employment discrimination cases are likely to be litigated. Trials are not themselves organized around the three-step minuet. This fact never ceases to confound the author's employment discrimination students. But this is also the case in other areas of law where proof formulas are established. Discussions

95. Id.
96. Professor Malamud's article derives its power from her critique of the two common arguments for this. But, like Smith, Malamud draws implicitly on the lack of logical connection between the prima facie case and the ultimate showing to suggest that the replacement of logic with artifice is somehow inherently troublesome. Malamud, supra note 11.
97. Smith, supra note 11, at 381-86.
98. Id.
99. Daniel W. Zappo helpfully reminds us that the three-step approach is designed to evaluate evidence at trial, not to structure other concerns, especially summary judgment. Zappo, supra note 87, at 1080-81. Unfortunately, at least since Hicks, the three-step formula has been assumed to structure all Title VII related inquiries and, proving less than useful, has been largely abandoned. See Chin & Golinsky, supra note 87, at 671. "[S]everal district court judges now dispense with the first two prongs of the McDonnell Douglas analysis . . . and proceed directly to determining whether the plaintiff . . . has proven . . . the employer's decision was motivated at least in part by an impermissible or discriminatory reason."
of summary dispositions in torts also confuse as the elements of the prima facie case have no direct connection to the ordering of proof at trial. Though what to make of this is not clear. Smith asks, "In a trial where the ultimate question is the existence of discriminatory intent, why should either party be precluded from going outside the parameters of the prima facie case in order to convince the fact-finder of the defendant's true state of mind?" To which the direct answer should be "nothing." However, the question is raised against a distorted background. In tort law, to pursue the comparison, the plaintiff is not limited in what evidence he presents in order to establish the ultimate question of intentional, negligent, or absolute liability; however, the specific theory of intentional or negligent recovery, or for that matter the specific theory of negligence the plaintiff chooses to pursue does limit what she might argue in effectively establishing the elements of the "ultimate" question of legal cause. In employment discrimination cases, confusion is ingrained, it seems, in the paucity of theories of recovery and in the inevitable generality of those theories. There is no doubt that the order is often at odds with the demands of litigation; but as indicated in Part II below, there are important reasons to preserve the ordering, and the difference between employment discrimination and tort on this point at least fades.

As for the complexity of the framework, Smith's arguments cannot be doubted. The three-step formula does little to aid jurists in evaluating evidence of the ultimate factual question of discriminatory intent. "Apparently," says Smith, "McDonnell Douglas falls short of its goal in providing juries with a sensible, orderly way to evaluate the evidence." In Aikens this statement is buttressed by the Court's own reluctance to focus on the prima facie case. If, as in Aikens, the prima facie case is irrelevant at the appellate level, it does not seem like there is much relevance to organizing the evidence of the case at all. At the core of Smith's concerns is, of course, the light prima facie case again.

The three-step formula makes considerably more sense if the imputed connection between the prima facie showing and the ultimate factual question is conceded to be distant. If there is no logical connection between the two, the only basis for a prima facie case of the type

100. Smith, supra note 11, at 379.
101. Id. at 380-81.
102. Id. at 381 (internal quotations omitted).
103. In Aikens the Court argued that the issue of the prima facie case was "fully tried" below, making a return to that issue unnecessary to the Court's evaluation of the case. 460 U.S. at 713-14.
advanced in *McDonnell Douglas* is that some policy goal is achieved by crafting an artificial approach to proving discrimination. Putting that argument aside for the moment, it is apparent that Smith has cut to the nub of the matter. *McDonnell Douglas* simply replaces reasonable understandings of discriminatory intent with artifice. Because, as Smith ably demonstrates, this has had devastating consequences for the understanding of the proof and the conduct of trials under it, it must be justified on some other substantial ground, or as Smith urges, abandoned.\(^{104}\) Because the plaintiff’s inability to obtain evidence and the reduced frequency of discrimination have been effectively refuted by Professor Malamud, some other reason needs to be urged to justify this strange construct.

In any case, it is the problem of the light prima facie case that prompts the *Hicks* reassessment of *McDonnell Douglas*. As the Court confirms in *Reeves*, it is satisfied with the burden shifting approach of *McDonnell Douglas*, so long as the artifice of the scheme is not given priority over the ultimate question of discrimination, *vel non*.\(^{105}\)

C. Remedies to All the Wrong Problems: *Hicks*

*Hicks* is offered as a fix for the problems associated with *McDonnell Douglas*. If *McDonnell Douglas*’s process orientation is flawed, *Hicks*’s emphasis on substance might have been expected to have been embraced. Instead, the decision is alternatively perceived as disrupting an otherwise fine system, or it is dismissed as not going far enough to vanquish the anachronistic and stilted three-step form. Despite these views, it seems apparent that *Hicks* really does resolve most of the problems associated with the three-step formula. It makes the prima facie and rebuttal stages purely pro forma steps, transforming the key question in the litigation to only whether there exists evidence of discriminatory intent. Unfortunately that resolution is neither mandated by the underlying presumptions of the original formula, nor a fully effective fix to the perceived *McDonnell Douglas* inadequacies. In fact the decision’s response to perceived inadequacies in *McDonnell Douglas* derives from the misunderstanding of the benefits of the *McDonnell Douglas* approach by the Court in *Hicks* and critics of *McDonnell Douglas* alike.

It is only overconfidence in the coherence of the protected categories that makes *Hicks* seem a plausible modification of *McDonnell Doug-

\(^{104}\) Smith, *supra* note 11, at 398.

\(^{105}\) *Reeves*, 530 U.S. at 148-49.
As demonstrated in Part II, the protective categories lack any stable connotation. The meaning of "discrimination because of a protected category" shifts constantly in application. Hicks's emphasis on substance is thus relatively unbounded and fluid. The seemingly clear requirements of Hicks allow judges rather wide discretion to define discrimination on an ad hoc basis while concealing the capricious nature of their judgment behind the left over process of McDonnell Douglas. Reeves was necessary because Hicks's balance between defined process and undefined substance naturally produced varying outcomes. Reeves will likely provide little stability in this area of law as it largely echoes Hicks. Without a consensus on the meaning of the categories, there can be no adequately defined prima facie case, much less a sufficiently detailed definition of discrimination (at least of the type Smith suggests). Discrimination will remain an inchoate category, just beyond our grasp, and operating according to the whims of those who apply it.

However, the apparent tension between the McDonnell Douglas process orientation and the Hicks substantive focus disappears when one notes the similarity between the Court's recent reading of disparate treatment and its requirements in general civil rights cases. The Court can be understood in Hicks and Reeves as unifying employment discrimination law with the Court's other major civil rights decisions. So understood, the incoherence of the protected categories and, therefore, any definition of discriminatory intent, is harnessed to vest in district court judges a particular type of judicial discretion—an equity power.

1. The Hicks Decision. Hicks concerns only the effect of a showing of pretext on the outcome of a disparate treatment case, but the Court's resolution of the case implies much more. On its narrowest ground, Hicks asks only what is the effect of a showing that the employer's articulated reason for an employment decision is false (so-called "pretext"). The case addressed a circuit split that differed on whether pretext alone could support a decision for the plaintiff. Another version of this same question, addressed by Reeves, concerned whether pretext-plus is necessary to support a decision for the plaintiff. On

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106. See Part II, infra.
108. Compare, e.g., Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc., 31 F.3d 9, 17 (1st Cir. 1994) (requiring additional evidence or pretext-plus), and Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994), with Barber v. CSX Distribution Servs., 68 F.3d 694, 698 (3d Cir. 1995) (pretext alone enough to warrant trial),
these terms, the Court’s decision that pretext alone did not mandate a finding for the plaintiff seems both uncontroversial and modest. Left open is the possibility that pretext alone might support a decision for the plaintiff (and pretext-plus unnecessary, even overkill), as Reeves has now held. But this presentation, focusing on only one component of the three-step proof, is characteristic of how Title VII questions take on a deceptive simplicity. Underlying this description is the prior treatment of the McDonnell Douglas formula and the Court’s treatment of the prior steps in that proof in Hicks. The Court’s approach in Hicks to each question implies a quite different result: pretext alone should never require judgment for the plaintiff; pretext alone is probably rarely sufficient to justify judgment for the plaintiff (except in the situation when the nature of the defendant’s explanation and its disproof indicates something more); and pretext-plus is probably the standard of proof required under the disparate treatment formula.

Hicks indirectly concerns the effect of the presumption of discrimination created in the prima facie case. McDonnell Douglas implied that failure of a defendant to “meet” the prima facie case required judgment for the plaintiff. In succeeding years, this made the elements of the prima facie case and the nature of the defendant’s response key issues in disparate treatment litigation. The former question was side-stepped by the Court when it ruled in Aikens that once the court had proceeded to the substantive issue of discriminatory intent—that is, once the prima facie case was met by the defendant’s rebuttal—the sufficiency of the prima facie case was no longer at issue in the case. This implied,
as the Court had clarified in Burdine, that the defendant’s burden, always tied to the plaintiff’s prima facie showing, was light. In Burdine the level was said to be a burden of production. The defendant only had to submit admissible evidence that, if believed, would explain why the adverse employment decision was taken. The defendant had no obligation to prove the believability of this explanation.

On this ground, the confusion leading to Hicks was set. If the defendant gave no answer, he loses under the presumption created in McDonnell Douglas. If, however, he answers and his answer is unbelievable, Hicks asked, should he be able to prevail? Thus the issue of the pretext showing that Hicks undertakes is intimately tied to the force of the prima facie case. And when the Court in Hicks reminded that the plaintiff always bore the burden of proof (a direct reference to Burdine) and that the presumption of the prima facie case “fell away” after it was met (also a direct reference to Burdine), its seemingly mild statement was read by the dissent as an invitation for defendants to fabricate rebuttals in order to avoid being pinned down on the issue of discrimination. The propriety of Hicks is, then, less a decision about precedent and stare decisis than it is a landmark decision about the nature and direction of Title VII.

115. Burdine, 450 U.S. at 255.
116. Id.
117. Id.
118. Id. at 254.
119. Id.
120. 509 U.S. at 509-11.
121. “The plaintiff retains the burden of persuasion . . . .” Burdine, 450 U.S. at 256.
122. “If the defendant carries [its] burden of production, the presumption raised by the prima facie case is rebutted . . . .” Id. at 255 (citing James Bradley Thayer, Preliminary Treatise on Evidence 346 (1898)), an obvious reference to the “bursting bubble” theory of presumptions. See infra text accompanying notes 270-77 for a discussion of this theory in this context.
123. Hicks, 509 U.S. at 539-40 and n.13 (Souter, J., dissenting). “The majority’s scheme therefore leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will benefit from lying, but must lie, to defend successfully against a disparate-treatment action.” Id. at 539-40. Stephen Plass argues that the Court should take employer lies of this type more seriously than it did in Hicks. Stephen Plass, Truth: The Lost Virtue in Title VII Litigation, 29 Seton Hall L. Rev. 599 (1998).
124. Professor Deborah Malamud is careful and sober in her defense of Hicks. She is, therefore, deserved of the acclaim attributed to her article. Like the Court, however, she succeeds only in establishing that Hicks was consistent with prior decisions, not that it was mandated by them. Part II of this Article argues that Hicks was not necessary and, in light of the problems with understanding the protected categories, unwise.
2. *Hicks* as “Correct.” While Justice Scalia’s *Hicks* opinion stands on its own, the opinion earned considerable respect from commentators only after a strong defense of the opinion was advanced by Michigan Law Professor Deborah Malamud.125 In her influential article, Professor Malamud (reluctantly) argued that “the prima facie case [was never] high enough to permit the proven prima facie case to support a sufficiently strong inference of discrimination to mandate judgment for the plaintiff when combined only with disbelief of the employer’s stated justification.”126 In Malamud’s view, judgment for the plaintiff on a showing of pretext can be justified only if the “weight of the evidence” supplied by the prima facie case and the pretext showing is sufficient to prove discrimination to a reasonable fact-finder, or if the presumption created by the prima facie case is carried over. This second route is justified only if, in her view, there is sufficient reason to do so on policy grounds. Professor Malamud rejects any policy ground for carrying over the presumption. Thus, Malamud sees *Hicks* as “correct” in that both approaches fail to support a pretext alone ground for a mandatory finding for the plaintiff.127

Malamud demonstrates convincingly that if a mandatory presumption was meant to be created in *McDonnell Douglas* the Court was never confident in that view, retreated from it rapidly, and doubted its propriety in any case.128 That is, the Court never viewed the prima facie case as sufficiently strong from an evidentiary perspective to support a finding for the plaintiff, apart from the rare circumstance when the defendant did not respond.129 Professor Malamud’s inquiry is very narrowly framed, putting aside any issue of the creation of a legal presumption. As such, it represents something of housekeeping, reminding us that, on its own terms, the prima facie case is too light to be linked logically to the ultimate question of discrimination. But this

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125. Malamud, supra note 11, at 2236-37.
126. Id.
127. Id. at 2244-54.
128. Id. This argument proceeds in three steps, each of which constitutes valuable original research into the thinking of the Court. First, like Smith, she establishes that the Court’s reluctance to create a fixed rule undercuts even the presumption created in *McDonnell Douglas*, as it created a “rule” with fixed consequences but no fixed basis. Second, in *Burdine*, an exchange between Justice Powell (who wrote for the Court) and Justice Stevens indicates that the justices were reluctant to give the prima facie case the effect usually attributed to it. And third, Chief Justice Rehnquist’s draft opinions in *Aikens* indicates his doubts about the one size fits all nature of the prima facie case and his reluctance to give the prima facie case great evidentiary weight. Id.
129. Id. at 2243-44.
leaves open the question of whether the presumption created in *McDonnell Douglas* should be carried over to the postrebuttal phase of the case.

This makes the second inquiry of Malamud's the most consequential, particularly because it is that part which is most at odds with the dissent's fears. She manages Justice Souter's concerns by addressing the primary argument for extending the presumption to the pretext stage of the litigation—the view that when the employer fails to explain the reason for an adverse decision, the reason should be presumed to be discrimination.130 This is Professor Calloway's "mandatory presumption" argument,131 which Malamud rejects for four reasons: (1) it proves to be false in many circumstances; (2) the presumption fails to recognize the diverse contexts and character of discrimination; (3) the "but for" cause test required in the cases since the decision in *Price Waterhouse v. Hopkins*132 proves that some category-based considerations were at play; and (4) the presumption is at odds with generally held beliefs about discrimination in the workplace.133 William Corbett has argued that Professor Malamud's defense of *Hicks* turns on her juxtaposition of employment at will and the antidiscrimination principle.134

Professor Malamud's first defense of *Hicks* is an obvious nod to employment at will as a laudable justificatory rubric for adverse decisions, one which is by definition exclusive of Title VII violations.135 Using employment at will as a mutually exclusive category, Malamud defines discrimination narrowly.136 This move requires especially clear

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130. *Id.* at 2254-55.
132. 490 U.S. 228 (1989).
133. Malamud, *supra* note 11, at 2254-62. The most important of these are the first three. The third is a correct statement of the law, which requires address outside the context of Malamud's arguments, leaving the first two as the core of her objection to the mandatory presumption. The last of these is curious, given Malamud's rejection of "nostalgic" defenses of *McDonnell Douglas*, because it seems to be of the same order, only a contemporary, contrived populism. However, that reason seems less important than the others and I will not engage it here.
135. See *id.* at 351-58.
136. Malamud's first reason for rejecting the mandatory presumption proceeds from her comparison of the approach with the tort doctrine of *res ipsa loquitur*. Malamud ushers several studies tending to show that employers often make adverse employment decisions on wrongful or undefendable grounds that do not equal grounds prohibited under the statute. Malamud, *supra* note 11, at 2254-55. On this basis, to trigger the statute simply because the employer did not articulate that (wrongful) reason is an improper basis for finding the employer liable for discrimination. This argument has a strange tone to it,
and coherent protected categories if decisions based on those categories are to be distinguished from noncategory based decisions. Undoubtedly, the balance between unfettered employer discretion under employment at will and limited employer prerogative under Title VII is the very balance the Court in McDonnell Douglas sought to maintain. However, Malamud’s balance favors employment at will, because her approach overestimates the distinction between the two categories, illegal discrimination and wrongful legal reason.

protecting from liability an employer who has chosen not to defend one case because of his desire to hide illegal or shameful behavior. Justice Souter also makes this point:

It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding in it a justification to dispense with an orderly procedure for getting at “the elusive factual question of intentional discrimination.”

Hicks, 509 U.S. at 537 (Souter, J., dissenting) (quoting Burdine, 450 U.S. at 255 n.8). Of course, this argument is effective at establishing that any presumption of discrimination from this fact is unsupported, though it would seem good policy to require employers to “defend or die.” Indeed, the initial presumption established in McDonnell Douglas does nothing if it does not require employers to show up. As Justice Souter points out, “if an employer claims it cannot produce any evidence of a nondiscriminatory reason . . . the court must enter judgment for the plaintiff” impelling defendants to lie as a necessary defense in such a case. Id. at 538-39. Surely in the early 1970s many would have preferred to ignore a discrimination claim if they could. An argument like Justice Souter’s might be advanced that without the mandatory presumption, employers are effectively allowed to not show up. See id. at 529-31. But there is a more grave concern here.

137. As Justice Brennan put it in his plurality opinion in Price Waterhouse:

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions. The converse, therefore, of “for cause” legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employer’s freedom of choice. 490 U.S. at 239 (Brennan, J. plurality opinion) (citations omitted).

138. The moment the level of inquiry is taken above the details of any specific case, an easy dismissal of the notion that employers should justify decisions as “business-like” is doomed. As this is Malamud’s construct, she ought offer more explanation why employers should not explain their decisions. Corbett and Jones point out that the law is moving in the direction of employment at will, a development with added significance when the inquiry goes beyond a specific case. See Corbett, The Fall of Summers, supra note 12, at 351-59; Jones, supra note 9, at 2358. The move toward employment at will dictates outcomes like Foster v. Dalton, 71 F.3d 52 (1st Cir. 1995), as Professor Ann McGinley points out when arguing that Title VII’s goals generally require that employer’s have rational bases for their decisions. See McGinley, supra note 10, at 1010-16. Hicks specifically limits this type of requirement. See id. at 1016-27.
While all violations of Title VII are defined as outside the privilege of employment at will, the bases for a Title VII violation (a distinction based on a prohibited category) nevertheless overlaps with the category "wrongful legal reason." Only by presuming that Title VII's prohibited categories are more coherent than they are, can Professor Malamud presume the "wrongful" reasons she cites do not also represent illegal decisions based on the categories. By arguing against the mandatory presumption on this ground, she demands that those who oppose Hicks prove that wrongful dismissal cases are coverups of discriminatory dismissal cases. Thus, her argument becomes little more than arguing that plaintiffs should show there is this overlap, without explaining why this showing is not accounted for by McDonnell Douglas.

Decisions based on protected categories and those based on wrongful reasons are not equivalent. However, protected categories do significantly overlap with other important decisional bases like style, look, and personality (i.e., people skills or a winning personality). While decisions based on these factors may be wrong and unconnected to any protected category, they may also be category-based distinctions themselves. Malamud's construct, which appears consistent with the case law's construct, is that these factors must be proved to be false or mere fronts for race opinion to succeed under the statute. It is only overconfidence in the coherence of the protected categories that makes conclusions like Malamud's possible. Indeed, in confessing some doubt in the probity of the studies upon which she relies, Malamud seems to recognize that, at least when it comes to study design, it is difficult to tell what reasons are category-based and which are truly not.139

Professor Malamud seems to recognize that employment decisions are rarely either/or propositions. Her second reason for rejecting the basic assumption is that discrimination occurs in various contexts, to various degrees and in various ways.140 Some workplaces might be sufficiently integrated to allow persons to have nonracial, personal relationships. Likes and dislikes in those workplaces might be nonracial as well. In those workplaces the assumption that adverse decisions are based on race might be inaccurate. But the converse is equally true. Nonracial reasons in some workplaces may be racial reasons in others. This factor seems to cut both ways, leaving little ground for rejecting the presumption except for the empirically unsound first argument.

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139. Malamud, supra note 11, at 2255-57. "These data are far from perfect, but they serve to demonstrate the instability of the empirical foundation underlying the 'basic assumption' that employment decisions are correct and defensible absent discrimination." Id. at 2257.
140. Id. at 2257-58.
In this way, Malamud's defense of Hicks seems to turn heavily on the ability to distinguish between racial and nonracial wrongful reasons. If, as urged below, the ability to make this distinction is overestimated, Malamud's defense of Hicks is vulnerable to the concern of Justice Souter's dissent, that Title VII will be undercut by evasive defenses or, as seems to be the case, impatient judges who cut through the McDonnell Douglas formula to dismiss cases that in their view could not possibly constitute discrimination. Malamud is correct that the creation of a presumption of discrimination would require a substantial policy basis. She has, like the Court, simply missed that basis: the incoherence of the categories.

3. Hicks as Unacknowledged Policy Decision. Justice Scalia's Hicks opinion adopts the tone that Hicks changes nothing and is little more than the extension of existing precedent. This claim is partially supported by Professor Malamud, whose keen analysis of McDonnell Douglas and Burdine shows that the Hicks decision is not unsupported. However, Malamud's study falls short of proving that Hicks was required. The jurisprudential argument is better characterized by Justice Souter who argues that the key issue was dicta in the prior cases and should be followed.\(^{141}\) Neither McDonnell Douglas nor Burdine provide any real basis for resolving the questions presented in Hicks. If Hicks is consistent with, but not dictated by precedent, how that decision is to be understood remains in question. The best reading of Hicks, taken in light of the foregoing discussion, is that Hicks is an unacknowledged policy decision that the plaintiff in Title VII cases must define and prove intentional discrimination. For all intents and purposes this overrules McDonnell Douglas and Burdine, both unanimous decisions, in a 5-4 decision that never addresses the question of reversing those precedents.

Hicks guts language in the prior precedent that emphasized the procedural aspects of disparate treatment. While claiming to uphold the core values of the gutted opinions, the Hicks opinion emphasized the plaintiff's obligation of proving discriminatory intent.\(^{142}\) In this context, the basis for this approach is the suggestion that all contradic-

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141. Hicks, 509 U.S. at 540 (Souter, J., dissenting).
142. Professor Selmi takes something of a different approach. He sees arguments about severe shifts in doctrine as exaggerated, but he does see Hicks as representing a severe break. Rather than a shift in doctrine, he views Hicks's turn as representative of a shift in the presumption of discrimination. See Selmi, Proving Intentional Discrimination, supra note 9, at 283.
tions between Hicks and prior cases are mere dicta. But neither McDonnell Douglas nor Burdine purported to define discrimination, substituting a three-step formula for a substantive definition. In both cases that formula was the deciding factor. And, as defined, the three-step formula bore no direct connection to any substantive definition of discrimination. Of course neither case was controlling on the question of the effect of pretext showings, but the centrality of the three-step procedure was. Justice Scalia sought to preserve the three-step approach and thereby avoid a head on conflict with the prior cases. This avoidance move fails because he recast the three-step formula as a set of natural burdens of production, completely undercutting the only reasonable reading of the McDonnell Douglas construct. Notwithstanding Professor Malamud's carefully researched finding that the Court in Burdine was uneasy with the legal presumption created in McDonnell Douglas, there is nothing to suggest that it abandoned it. Rather the Court clearly allayed its concerns by defining the legal burden of production for the defendant very lightly.

The leap that Justice Scalia and Professor Malamud make is on the basis of the bursting bubble theory of presumptions that the only result consistent with the Court's uneasiness in Burdine is that pretext showings have no automatic effect. The opinion in Hicks urges that the prior opinions' reminders of the three-step structure were meant to narrow the factual questions indicated and the presumptions grew naturally out of the probative weight of the prima facie showing. When that showing was met, only an inference was believed to be capable of being drawn from it. But this view overlooks the basic criticism of the McDonnell Douglas formula—that the prima facie case was too light and factually underdetermined to support the development of a natural presumption. Because the judges who created it undoubtedly knew this, it stands to reason that they might have intended to create

143. In two parts that can only be described as angry, Justice Scalia assails the dissent's disagreement with his majority opinion in Hicks. In Part III, Scalia dismisses the "authority" in support of the dissent as mere dicta. 509 U.S. at 512-20. In his Part IV he responds to the dissent's concerns with the practical effect of this opinion. Id. at 520-25.

144. Specifically, he cast the three-step organization as only a procedural tool: "The McDonnell Douglas presumption is a procedural device, designed only to establish an order of proof and production." Id. at 521. That is, the requirements of the ultimate fact of discrimination provide the substance that is to be shown at each stage. The McDonnell Douglas stages only refer to who must address the ultimate fact at each given stage. See infra text accompanying notes 174-78.

145. See infra text accompanying notes 270-77.

146. This is an extension of then Justice Rehnquist's construction in Furnco Construction Corp., 438 U.S. at 576-78.
a presumption on some other ground, particularly as a legal device to resolve the cases in satisfaction of some policy concern.

Hicks’s focus on the bursting bubble theory adds little to the resolution of this question. It does, however, obscure the policy choice made by the Court in requiring plaintiffs to prove an as yet undefined intentional discrimination. Concerned as the reader is with whether the bubble bursts or “re-arises,” the opinion’s lack of any useful definition of discrimination does not seem troublesome. In fact, neither does the fact that the Hicks approach fails even the call to “narrow the inquiry,” instead broadening it in the form of an unstructured discrimination inquiry. So hidden, the fact that there exists no definition of discrimination floats past the reader, leaving him with the comforting view that the plaintiff is only being asked to do what any plaintiff must do.

Justice Scalia makes much of the doctrinal contours of the precedent, the “requirements” of Rule 301, and the inherent nature of Title VII’s mission, revealing that he thinks discrimination has been defined.147 He remarks that the Court has “no authority to impose liability upon an employer for alleged discriminatory employment practices unless an

147. Perhaps he thinks that discrimination is adequately defined in Hazen v. Biggins, 507 U.S. 604, 610 (1993). ("Whatever the employer’s decisionmaking process, a disparate treatment claim cannot succeed unless the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.") Professor Zimmer suggests that in Biggins Justice O’Connor defines discrimination as stereotypical thinking: [It is] “the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.” [T]he employer [cannot] rely "on age as a proxy for an employee’s remaining characteristics, such as productivity," [but must instead focus on those factors directly].


Justice Scalia ... resorted to adding language to quotes from McDonnell Douglas and Burdine in order to harmonize those cases with his holding. One instance in which such a distortion took place was when he stated that the ultimate question was whether the plaintiff has proven “that the defendant intentionally discriminated against him’ because of his race.” The critical language, “because of his race,” however, was absent from the portion of the Burdine case which is being quoted.

McPhillips, supra note 51, at 1067. While this use is hardly a distortion, it perhaps indicates the faith Justice Scalia has in the “because of” construction as a means of structuring cases.
appropriate fact-finder determines . . . that the employer has unlawfully discriminated.\textsuperscript{148}

The policy choice to require specific, substantive proof of discrimination is supported by the claim that adverse decisions are made on numerous bases, many of which are bad, even illegal, but not discriminatory. Professor Corbett observes that this is a defense of the employer's privilege of employment at will, which employment discrimination law had implicitly modified.\textsuperscript{149} Scalia's majority opinion underscores this by rather bizarrely including a hypothetical in the text of his opinion.\textsuperscript{150} According to the logic of his hypothetical, an employer's decision maker might have exercised his power, making a hiring decision, but later falling out with the employer, then refuses to convey the "real" reason. Disturbingly, Justice Scalia seeks to show that discrimination could not have been at issue by casting both the decision maker and the plaintiff in his hypothetical as black, implying that a black person could not possibly discriminate against another black person because of race.\textsuperscript{151} Indeed, this is not only possible but common. Extending his hypothetical, the black decision maker who discriminates on the basis of race might have every incentive to hide any racial basis for his decision in order to maintain his legitimacy among black peers and to preserve any token based belief in his employer's eyes that he was among the genuinely qualified black workers.\textsuperscript{152}

However, Scalia's hypothetical is telling. Apart from having absolutely nothing to do with the case he is deciding, Scalia's hypothetical reveals that he believes that most discrimination cases do not involve discrimination at all. With the hypothetical he is able to insinuate this without having to defend or support the position because it is buried in the hypothetical facts. As Professor Selmi argues, this is the key consequence of Hicks:

\textsuperscript{148} Hicks, 509 U.S. at 514.
\textsuperscript{149} Corbett, The Fall of Summers, supra note 12.
\textsuperscript{150} Hicks, 509 U.S. at 513-14. The reason for this hypothetical is probably the Justice's unbridled antipathy for Justice Souter's dissenting opinion and Justice Blackmun's decision to join that opinion. On the latter, Justice Scalia chides Blackmun for alleged inconsistency. Id. at 519-20.
\textsuperscript{151} Hicks, 509 U.S. at 513-14. This hypothetical is troubling in many respects, but it is fundamentally racist insofar as it presumes that black decision makers could not discriminate against black applicants or (especially bizarre for an opponent of statistical analysis of discriminatory results and affirmative action) that an employer with forty percent black employees could not discriminate against black workers. This racially deterministic rhetoric is degrading to the Court and is at least poor opinion writing.
\textsuperscript{152} These practices are so common that they have been reduced to acronyms: FAON (first and only Negro) and HNIC (head Negro in charge). In both cases Negro is substituted for the derogatory term actually used in casual speech.
In essence, [the Court's models of discrimination] suggested that deviations from race-neutral expectations, when the deviations were in the form of significant statistical disparities or procedural irregularities, could be seen as the product of discrimination because our history suggested that discrimination was the most likely explanation when the deviations were otherwise unexplained. Consequently, these models functioned properly only when the courts applying them were willing to see discrimination as a viable explanation for social and political conditions—a fact that was revealed most clearly in the Court's recent employment discrimination case, St. Mary's Honor Center v. Hicks.\textsuperscript{153} Hicks altered the standards for proving employment discrimination under Title VII in a way that will likely make it more difficult to prove claims of discrimination. Combined with recent Supreme Court decisions in the affirmative action and voting rights contexts, the Hicks case signals a judicial presumption that discrimination no longer offers an explanation for otherwise unexplained racial disparities.\textsuperscript{154}

Thus, the hypothetical becomes the most important part of Hicks as it carries the policy basis of the opinion, stealthfully hidden in a package that lawyers are unlikely to view as unusual, but which they likely unconsciously understand to be packed with import.

Moreover, rather than construct a litigation model that would seek the true reason for an employment decision, one which might penetrate his obscure hypothetical, Justice Scalia requires the plaintiff to define and prove a discrimination that his hypothetical suggests could never be proven. As for Malamud, Professor Michael Selmi has already argued that Professor Malamud's claim that other reasons could explain putative discrimination exaggerates the data.\textsuperscript{155} In any case, the policy decision to force plaintiffs to prove the undefined seems based on impressions about the supposed quantity of discrimination and the need

\textsuperscript{153} 509 U.S. 502 (1993).
\textsuperscript{154} Selmi, Proving Intentional Discrimination, supra note 9, at 283.
\textsuperscript{155} Malamud . . . ultimately fails to make the case that the underlying presumption of discrimination [in the absence of explanation] is either unrealistic or valueless. Despite the various arguments she provides to support her conclusion that discrimination is not the cause of all unjustified actions against members of protected classes, implicit in her argument is a belief that race discrimination no longer offers the explanatory power required to support an inference of discrimination once the plaintiff disproves the employers articulated reason. Selmi, Proving Intentional Discrimination, supra note 9, at 331.
to eliminate frivolous suits, without arguing why those considerations are central to employment discrimination cases.

The real flaw here is the undefined "intentional discrimination," which Justice Scalia seems none too eager to define. Without the ability to say that direct evidence of use of the category defines discrimination, since *Price Waterhouse* and the 1991 Civil Rights Act cast those cases as mixed motives cases, everyone speaks vaguely about what intentional discrimination is supposed to be. There is a reason for this; the concept is undefinable because no one really knows how to define the underlying categories. Consequently, the notion that someone used the category is itself incomprehensible and in any case indistinguishable from the "other reasons" Scalia and Malamud see everywhere. As the next section shows, the policy basis for preserving the McDonnell Douglas formula is the fact that the discriminatory intent that Hicks


158. See Zimmer, supra note 147.

159. [The Hicks case is about how discrimination is proved; what evidence will give rise to inferences of discrimination, and where the Court will draw the line. It is, in this respect, about the same question that was at issue in Arlington Heights, and the result, not surprisingly, turns out to be the same. In both instances, the Court creates structure for proving discrimination through the use of circumstantial evidence, but which in reality turn out to be exceedingly difficult to meet. Selmi, *Proving Intentional Discrimination*, supra note 9, at 332.

160. Professor Selmi argues that this is the characteristic approach the Court has used in discrimination cases.

[Despite its rhetoric regarding the importance of ferreting out subtle discrimination, the Court has only seen discrimination absent a facial classification, in the most overt or obvious situations—situations that could not be explained on any basis other than race. Whenever the Court found room to accept a nondiscriminatory explanation for a disputed act, it did so . . . . [T]he Court has never moved beyond its view of the world prior to the passage of civil rights legislation in the 1960s when explicit barriers prevented African-Americans and women from fully participating in social and economic life. Selmi, *Proving Intentional Discrimination*, supra note 9, at 284.
requires is simply incoherent. The result is that Hicks transforms employment discrimination law into the worse stereotype of that kind of litigation: a battle over slurs and conspiracy theories.

4. Reeves's Attempt to Steady Hicks. Hicks's insinuation of a substantive focus in disparate treatment cases, while retaining the procedural form of McDonnell Douglas, was always confusing and likely to produce disorder in the circuit courts. Predictably, the Supreme Court was forced to revisit Hicks, which it did in Reeves v. Sanderson Plumbing.\(^{161}\) Perhaps surprisingly, the Court in Reeves duplicated Hicks's dual commitment to both a substantive and procedural focus in reaffirming Hicks.\(^{162}\)

The Supreme Court’s decision in Reeves reinstated a jury verdict for plaintiff Roger Reeves, a supervisor at Sanderson Plumbing who was discharged on the basis of his age after forty years of service. The Fifth Circuit had reversed the district court’s denial of a motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. The Fifth Circuit panel argued that the plaintiff’s showing of “pretext,”\(^{163}\) along with the evidence he had presented to establish his prima facie case, was insufficient to support judgment.\(^{164}\) The Su-

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162. Id. at 141-49.
163. See Lancot, supra note 32. Though never clearly defined in the cases, pretext means a showing that the defendant’s nondiscriminatory explanation has been shown to be false. See McDonnell Douglas, 411 U.S. at 804-05. Pretext-plus is the requirement that the plaintiff show additional evidence of discrimination apart from the prima facie case and the showing that the defendant’s explanation was unbelievable. See Hicks, 509 U.S. at 515 (“a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason”).
164. The Supreme Court recounted the Fifth Circuit’s view of the case: The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. 197 F.3d at 694. After noting respondent’s proffered justification for petitioner’s discharge, the court acknowledged that petitioner “very well may” have offered sufficient evidence for “a reasonable jury [to] have found that [respondent’s] explanation for its employment decision was pretextual.” Id., at 693. The court explained, however, that this was “not dispositive” of the ultimate issue—namely, “whether Reeves presented sufficient evidence that his age motivated [respondent’s] employment decision.” Ibid. Addressing this question, the court weighed petitioner’s additional evidence of discrimination against other circumstances surrounding his discharge. See id., at 693-694. Specifically, the court noted that Chesnut’s age-based comments “were not made in the direct context of Reeves’s termination”; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved in petitioner’s discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge
The Supreme Court ruled that such a showing might be adequate. Consequently, *Reeves* has been seen as a strong rejection of "pretext-plus"; however, the opinion, like *Hicks*, is more equivocal.

The *Reeves* controversy has concerned the consequences following a plaintiff's showing of pretext. *Hicks* clearly held that because a plaintiff bears the burden of proof throughout the litigation and because any presumption of discrimination created by the prima facie case "falls away" or "bursts" when rebutted, the plaintiff's showing of pretext could have no automatic consequence. *Hicks* was, however, marked by statements suggesting that the Court believed that the existence of discrimination *vel non* was proved only when pretext was accompanied with additional evidence—when the plaintiff showed pretext-plus. Moreover, the tone of Justice Scalia's opinion for the Court was antagonistic toward and suspicious of claims of discrimination. Perhaps predictably, lower courts soon became split over the meaning of *Hicks*. In particular, some circuits took the position that *Hicks* required pretext-plus. Other circuits accepted that pretext alone could support a finding of discrimination, but generally required additional evidence to support a verdict for the plaintiff. Still other

Room supervisors were accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. *Ibid.* at 693-694. On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age. *Id.*, at 694.

*Reeves*, 530 U.S. at 139-40.

165. *Id.* at 149.

166. 509 U.S. at 510-11.

167. *See id.* at 515-16.

168. *See, e.g.*, *id.* at 513-14.

169. The Supreme Court stated:

We granted certiorari, 528 U.S. 985 (1999), to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

530 U.S. at 140.

170. Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997) (en banc) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), *cert. denied*, 522 U.S. 1075 (1998); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (same) (*Rhodes* did not say pretext-plus, but was applied in that way); Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) (same); Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) (same).

171. Aka v. Washington Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc) (plaintiff's discrediting of employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext).
circuits read *Hicks* for as little as it stood for, allowing plaintiffs to prevail on pretext alone.\(^{172}\)

Reeves had established a prima facie case, which was rebutted. He had offered substantial evidence of pretext\(^{173}\) and his case had gone to the jury, which ruled for him. After surviving a motion for a judgment as a matter of law, Reeves's judgment was reversed on appeal. The Fifth Circuit held that Reeves's evidence of pretext was insufficient to support the jury verdict in his favor.\(^{174}\) In *Reeves* the Supreme Court addressed the ambiguous role of pretext in the proof of discrimination. The *Reeves* opinion does resolve the basic controversy generated by *Hicks*:

>[The] Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in St. Mary's Honor Center . . . . In [*Hicks*] we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.\(^{175}\)

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173. 530 U.S. at 142-45.

174. The Fifth Circuit held:

    Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual.

    On this point, Reeves very well may be correct. Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under the ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision.

Sanderson Plumbing Prods. v. Reeves, 197 F.3d 688, 693 (5th Cir. 1999). *See Reeves*, 530 U.S. at 138-40.

175. *Reeves*, 530 U.S. at 146-47. The Court explained that, in *Hicks*:

    [W]e held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff. 509 U.S., at 511. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *Id.*, at 524. In other words, "it is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.*, at 519.
The opinion is fairly read as holding that pretext alone might support a verdict of discrimination for a Title VII plaintiff.\(^{176}\)

The decision in Reeves leaves many questions unanswered. Reeves, like Hicks, has language that can be taken as supporting a pretext-plus requirement.\(^{177}\) The decision emphatically does not question the

In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id., at 511.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. See id., at 517 ("Proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

_id. at 146-47 (quoting Hicks, 509 U.S. at 517).

176. _Id. at 146-48.

177. An extensive passage from the Reeves opinion illustrates this:

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. See Aka v. Washington Hospital Center, 156 F.3d, at 1291-1292; see also Fisher v. Vassar College, 114 F.3d, at 1338 ("If the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not ""treat discrimination differently from other ultimate questions of fact."" _St. Mary's Honor Center, 509 U.S. at 524 (quoting Aikens, 460 U.S. at 716).

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. See infra at 181-82. For purposes of this case, we need not—and could not—resolve all of the circumstances in which such factors would entitle an employer to judgment as a
propriety of the three-step formula. Quite the contrary, the opinion strongly reaffirms the three-step formula, suggesting that the Court believes that approach adequate to structuring circumstantial proofs of discrimination. However, the facts in Reeves included strong statements of bias against the plaintiff because of his age. Although these statements were not sufficiently closely connected to the ultimate decision maker to make Reeves a direct proof case, they served as strong evidence of age-bias and prejudice. Consequently, Reeves raises some doubt about whether the Court's ruling that pretext alone might support a verdict of discrimination can be extended to cases that lack such statements. Together these observations suggest that there might be support in Reeves for a limited requirement of pretext-plus, at least in weak cases.

In the end, Reeves accomplishes little more than reemphasizing the Court's faith in Hicks. Indeed, no new ground is broken. For those who hoped that Reeves would prompt the Court to discard the McDonnell Douglas formula, Reeves was a significant disappointment. But Reeves also disappoints those who thought Hicks undercut that formula. The Reeves legacy, yet to fully develop, already suggests that it is not proving to be a correction of Hicks. Some circuits, including the Fifth Circuit from which Reeves came, have already read the decision to have only a limited effect on the disposition of Title VII suits.

D. The Irrational Turn as the Unification of Civil Rights Proofs

The unifying goal of the Supreme Court's recent decisions is evident in what remains coherent after Hicks and Reeves: the Court's causation requirement. Some commentators have already argued that the requirement of discriminatory "intent" in Title VII is really a require-

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matter of law. It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Reeves, 530 U.S. at 148-49.

178. See Sanderson Plumbing v. Reeves, 197 F.3d at 691 ("Reeves based his claim on two age-related statements allegedly made by Chesnut several months before Reeves's dismissal, namely (1) that Reeves was so old that he 'must have come over on the Mayflower,' and (2) that he was 'too damn old to do the job.'").

179. See Michael Zimmer, Slicing and Dicing, 61 LA. L. REV. 577 (2001) [hereinafter Zimmer, Slicing and Dicing]. Professor Zimmer believes that this resistance to Reeves will be short lived; however, this author disagrees. I believe Reeves will be substantially limited by the circuits that have already required pretext-plus, as circuits apply an approach to civil rights law that mirrors the old tendency to view statutes in derogation of the common law narrowly.
ment of causation. Moreover, Professor Michael Zimmer has suggested that the Court has sought to unify the strains of employment discrimination proof under the causation rubric of Price Waterhouse v. Hopkins. The Court’s focus on intent as causation suggests an even broader unification: a unification of all civil rights law.

The broader unification goal of the Supreme Court is concealed, however, in the incoherent part of its substantive emphasis on discriminatory intent. This is revealed by an analysis of the distinction between discriminatory intent as causation and tort causation. If intent in employment discrimination cases really refers to causation, the question becomes causation of what. In tort law, causation analysis focuses on how action causes injury. In employment discrimination law this formula is distorted because the adverse employment decision is both the act and the harm. The mental state—in tort law, usually thought to be combined with the act for causation purposes—is the thing thought to cause the act and the injury. (The following chart illustrates the different structures.)

<table>
<thead>
<tr>
<th>TORT</th>
<th>EMPLOYMENT DISCRIMINATION LAW</th>
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<tr>
<td>Mental State + Act (Causes) == Injury</td>
<td>Mental State (Causes) == Act + Injury</td>
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As the mental state in employment discrimination is “a decision based on the category,” the coherence of intent as causation is lost on the confusion of what is a “decision based on the category.” This confusion is exaggerated when, as shown in Part II below, the category is itself indefinable.

Because the Supreme Court overlooks the incoherence of the categories and disregards the differences between tort and discriminatory causation, the Supreme Court’s employment discrimination jurisprudence can be understood as coherent only by seeing it as an effort to unify all of civil rights law under a single approach. That is, the “discrimination” to which the Court’s tests refer is best understood as an “outrageous act”—a decision akin to, but more conscious than, deliberate indifference. In the Court’s substantive due process jurisprudence, this standard is designated the “shocks the conscience” standard.

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181. 490 U.S. at 239-41. See Zimmer, supra note 147, at 580-82.
182. See County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998). Some courts have read Lewis as limited to cases involving police chases, or at least cases where the state actor has not had time to reflect on the decision. See, e.g., Khan v. Gallitano, 180 F.3d 829, 836 (7th Cir. 1999); Morland v. Las Vegas Metro Police Dep’t, 159 F.3d 365, 372-73 (9th Cir. 1998). Those courts apply “deliberate indifference” to those cases where the officer has
The Court's disparate treatment jurisprudence is best understood, then, as moving toward the Court's general civil rights jurisprudence (as represented by the Court's substantive and procedural due process cases). In substantive due process cases, causation remains key as the plaintiff must show that there was an injury, caused by the actions of a state actor. This is not enough, however. The plaintiff must also establish that the state actor acted with deliberate indifference (or in a manner which shocks the conscience) and that it was the behavior of this character that caused the injury to the plaintiff.\textsuperscript{183} Similarly, in procedural due process cases, the plaintiff must show that the injury said to be suffered because of a lack of process was of the type that predeprivation process would be expected to prevent. Thus, most intentional torts tend to be outside the scope of a procedural due process claim because the state cannot know when they will occur and cannot be expected to provide process prior to the deprivation. The cases that do satisfy this test tend to shock the conscience—that is, they are so likely and severe that the state could be expected to know they would occur and it would be outrageous for the state not to provide procedures to ensure that deprivations of life, liberty or property are proper.\textsuperscript{184}

Even civil rights cases involving incorporated rights duplicate this formula. For example, the Court has required a deliberately indifferent mental state to trigger liability in cruel and unusual punishment cases under the Eighth Amendment. Also, the liberal recognition of the qualified immunity defense in most civil rights cases allows personal liability only against officers whose acts are unreasonable and caused the harm. That is, officers must basically act with deliberate indifference to clearly established law in a way that actually causes harm to be liable under 42 U.S.C. § 1983.\textsuperscript{185}

\textit{Hicks and Reeves} duplicate this form. The Supreme Court's ambiguous reference to discrimination reflects the view that outrageous acts

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\textsuperscript{183} See Bd. of County Comm'r's v. Brown, 520 U.S. 397, 404 (1997) (requiring causal connection between deliberately indifferent decision by policy maker and injury suffered by section 1983 plaintiff to create liability). See also Gibson v. City of Chicago, 910 F.2d 1510, 1519-20 (7th Cir. 1990) (city's liability for private acts turns on causal connection between the policies created by the city and the harm caused by private actor).
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\textsuperscript{184} See Zinermon v. Burch, 494 U.S. 113, 124-39 (1990) (procedural due process claim stated where state had procedure, knew the circumstances under which the procedure would be applicable, and did not apply procedure to the deprivation of plaintiff's liberty).
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\textsuperscript{185} Indeed, the Court has recently argued that even unreasonable behavior by an officer will not subject him to liability if his actions are the kind of mistake a reasonable officer might make. Saucier v. Katz, 533 U.S. 194 (2001).
\end{flushright}
that cause the plaintiff’s injury (the adverse employment decision) should trigger liability. Close cases should be decided in favor of the defendant. By never defining discrimination, the Court allows the trial judge to make these calls. But Hicks and Reeves suggest the parameters of the decisions judges should be making. In Hicks a close call between generalized personal animosity and personal animosity rooted in prejudice goes against a finding of discrimination. In Reeves, a case involving outrageously discriminatory statements combined with the replacement of the plaintiff by someone from another group in the protected class, the Supreme Court corrects the appellate court’s reversal of a jury finding of discrimination. Similar conclusions can be drawn from the Court’s opinion in Hazen Paper v. Biggins, when the Court held that factors that correlate with a protected category might be some evidence of the use of the category, but do not mean the category was used unless it implies that decisions were made on the basis of stereotypes about the group in question. In all cases, the Court seems to be saying that the act and injury (the adverse employment decision) must be causally related to another act: a decision which shocks the conscience.

The hoopla about pretext is only a vehicle for the Court to emphasize the substantive approach to proving discrimination and for obscuring the absence of a definition thereof. The Court is untroubled by the tension between the procedural and substantive aspects of the disparate treatment proof because perhaps it sees the cases as requiring deliberate indifference and causation.

At least two lines of jurisprudence link disparate treatment proof and the Supreme Court’s general civil rights decisions. First, the Court has always decided disparate treatment cases under the Fourteenth Amendment Equal Protection Clause. As these constitutional discrimination cases are often paired with due process claims, one can expect to observe a unifying tendency, reconciling equal protection and due process in discrimination cases.

Second, the Court’s two-pronged civil rights approach has long been applied in the Court’s Title VII harassment cases. The harassment cause of action requires a showing of (1) severe and pervasive offensive conduct, (2) because of a category. In tort law, when the severe and pervasive language is often used to define the limits of an intentional

186. 530 U.S. at 142; 509 U.S. at 509.
188. 530 U.S. at 151-54.
189. 507 U.S. at 608-14.
190. U.S. Const. amend. XIV, § 1.
infliction of emotional distress claim, that standard is often equated with "shocks the conscience," highlighting the close similarity between harassment law and the elements of substantive due process violations.

However, employment discrimination law is ill suited for unification with general civil rights law. In contrast with employment discrimination cases, most constitutional tort cases duplicate the causation structure of tort law. When an officer abuses his authority, he causes injury. The structure of substantive due process claims adds additional requirements to the otherwise analogous tort claim of battery—specifically, that the act be done with deliberate indifference to the constitutional rights which are violated. However, the basic structure is identical to the tort of battery. For battery, a certain state of mind animates an act which must cause an injury; for substantive due process, that state of mind is also deliberately indifferent to the constitutional rights that would be violated by the act causing the injury. In order to protect federalism, distinguish constitutional rights from "mere torts," and ensure that officers are capable of making difficult choices in serving the public, the Supreme Court has raised, but not changed, the proof requirements of Constitutional torts. When employment discrimination cases are forced into this structure, however, the consequences are more dire. As the next Part will highlight, this move toward unification transforms employment discrimination cases into irrational contests over the force of slurs or the pervasiveness of prejudice in an organization. The result is not only an exceedingly narrow definition of discrimination, but one that insulates contemporary discrimination by defining it in terms of historical models.

III. HICKS’S IRRATIONAL EFFECT

_Hicks_ only changes slightly the structure of proof in employment discrimination cases. What changes it makes are supported by fair readings of the prior cases and correctly perceived flaws in the _McDonnell Douglas_ formulation. However, these subtle changes have changed the dynamics of employment discrimination litigation. 191 At root is the

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191. An interesting contrary view is expressed in Judith Olans Brown, Stephen N. Subrin, & Phyllis Tropper Baumann, _Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal For Reopening the Judicial Dialogue_, 46 EMORY L.J. 1487 (1997). Although earlier criticizing the Court for a "prodefendant" stance, their 1997 article adopts a more conciliatory tone. _Id._ at 1487 n.1. In particular they note that not all of the dire predictions associated with _Hicks_ have come true: the Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits allow plaintiffs to reach juries on pretext only showings while the Third, Sixth, and Eighth Circuits have apparently sometimes allowed such a result. _Id._ at 1523-28. Of course the remaining Circuits have
effect of changes made to how allegations of discrimination are perceived, especially how they are distinguished from other bases for adverse decisions. What is remarkable is the Court's confidence in these changes, given the utter lack of a definition of either discrimination or the categories in the case law or elsewhere. Through a minor adjustment in proof structures, *Hicks* has unleashed district courts to answer these questions on their own, through judges' imposition of their own definitions of race, discrimination, and appropriate workplace behavior.192

The substantive emphasis of *Hicks* and *Reeves* clearly obliges plaintiffs to persuade the fact-finder of "intentional discrimination," even when the defendant's rebuttal is completely beside the point or even affirmatively deceptive. While a plaintiff may accomplish this after *Reeves* by showing pretext, *Reeves* does not disturb *Hicks*'s emphatic rejection of any mandatory presumption from the showing of pretext. Notwithstanding *Reeves*, plaintiffs' cases remain subject to scrutiny by judges early in the litigation, as they try to determine whether the plaintiff will be able to produce evidence of discriminatory intent. Because defendants can respond with totally superfluous rebuttals, a court need not even concern itself with what the defendant's response might be. Thus, at the earliest stage of the litigation, plaintiffs must persuade the judge of the probable fact of discrimination, despite the lack of any coherent definition of the concept. This is quite apart from the prima facie case or any other aspect of the three-step showing. In the language of the succeeding section, the plaintiff must meet a "natural" burden of production in addition to the three-step formula and must do so with no guidance on what constitutes the underlying fact of intentional discrimination.193

Under these circumstances and given the peculiarly inflammatory nature of charges of race discrimination, plaintiffs must walk the line between offering judges enough information so that they might be persuaded to believe discrimination took place while maintaining the believability of their accusations. This dilemma is attributed to the *Biggins* decision in Professor Zimmer's excellent illustration:

been substantially consistent in requiring pretext-plus evidence for a plaintiff to reach the jury. *See id.* at 1524 ("the First, Fourth, and Fifth Circuits have treated plaintiffs who lack direct evidence of discriminatory animus quite harshly both at summary judgment and at trial.").

192. Professor Selmi sees this as characteristic of how the Court has approached discrimination claims throughout its antidiscrimination decisions. *See* Selmi, *Proving Intentional Discrimination supra* note 9, at 285. A particularly telling example can be found in *Breda v. Wolf Camera*, No. 4:97-cv-366 (S.D. Ga. 2001) (society is too boorish to permit a finding of discriminatory harassment).

193. *See infra* text accompanying notes 270-75.
A simple example illustrates the extent to which . . . Biggins narrow[s] the McDonnell Douglas/Burdine formula. Suppose a 38-year-old woman is discharged, and thinks it was because of her gender and her age. Because the ADEA's protection from age discrimination applies only when persons reach age forty, she does not have a federal claim of age discrimination. If she sues only on the basis of sex discrimination, the employer can rebut that claim by admitting it acted because of her age. While such an admission is neither legitimate nor nondiscriminatory, the Biggins Court would find the employer's rebuttal sufficient. Thus the first result of Biggins is to pressure plaintiffs to sue on every possible basis.

On the other hand, if the plaintiff sues claiming sex discrimination and, using the federal court's supplemental jurisdiction, sues on age discrimination under a state law proscribing such conduct, the employer gains no advantage by admitting either sex or age discrimination. However, as the plaintiff expands her list of claims to avoid the trap set by the first part of Biggins, she faces the dilution established by the second result of Biggins, that is, that the power of an inference drawn from circumstantial evidence to support any one claim of discrimination diminishes as the range of claims expands.194

These two aspects of Biggins, reproduced and expanded by Hicks's substantive emphasis, make the need to identify the particular nature of the protected categories more crucial. Every type of evidence of acts based on the category need to be presented, but the broadened scope of evidence of this type serves to imply that the decision was not based on the category, but rather on numerous noncategory bases.

Moreover the plaintiff is burdened by the need to present all or nearly all of her evidence early in the litigation. In the meantime, the defendant waits to undercut the specific arguments offered and the court's particular views of what constitutes discrimination are nowhere recorded. Thus the plaintiff is burdened with trying to prove a discrimination nowhere defined but dormant in the court's personal impressions.195

The consequence is that the worse stereotypes of discrimination litigation come to reality: a de facto requirement of litigation on conspiracy theories, which turns on the presence of inflammatory evidence like racial slurs or misogynistic statements. This is illustrated by the difficulties inherent in identifying race-based discrimination.

195. This problem is much more likely than the fear expressed in Justice Souter's dissent in Hicks that the Court will find explanations neither advanced by the defendant nor explicit in the record.
When these difficulties are understood, the specific demands on plaintiffs are revealed to be unwieldy.

A. Race and Race Acts: The Irrational Consequences of an Ineffectual Category Definition

Part of the confidence the Court and others have in Hicks derives from their apparent certainty that race and the other protected categories are easily and coherently defined. Indeed it seems to be widely taken for granted that “decisions based on race” refers to a certain class of decisions, decisions in which a more or less universal notion of race animates a decision maker’s motive. Because race is not so unambiguously understood, this proves untrue. Just as significant, the lack of a coherent definition of race means that efforts to identify the hidden intent of a decision maker proves ever elusive. Focusing on the category of race, this problem is especially apparent.\textsuperscript{196}

Everyone seems to believe they know what race “is.”\textsuperscript{197} Most often

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\item 196. Undoubtedly the same problems exist in giving meaning to other categories, especially sex. Because sex might refer to everything from decisions based on genetic and hormonal differences, to stereotypes of behavior presumed to derive from those physical differences, to gender roles and stereotypes attendant thereto, the confusion is potentially greater. This is the stuff of feminist theory, easily the most significant contribution to scholarship of social institutions in recent years. See, e.g., FEMINIST LEGAL THEORY (D. Kelly Weisberg, ed., 1993).
\item 197. A tremendous literature on the question of race, its nature and origins, and its role in law has emerged in recent years, although race has been a topic of scholarly concern for as long as there has been an American academy. See generally STEPHEN J. GOULD, THE MISMEASURE OF MAN (1981) (on the refutation of biological theories of race); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES, FROM THE 1960S TO THE 1990S (Routledge 2d ed. 1994) (on the social construction of race); JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A MULTICULTURAL AMERICA 5-90 (West 2000); DERICK BELL, RACE, RACISM AND AMERICAN LAW 1-20 (4th ed. 2000) (both surveying the fluidity and variance of conceptions of race).
\end{itemize}

Race's fluidity and its relationship to modernism are nicely summarized in Paul Gilroy's recent book:

Although Race thinking certainly existed in earlier periods, modernity transformed the ways “race” was understood and acted upon. I am broadly sympathetic to the account that emerges from the rich work of recent historians on the “race” idea. From various political standpoints, many of them have argued that “race” as we comprehend it now simply did not exist until the nineteenth century. Though it is presented as a permanent, inevitable, and extrahistorical principle of differentiation, there is, they suggest, nothing automatic about “race” and the differences it makes. Consciousness of “race” is most constructively apprehended as a specific social product, the outcome of historical processes that can be mapped in detail.

PAUL GILROY, AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE 57 (2000). Gilroy continues with a telling quote from Eric Voegelin warning of the conceptual
this working definition of race operates as a not so subtle revival of biological notions of race. Categories like “black,” “white,” and “Asian” are tossed about like breeds of livestock whose physical and social characteristics are viewed as inborn. If race-based decisions are viewed as those decisions based on or closely associated with those types of categorizations, prohibitions on the use of race are triggered by the closeness of the decisional bases with these biological racial notions. Indeed it is this connection that gives moral force to Title VII's prohibition of racial discrimination. But in certain contexts, like affirmative action cases, it is this very use of race categorization, in an effort to eliminate race use, that is raised as a cause of concern. The reconciliation of this potential dilemma for some is a color-blind approach to discrimination that requires decision makers to make decisions without regard to race. Despite the appeal of this approach, it merely covers up the basic problem of when a decision is “based on race.”

Hicks reproduces the race identifying elements of the “color-blind” approach; instructing only that it is the plaintiff’s job to prove the essential facts necessary to the cause of action, Hicks implicitly defines the essential fact (consistent with prior precedent) as the obligation that the plaintiffs show the category was used. Hicks’s power is that it requires the plaintiff to prove that the defendant was a bad actor, one which employed a biological theory of race (or something akin thereto) in making a decision. In other words, it draws on the moral force underlying Title VII and limits successful cases to those when the plaintiff has made a case of moral reprehensibility. But when this problems a critical inquiry on race encounters:
A symbolic idea like the race idea is not a theory in the strict sense of the word.
And it is beside the mark to criticize a symbol, or a set of dogmas, because they are not empirically verifiable. While such criticism is correct, it is without meaning, because it is not the function of an idea to describe social reality but to assist in its constitution. An idea is always “wrong” in the epistemological sense, but this relation to reality is its very principle.

Eric Voegelin, The Growth of the Race Idea, Review of Politics 284 (July 1940) as quoted in Gilroy, supra note 197, at 57. The difficulty Voegelin describes attaches with equal weight to efforts to render race susceptible to legal sanction. Because it is not a thing that can be thought of critically, but an idea that constructs reality, efforts to pin down its existence are always, to a degree, fleeting.

200. 509 U.S. at 505-07.
201. In this way, Hicks is a substantive departure from the Court's past approach to identifying race discrimination. Under that approach the Court has emphasized that a
argument is advanced more generally, the Court's moves in Hicks hide the difficulty that is inherent to connecting a decision to the presumed underlying category of biological race.

Professor Michael Selmi's excellent work on the definition of discrimination in the Supreme Court's case law echoes that the Court's main approach to identifying discriminations is its focus on the identification of use of the category. Rather than focusing on intent in the sense of malice or motive, the Court's cases are concerned with whether the same decision would be made absent race, sex, or other protected categories. The means of identifying this is usually some version of Professor Strauss's "reversing the group's test." Using this test, Selmi can distinguish between pro-plaintiff and pro-defendant outcomes according to the Court's willingness to apply such a test rigorously or loosely.

But Selmi's confidence in the reversing the categories test reveals the core problem with the Court's ostensible definition of discrimination and is itself an example of overconfident conceptions of the protected categories. Perhaps because Strauss discusses the reversing the categories approach in the context of Feeney, it would be easy to focus on the relative coherence of sex distinctions. But when gender-based stereotyping underlies a decision, the category of sex becomes inherently more fluid as feminist writers have revealed. The key question is, reverse what groups? Even when the groups are assumed to be easily understood, this proves problematic. If a black person is the plaintiff and the reverse is a white person, the plaintiff faces the problem that white is associated with the general public, it is a category that is seen

showing of discrimination does not require a showing of malice or race-hate, only use of the category. See Selmi, Proving Intentional Discrimination, supra note 9. This change is not immediately apparent on the face of Hicks, but is rather hidden in Justice Scalia's use of his race hypothetical. Hicks, 509 U.S. at 513-14.

202. Selmi, Proving Intentional Discrimination, supra note 9, at 286-94.

203. Though articulating the test, Professor Strauss is less enthusiastic about it than Professor Selmi, criticizing it as too speculative. Strauss, supra note 47, at 965-68, 974-75, 990-91. See also Louis M. Seidman, Public Principle and Private Choice: the Uneasy Case for Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006, 1038-39 (1987) (discussing like criticism of reverse hypothesis vision of discrimination). Professor Selmi dismisses these concerns, though he concedes that the actual use of the test is particularly difficult. Selmi, Proving Intentional Discrimination, supra note 9, at 293-94. See Strauss, supra note 47, at 1002, for a discussion of the difficulty of applying the approach in Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

204. This is the dilemma that Professor MacKinnon revealed in her influential essay Difference and Dominance. CATHERINE MACKINNON, FEMINISM UNMODIFIED 32-45 (1987). For a general survey of feminist contributions to understanding law, see Chamallas, supra note 85.
as a noncategory. This discrimination question is not, by definition, “is this how the general public would be treated,” but rather “would another group be so treated?” If black workers and generalized white workers would be treated similarly, it is not necessarily the case that certain workers might not be treated differently. Indeed this is the problem in a case like Foster v. Dalton when the First Circuit, though it abhorred the favoritism and contempt for the hiring process shown by the Navy officials who made the contested decision, could only say it was nepotism rather than discrimination at play. Members of the reversed category in Foster, general white workers, were in the same position as the plaintiff who would have been expected to have gotten the job. Rather than ask “why was the employer motivated to avoid hiring plaintiff,” the court asks “was she in a different position from the general workforce.” Thus the reverse the groups test in Foster drove the fact-finder away from the fundamental question of the decisionmaker’s motive.

The reverse the group theory also misses why the particular decisional basis is employed against a particular employee. This is also because of its hypothetical character—determinations are based on what an employer might have done with an opposite race employee—but it also derives from the overlap between bases for decision. In Hicks the district court said there was no racial motive for Hicks dismissal, only a personal problem between employee and supervisor. However, it is not clear that these are distinguishable bases, and even if distinguishable, how the vendetta would have worked for an opposite race employee. This last point is so because embedded racial factors might restrict an actor’s actual behavior. Hicks’s supervisor might have felt his vendetta against a white worker would prompt adverse reactions from coworkers if it led, as in Hicks, to a contrived confrontation. The reversing the groups approach cannot account for these kinds of group dynamics that are at the core of discrimination. Thus, the supervisor and St. Mary’s Honor Center could have claimed with a straight face that they would have done the same if Hicks were white and that their insubordination

205. See the recent work on the social construction of “whiteness,” which seeks to explode the view of white as an antcategory, while revealing the imbedded privilege associated with the ability to claim that designation. IAN F. HANEY LOPEZ, WHITE BY LAW (1996).

206. 71 F.3d 52 (1st Cir. 1995).

207. Id. at 57.

208. D. Marvin Jones’s discussion of the move to increasingly individualistic models of discrimination implies these questions about the reverse the groups approach to defining discrimination. Jones, supra note 9, at 2346-59.
policy would have been fully enforced. Indeed this is what the district court found.209

This kind of problem is intimately connected to the difficult to define groups represented by the protected categories. In any given case the relative malleability of the definitions of the protected categories combined with the substantial overlap between stereotypes associated with certain groups and legitimate at-will decisional bases makes the reversing the groups approach problematic. If an employer says the demeanor of an applicant led him to believe that the applicant would not be efficient, it is difficult to analyze that assessment by reversing the groups, unless stereotypical assessments of particular groups are involved. When the plaintiff is black and the demeanor in question is laziness, it might be simple to say the employer would not apply that standard to a white applicant unless it was true, but might do so in a stereotypical manner for a black person. However if the demeanor issue is not associated with a stereotype of any implicated group, the illusory coherence of the categories is revealed and there is no basis for analyzing the case other than to say it is not racial.

Even accepting the reversing the categories approach, there is a problem with the links between the underlying biological theories of race and the socially constructed racial categories as they exist. Rarely have ostensible “racial” decisions ever been so clearly or completely connected to biological theories. It is often, perhaps most often, the case that decisions are made on bases conceptually independent of any categorization of the races, but which is applied to or rooted in racial distinctions. This distinction has always been manifest in defenses that take the form, “I don’t dislike black people, only bad people,” or “I ignored the person’s race; I decided against him because he didn’t do this or that.” Nor are decisions based on assumed biological or other distinctions always manifest as adverse decisions. A supremacist account of race or family would be adequate to exclude large swaths of the population from consideration on the basis of favoring one’s own or valuing the characteristic said to represent advantage. Also, preferences in some contexts manifest a paternalistic vision that someone is appropriate to a particular, subservient role because of his perceived characteristics. In any form, the actual basis for the decision made is obscured by these “non-racial,” if race-related notions.

At the root of the problem is the implicit opposition of immutable racial characteristics and social characteristics associated with them. The key illustration here is the once overwhelming held belief in white

209. *Hicks*, 509 U.S. at 506.
intellectual supremacy and black intellectual inferiority. While it is relatively rare today to hear someone defend this notion, it is all too common to hear "general intelligence" and standardized test results cited to prove that black people, students, workers, etc., are inferior. Perhaps because this general statement is indistinguishable from Jim Crow's justificatory dogma, it is most often rapidly followed with a caveat that the cited inferiority is not inherent or biological, but rather social or cultural in origin. The consequence of this caveat is the preservation of the categories "good black" or "smart black" etc., that, lest we forget, were exceedingly popular during Jim Crow.

This example reemphasizes that the basic issue is whether and when a decision based on social or other characteristics associated with a particular group are "racial." It is not just that "everybody" believes they know what race is, it is that everyone thinks they know what social characteristics are legitimately associated with race and when their use really conveys race. That is, the question in race discrimination cases is always whether, under the circumstances, a particular decisional basis is legitimate or racial.

As it turns out, certain decisional bases are widely regarded as indicative of race. These "stereotypes" are well known and use of them usually leaves little doubt of a racial decision. However even in these cases there is a slippage between the presumed biological categories and the social characteristics that led many to defend such stereotypes, despite their implicit application of the characteristics to a single group. In a study of Chicago employers, many candidly admitted not hiring "inner city" applicants, offering statements about poor abilities, which they attributed broadly to the racial and ethnic groups of the "inner city." The employers held out the possibility of consider-


211. The lament of this particular type of categorization was the basis of Professor Stephen Carter's questioning of affirmative action policies and has become a stock basis for attacks on affirmative action by those who see the policy as paternalistic. See Stephen L. Carter, Reflections of an Affirmative Action Baby (1991).

212. Views like "blacks are criminal" or "Mexicans are slothful" or "Jews are greedy" easily evidence "racial stereotypes" that share the characteristics of being excessively general and generally false.


When they talked about the work ethic, tensions in the workplace, or attitudes toward work, employers emphasized the color of a person's skin . . . .
erating suburban black and Latino applicants, but did not apply "inner city" to white applicants, whatever their geographic origin. The best example in recent years of this defense is Professor Lino Graglia's statements that there are so few qualified black and Mexican-American law applicants because of a "culture of underachievement" in those communities.\textsuperscript{214} This statement was correctly read as expressing Graglia's sentiment that black and Mexican-Americans are less intelligent, yet he defended the statement as supposedly not reflective of animus against either group but rather against their culture. His defense was properly rejected because it was itself bound to the parameters of the groups in question. His defense, though advanced as a means of deracializing his statement, proved that it was a comment on racial characteristics, whatever their origin. Never did Graglia attempt to justify the statement as reflective of general cultural practice associated with actual social or economic groups, only racial and ethnic groups.

As the distance between the protected category and social statements associated with stereotypes increases, decisions become more difficult to identify as "racial." Race is proven in these circumstances by the frequency and degree of association between certain social behaviors (or views considered stereotypical) and the biologically defined group, not by

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Although many employers assumed that black meant "inner-city poor," others—both black and white—were quick to see divisions within the black population . . . . Although many respondents drew class distinctions among blacks, very few made those same distinctions among Hispanics or whites; in refining these categories, respondents referred to ethnicity and age rather than class.

\textit{Id.} (as excerpted in \textit{FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW} 140-41 (John J. Donohue, III, ed., 1997)).

\textsuperscript{214} In 1997 University of Texas Law Professor "[Lino] Graglia . . . told a conservative group, which supports the Hopwood federal court ruling that banned affirmative action programs at Texas colleges, that the only reason UT had given 'racial preferences' to minorities was because 'blacks and Mexican-Americans are not competitive with whites in selective institutions.'" He reasoned minorities come from cultures in which "failure is not looked upon in disgrace . . . ." Graglia said he saw no benefit for white students mixing with "lower classes" which "perform less well in school and tend towards greater violent behavior." Editorial, \textit{Repudiate Graglia, but . . .}, \textit{SAN ANTONIO EXPRESS-NEWS}, Sept. 16, 1997, at B6. The comments generated substantial controversy including calls for Graglia's resignation. \textit{See, e.g.}, Kathy Walt, \textit{Professor's words prompt irate reactions; UT officials decry anti-diversity views as state legislators call for resignation}, \textit{HOUSTON CHRONICLE}, Sept. 12, 1997, at A37.

Graglia's statements and the shift to a culturally-based, rather than a biologically-based racism is associated with the "New Racism" where race is reconceived in culturalist and nationalist terms. \textit{See MARTIN BARKER, THE NEW RACISM} (1989).
the "use" of the category. Because it is proof of these associations that defines race-use—not an exclusive focus by the decision maker on a single group in the category—proof of race-use is quite distant from both the reversing the group idea and the simplistic moral model that gives Title VII its force.

In the absence of a detailed, coherent definition of race, the weighting of the significance of references to "social" characteristics can be "proven" to be racial only with indirect proofs, especially of analogy, context, and tone.\textsuperscript{215} As illustrated below, the absence of a coherent definition of race necessitates reliance on these indirect proofs and highlights why Hicks's move away from presumptions of race discrimination, as allowed in a limited way by McDonnell Douglas, raises the reliance on analogy and tone as forms of proof. The ultimate consequence is that proof of race discrimination becomes limited to proof of conspiracy or seemingly exaggerated responses to racialized comments and statements. That is, Hicks mandates the very worse stereotypes of antidiscrimination litigation, sifting out good but close cases while allowing weak cases with inflammatory evidence to proceed. Because the tone of Hicks clearly counsels district judges to eliminate weak cases, the end result is the exclusion of virtually all race-based employment discrimination claims.

B. Toward a Law of Conspiracy Theories and Slurs

In a race discrimination case, the lack of a definition of race makes definition of discrimination virtually impossible. If discrimination is a particular "race-act," identifying that act forces plaintiffs to resort to one of several rhetorical strategies in an effort to convince the fact-finder that not only was an adverse decision taken against him, but that the decision was based on race. With race relevant to the definition of discrimination as particular acts informed by race or said to be racial, the plaintiff's task is further complicated by the fact that the discrimination case places discussions of race in the highly conditioned environment of defining sanctionable employment conduct. This makes defining race a crucial but secondary concern in the context of a discrimination suit.

The confluence of race discussion with discrimination is thus quite complicated in practice.\textsuperscript{216} Hence debates over the nature of race often

\textsuperscript{215} The former is a macro-explanation of the types of cases that are fairly viewed as constituting discrimination in an effort to highlight similarities with the instant context. The latter is a micro-analysis of the instant case, seeking through evidence of the specific context to isolate the proper reading of the "social" facts.

\textsuperscript{216} Discrimination is, literally, only a distinction with a difference. Race discrimination is an act that distinguishes according to race. "Race," as the under-defined component
take the form, "What allegations are believable examples of sanctionable discrimination?" This construct infuses the debate with numerous social policy considerations related to the preservation of other important rights (such as employment at will and freedom of contract), the ability of institutions to provide remedies for the alleged action (implicit in the question of federal courts' role in regulating private action), and the propriety of responding to widely shared harms when the costs of such responses will be borne by smaller numbers of individuals. And while the effect of these considerations are wide reaching, the most significant consequence is that it leads to an indirect definition of race and race acts via reliance on two unstated metaphors: race as episodic, irrational hate, and race as mask. These two metaphors are invoked in discussions of race discrimination to judge the import of any charge of race discrimination.

Even a passing examination of Title VII's main proofs of intentional discrimination—Facial discrimination, Disparate Treatment and Pattern and Practice—reveal the force of the metaphors, which have independent power as examples of race acts. The metaphor of race as an episodic, irrational hate focuses on the race act as a violent event. Race is said to be the basis for coercive, even cataclysmic episodes of subordination. Race is a motivating basis for particular coercive behavior and as such race as episodic, irrational hate, reeks of malice. Race is, in this sense, irrational in two ways: (1) it is an improper basis for the allocation of social burdens; and (2) it is the basis for acts that are themselves irrational. Title VII's efforts to prohibit discrimination draws on both senses of this view of race. But race is also conceived from a more personal perspective. Race is seen as a mask that obscures one's true identity. Race is, in this sense, also irrational in that it obscures the true character of the person behind the racial mask. Efforts to prohibit discrimination on the basis of race focus on attacking race's irrational character and establishing a tacit distinction between rational (acceptable) bases for employment decisions and irrational (prohibited) bases for employment decisions. With the three main evidentiary structures based on race's dual sense, Hicks's subtle changes are revealed to be far more consequential, because they disrupt the underlying basis for defining the prohibited acts and exaggerate reliance on the metaphor-based understanding of prohibited behavior.

Each of the main evidentiary proofs builds on the dual aspects of race. All constitute charges that a decision taken was racial, and therefore

of this construction, takes its meaning largely from the kinds of acts conceded to be discriminatory; under Title VII, most debates over discrimination concern the related but distinct question of what evidence proves race discrimination.
discriminatory in at least a minimal sense. The three charges around which the proof structures are built are: (1) a charge that a decision was taken, accompanied with derogatory racial statements or epithets, what some antidiscrimination texts call an "express use" case;\(^{217}\) (2) a charge that a decision was taken based on the racial category, but that use is implicit or unstated; and (3) a charge that a statistical summary of a series of decisions indicates that those decisions are likely "racial." While most will view these as differentially probative of a race act, the strength of each of these charges is usually taken as self-evident. Both their absolute and relative strength, however, actually derive from the role and power of the two senses of race, differentially invoked by each charge.

Race as epithet. A decision taken in light of a derogatory statement is the most intuitively powerful of the three cases. This power is found in its direct invocation of symbols of past subordination. The presumed reliance on the stereotypical presumptions represented by an epithet also strongly indicate that the subject of the decision was not evaluated on their own merits. Hence a statement like, "niggers are incompetent" is clearly derogatory and any decision based on such a statement is presumably invalid.

The only retort in this circumstance is to attack the causal connection between the derogatory statement and the decision taken.\(^{218}\) Intervening justifications might be invoked to mitigate the force of the statement or some alternative reason for the decision taken might be invoked. Critics of employment discrimination protection in this context are few, but those that exist tend to blame the victim, focusing on provocations or other explanations undercutting the force of the derogatory statements. This highlights that the power of this first case lies in the force of the first metaphor. To overcome the implication of that metaphor,

\(^{217}\) I do not use an example of so-called facial discrimination for two distinct reasons. First, such a policy is accepted as being racial; that policy is, in terms, a facially discriminatory policy. Everything turns on whether the policy is deemed to be "racial" in character; if it is not, the policy is not facially discriminatory. Also, any category that is facial relies on the existence of traditionally accepted racial groupings—a policy providing that "colored shall not . . ." relies on the definition of "colored" as a racial grouping to give meaning to the policy. As such, the dependence on the metaphors (especially the first one) is obscured because the traditional racial categorization that might constitute the "facial" policy is already incorporated in the terms of the policy.

\(^{218}\) See, e.g., Slack v. Havens, 7 F.E.P. 885 (S.D. Cal. 1973), aff'd as modified, 522 F.2d 1091 (9th Cir. 1975) (causation defense fails). Cf. Indurante v. Local 705, Intl Bhd. of Teamsters, 160 F.3d 364 (7th Cir. 1998) (anti-Italian statements do not equal direct evidence of discrimination because causal link weak); Shorter v. IGC Holdings, Inc., 188 F.3d 1204 (10th Cir. 1999) (manager's reference to plaintiff as "incompetent nigger" not direct evidence of discrimination because causal connection distant).
salacious accusations are needed: e.g., the victim and the decision maker had a long standing animosity (such as was the case in *Hicks*), or the victim committed a crime, or the victim has invited the bad behavior,219 or is otherwise undeserved of protection.220

However this case is potentially problematic in another way. When the force of this case is so great, there is a substantial chance that the case might be invoked inappropriately or that an appropriate invocation is taken to have too much force. These two errors of application derive, respectively, from misapplication of the first and second metaphors. Implications made from racial epithets are especially susceptible to each of these errors. In some circles, for example, the use of “nigger” by some black youth (and others) has become a slang, generic reference to a person, particularly a close associate or friend. This use does not detract from the term’s derogatory or insulting capacities, but it does potentially create some confusion over the use of the term. Thus when there is a conflict accompanied by use of the word, the word’s invocation of the first metaphor in particular is ambiguous. Importantly, this does not mean that the situation is nonracial; rather it indicates only that the appropriateness of inferences from the historically powerful, symbolic nature of the term is more questionable, and that the force of any such inference is limited to some degree.

Just how the term is used in such a context is usually rather obvious in fact, but only via inflection, context and interpretation. Unfortunately, “you have to be there.” However, seizing on this ambiguity, offending speakers of such an epithet often seek to explain away their offending behavior by suggesting that they meant to employ the term in a nonderogatory manner. A similar defense is the claim that their use of the term refers to some general, rather than derogatory trait. This defense seeks to undercut the force of the second metaphor. So a user of “nigger” might suggest that the term refers to, say, anyone who is

219. This tendency is somewhat bizarrely illustrated by the refusal of a district court judge to recognize harm from objectively offensive harassment when the plaintiff had posed partially nude for a “biker” magazine. Burns v. McGregor Elecs. Indus., Inc., 955 F.2d 559 (8th Cir. 1992) (reversing district court finding that plaintiff suffered no harm from sexual harassment because she had posed in national magazine), on remand, Burns v. McGregor Elecs., 807 F. Supp. 508 (N.D. Iowa 1992) (insisting that as finding of fact plaintiff suffered no harm), rev’d by, remanded by, Burns v. McGregor Elecs., 989 F.2d 959 (8th Cir. 1993) (directing judgment be entered for plaintiff).

220. The recognition of mixed motives analysis in recent years poses another significant defense to this kind of case in which the defendant is most likely to be found liable. Though cast in terms of cause in the *Price Waterhouse* decision and remedies in the context of the 1991 Civil Rights Act, the mixed motives defense is least acceptable in this context because it runs against the overt moral power of this first case.
untrustworthy or "low class." This is both a weak attempt to dilute the metaphorical power of the first metaphor and an attempt to transform the reference from an "unreal" distortion of the subject's genuine character, into a statement of that person's "non-racial" traits.

Clearly the weight of analysis in this context is being carried by the derogatory statements. The force of the charge lies in the connection the statements supply between past and present behavior, as well as the sense that the "real" character of the subject of the statements is distorted by their use. Though this is an "easy" case, certain aspects of it should not go unnoted: the case is subject to manipulation, for example, as the force of the imagery is reduced; the victim's recovery is dependent exclusively on the currency of these images; that currency might be reduced by ascribing to the victim bad acts (as though they are mutually exclusive of a racial decision); and in no way do questions of inequality or broader societal relations inform this analysis, much less does it suggest that any view informed by broader societal considerations might inform people's thinking about race relations.

Race as category use. A decision said to be taken on a racial basis, but without overt reference to the category is obviously without the benefit of express reference to the first metaphor. Reference to such metaphors are, at best, only incidental in this context, deriving from the fortuitous similarities between the matter in question and historical events with powerful symbolic force. As such, the hanging of a black person is probably more likely to be viewed as a "racial" incident than the shooting of that same person, no matter what the other circumstances are because of the historical force connected to lynching. Absent these kinds of facts, greater reliance must be made on the fact that the decision was not based on the person's "real" qualities or liabilities. This magnifies the role of references to "other" factors. Unlike the epithet case, these factors are not invoked to upset causation, but to challenge the racial categorization altogether. Thus employment discrimination cases come to be viewed as primarily contests over the qualifications and actions of the plaintiff as derogatory statements are usually unavailable by definition.

Much of the analysis of this type of charge duplicates the response to the former charge, but here the influence of biologically based assumptions about race are heightened. Everything turns on whether the subject's "real" character was the basis of the decision. Thus while an employment decision made on the assumption that black Americans are lazy would clearly violate all antidiscrimination laws, such an assumption is not likely to be apparent. The plaintiff would be hard pressed to elicit such evidence (because it would obviously change this to an epithet case) and would have to rely on circumstantial evidence that this was in
fact the basis of the decision. However if the basis of the decision were the assumption that this applicant’s speech or demeanor indicated laziness, that decision would be generally taken as permissible, so long as it referred to the speech and assumed lack of industry of that person, not the group. This is probably true even if the assumption that there is a connection between the speech pattern and laziness is itself based on racial stereotypes, because such stereotypes, are hidden in this example.

Some commentators defend this kind of decision’s categorization as nondiscriminatory, although it is not clear if they mean that it is nonracial. Their argument is that employers need to be able to obtain information cheaply, perhaps raising evidentiary and efficiency questions. Despite the merger of evidentiary and policy questions in this metaphor-based approach to race classification, there remains a question about whether this is a discriminatory use of race. Because it indicates a difference in defining race, the former case is viewed as racial because it invokes unreal attributes and applies them to the subject of the decision. Of course the former example also partially invokes a symbol of the first-metaphor type, but the key is that the subject is treated as lazy because others of his “type” are assumed to be lazy. In the latter example, by contrast, the subject’s “real” attributes are invoked, avoiding the implication of either metaphor, even if those attributes are not really that of the applicant, and even if their association with one of the applicant’s traits is itself based on a (submerged) stereotype.

In this circumstance, the willingness of society to accept as indicia of “real” skills defects, stereotypical assumptions from real behaviors, provides a ready mechanism for transforming even the most severe racial stereotyping into a “non-racial” decision. This second class of cases, which surely account for the majority of putative “racial” incidents today, become subject to wide disagreement over whether certain reactions to certain traits constitutes racial behavior. Cognizance of racial questions comes to seem oppressively burdensome because this interpretive plane is largely unbounded. Consequently, many reasonably

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221. Professor Epstein is the most famous defender of this kind of decision making, arguing that it constitutes an efficient way for employers to determine employee qualification without encountering formidable transaction costs. See Richard Epstein, Forbidden Grounds: The Case Against Anti-Discrimination Laws (1993).

222. This kind of argument also arises in BFOQ cases when the employer insists that the protected category is a proxy for job qualifications. See W. Airlines, Inc. v. Criswell, 472 U.S. 400 (1985) (proxy argument rejected in ADEA case). See also Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (upholding BFOQ in ADEA case on proxy ground). The BFOQ defense is not available in race and color discrimination cases.
abandon attempts to "overcome" race. Putative victims fatalistically accept a racialized existence as a matter of course, while putative perpetrators deny that so much of the world could be racialized in this sense. Indeed both are correct. Victims' inability to convey the racialized nature of their existence in the language of these metaphors derives from the metaphors' implication that the racialization of the world is the product of discrete decisions of a particular type. Further, the metaphors do in fact suggest that these types of overt decisions exist everywhere, because people often duplicate the kinds of behaviors of the Jim Crow period and also often interact with others on the basis of assumptions, stereotypes, and finicky tastes.223

Race as patterns of behavior summarized in statistical form. In an effort to give form to the vast interpretative plain of social existence, thereby limiting the cases that might be called racial, the tools of social scientific summary have been used to indicate racial behavior in legal, policy, and informal disputes.224 These claims insist that racial behavior can be discovered with the impressive statistical tools developed by social scientists. Putting aside anti-intellectual suspicion of these tools, there still exists substantial debate over what they can prove. Indeed, while this kind of evidence does limit the unbounded debates possible in the second case and provide a basis for measuring the kinds of social consensus that inform determinations of cases in the second category, statistical evidence is an intuitively weak proof of race as defined by the metaphors.

Statistical claims invoke neither the first nor second metaphor. Statistical descriptions are analogous to dramatic historical symbols in only the most abstract sense. The strongest case highlights the problem: if Jim Crow itself, stands for severe, enforced inequality, statistical evidence of similar or increased inequality is immediately subject to unlimited interpretation over what produced both circumstances, much less whether there is a connection between the two summaries. As any social scientist knows, the data does not speak for itself.

The second metaphor is also not invoked. Statistical summaries are summaries. While a person's performance might be rendered statistically, any sports fanatic can tell you that a person is not the sum of the statistical summaries of his performance. Moreover, the use of statistics in proving discrimination usually focuses on groups of people over time; in this circumstance the data does not even purport to refer to any individual person. Thus, while statistical summaries are probative,

223. See Krieger, supra note 85 (discussing the embedded use of categorization as revealed by cognitive psychology).
critics of their use in characterizing any event or set of events as racial, need only point to their limits to undercut the claim.

Consequently, a hierarchy of claims proves the force of the metaphors. When both are invoked, the claim is intuitively "racial." When one or none are invoked, the force is questionable at best. In so far as statistical proofs are concerned, this is especially important because this is the type of proof that is most likely to account for inequality, the structuring of belief systems, and the persistence of race. The other proofs suppose a person in a vacuum, deriving their untoward motivations, and committing their despised acts, when they do, without any justification or connection to the society that produced them.

In this context, the persistence of racial behavior or thinking is inexplicable. As such, the metaphor approach to race definition is importantly revealed to begin from the assumption that no race decisions exist, requiring affirmative evidence to prove its existence. This burden shift is troubling, but also peculiar because the probative value of evidence in this context derives from the force of accepted historical inequities. Thus, history of racial subordination is useful as a means of weighting evidence, but relatively insignificant in the identification of a social context that might inform, generate, and sustain the kind of racial decisions grudgingly accepted as extant. Race, so defined, is a social construct, but a peculiarly circumscribed one.

C. Discrimination as Conspiracy and Slur

So despite understandings to the contrary, race is widely conceived in biological terms that imply social consequences, some of which are historical in nature and others simply inaccurate descriptions of particular people. Illegal discriminatory acts are defined as decisions based on race, such decisions paralleling the relation between race and the social consequences associated with race. Racially discriminatory acts, are then commonly understood as stereotypes applied to someone in accord with historical instances of "race acts" and in contravention of that person's "true character." Combinations of these two senses of race acts produce differentially compelling allegations of race acts, that is discrimination. Thus the proof of discrimination can be expected to become an exercise in adducing evidence of these two types against a background presumption that race acts are episodic, uncommon (if frequent) decisions. It is natural in this context to presume plaintiffs have the burden of proving a decision to be "racial," but if social life is in some way infused with race-thinking (and until it ceases to be so), these efforts will appear out of place in the absence of evidence of the most extreme sort. As the following example illustrates, Hicks's focus on plaintiffs' need to prove discriminatory intent drives plaintiffs to
pursue evidence of the most ridiculous type and leads proponents of *Hicks* to presume that this is only because race-thinking is rare and race decision making even rarer.

It becomes apparent in the analysis of a hypothetical case that plaintiffs are driven to unreasonable extremes to prove discrimination. Consider this hypothetical: The plaintiff applies for a job and is rejected. On the basis of the "attitude" of the decision maker, the plaintiff decides that he has been a victim of discrimination. After complying with the procedural and administrative requirements, he files a timely suit claiming discrimination and establishing his prima facie case. The defendant rebuts and the plaintiff is left with the burden of proving discriminatory intent. However, he is distracted in this first task by the tacit requirement of *Hicks* that he disprove the defendant's rebuttal.

Disproving the defendant's reason might be accomplished by showing that the reason equals discrimination, but *Hicks* implies that such a showing could be accomplished only if the reason could be considered direct evidence of discrimination. In such a case, the suit would be removed from the ambit of *McDonnell Douglas*/*Hicks* and dealt with under the modified *Price Waterhouse* approach.\(^\text{225}\)

Assuming the plaintiff can show pretext, the difficult part of the case has only just begun. The Court's famous injunction in *Hicks* that the plaintiff must prove discriminatory intent becomes a significant and shifting hurdle. In the hypothetical above, only two promising routes present themselves: (1) the plaintiff might seek evidence that the situation resembles episodes from the period of Jim Crow; or (2) he may pursue evidence that the particular decision maker harbored prejudiced views.\(^\text{226}\)

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\(^\text{225}\) Short of this, pretext might be established by some other showing of discrimination that could be inferred from the reason offered, but *Hicks* seems to exclude this option. For example, if the defendant's decision maker claims that the plaintiff's demeanor was off-putting, that statement might be shown to be a ruse for discrimination. *Hicks*'s use of pretext, however, seems to turn on whether this was actually the decisional basis. Pretext under *Hicks* seems to require the plaintiff to show that the stated reason was not. The court might not be moved, under these circumstances, to find that the plaintiff had carried his burden of proving pretext. In such a case, what was the decisional basis and whether that basis was discriminatory merge, allowing the court to decide the case on the hidden basis of its reaction to the offered rebuttal.

\(^\text{226}\) *Reeves* does little to change this. Although the fact-finder is allowed to infer discrimination from the plaintiff's proof that the rebuttal reason was untrue, it is not required to do so. Further, the judge might not allow the case to reach the jury on the belief that no reasonable inference of discrimination can be drawn from the proof of pretext. In either case, the plaintiff must be prepared to offer substantive evidence to indicate that discrimination was the cause of the adverse employment decision.
1. Historical Analogy as Proof of Discrimination: Discrimination as Conspiracy Theory. As our hypothetical includes to this point only an allegation of discrimination and a response that the decision was made on grounds shown not to be the real grounds, the plaintiff must begin his proof from a blank slate. In this sense Malamud's and Smith's concerns with the minutia prove true. It has been a complete waste. More importantly, it is at this point that the absence of a definition of discrimination becomes apparent. Having applied for the job and been rejected, the plaintiff has no guidance on what he is trying to show, other than, in the end it must comport with someone's view of discrimination. For a plaintiff in this country, the most powerful notions of discrimination are those associated with the system of Jim Crow, especially as portrayed in popular accounts of the civil rights movement. Thus discrimination might be defined as acts similar to the practices associated with that time. Consignment of black citizens to separate facilities (the back of the bus), issuance of day to day indignities in the face of black people (treating grown men as "boys"), or allocation of leftovers and scraps to black aspirants all present powerful symbols of indignity and second class citizenship. By alleging that employment practices resemble these or other symbols of Jim Crow, the plaintiff might seek to persuade the court that the adverse decision was indeed equivalent to these practices.

Apart from the obvious problem of trying to maintain analogies between practices that existed in a social and legal context where they were accepted and practices that exist in a context where they are illegal and widely disfavored (if not also discouraged), this approach encounters several impediments. Without legal sanction, the existence of a segregated workplace is of limited probative force unless accompanied by an express policy of segregation. General indignities, unless taking the form of racial slurs, are likely dismissible as personal problems between particular workers (remember, this is what the judge did in Hicks). And generalized indignities never prove discrimination themselves, becoming probative only if accompanied by additional evidence. Thus even this promising route proves illusory. Applying these types of facts to the hypothetical illustrates their ineffectual power.

The plaintiff in our case applied for and did not receive the job. He notes that there are no black incumbents in the job he desires. Seizing upon this, he argues that this proves he was a victim of discrimination. This evidence takes the form of the popular pattern and practice claim, exposing its weakness. By invoking the hiring of others, the plaintiff incorporates the limitations of their claims into his own. If the pool of applicants similarly situated is small, the fact that there are few black
incumbents does not strongly indicate discrimination. The Court's instructions in *Hazelwood School District v. United States* and latter refinements in *Wards Cove Packing Co. v. Atonio* highlight the strict connection required when generalized patterns are invoked to support an individual disparate treatment claim. Moreover, even if the plaintiff can show a pattern of excluding black applicants, he must still litigate his own claim again; he must defend against the showing that he is not entitled to recovery because he was not subject to the pattern he proved. This redundancy makes the pattern and practice proof inefficient and unattractive to individual discrimination claimants.

As *Hicks* demonstrated, a plaintiff seeking to prove discrimination through showing that he was generally treated badly risks proving the employer's defense under the *Hicks* based requirement that he prove discriminatory intent. Short of racial slurs, the plaintiff in the foregoing hypothetical might seek to adduce evidence of how the decision maker evidenced a "bad attitude" when he interviewed, or perhaps that the person processing applications ignored him in favor of a nonblack other. These types of evidence seek to invoke the indignities common to Jim Crow. They fail, however, because outside the context of Jim Crow they are not necessarily "racial." Indeed, this is the nub of the problem of disparate treatment cases. Nothing is "necessarily" racial. Left to judge unprofessional behavior on the part of the employer's decision maker, courts are unsurprisingly reluctant to attribute the moral sanction of discrimination to an employer when the "bad attitude" might just as likely have evidenced "personal problems." On the other hand, most one-on-one racial problems are "personal problems" for the parties involved.

Finally, the plaintiff might try to identify that black applicants enjoy only the least desirable roles in the employer's workplace. This approach seems more promising but really combines the limitations of the prior two. It is a broad description of the workplace that has no inherent connection to the plaintiff's case and is informed by numerous uncontrolled variables like the educational and skill levels of the numerous employment pools represented in the employer's work force. It is also a suggestion that decision makers harbor antagonistic views of black applicants and seek to slot them in the least desirable jobs. This

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229. *See Teamsters,* 431 U.S. at 359 n.45. Although the defendant bears this burden, the plaintiff is still at risk of not recovering, especially on the grounds that he was not qualified for the position.
230. 509 U.S. at 508.
claim is perfectly plausible but requires courts to accept that decision makers would delay hiring decisions, sacrifice employment of better workers, and otherwise manipulate the hiring process to produce this outcome. This concerted plan is easy to accept if there is a single decision maker, but fails to be compelling when employment decisions are decentralized. In those systems this type of claim will be compelling only if officers high in the organization are shown to harbor affirmatively racist views, as was the case in the highly publicized Shoney's case. 231

As the last argument suggests, any of the plaintiff’s claims are augmented if they can be attributed to the whole of the employer’s decision making structure. That is if the plaintiff can show that numerous decision makers have consistently made hiring decisions in a way that excludes black applicants, or that black workers suffer indignities and harassment throughout the employer’s facilities, or that “everyone” harbors the view that black workers do not belong in certain jobs, he can effectively show that his employment decision was likely informed by race. In other words, the plaintiff is driven to prove a conspiracy to exclude black applicants; he must show that his application was largely ignored; he must show that the employer (and many of his decision makers) exist in “slavery time.” 232 This is just untenable. No wonder some advocates of stronger employment discrimination laws argue that nothing has changed since 1973: Plaintiffs are essentially required to prove just that if they are to prevail.

231. The CEO of Shoney’s, Ray Danner, was found to have enforced a system of racism in the management of several restaurant chains owned or operated by Shoney’s, Inc. The more extreme nomenclature that developed under Danner’s “leadership” is described by Steve Watkins in his Nation magazine article on the incident:

[There was] zero minority representation at the upper levels of Shoney’s management, and virtually none at any level in the central office in Nashville. [W]ell built black men were referred to as “Arnold Schwartzenigger,” that too many blacks meant a restaurant was “too cloudy” or that someone must be “shooting a jungle movie” or that it was “Little Africa.” [H]iring blacks back after you’d just “lightened” your store was known as “renigging.” [N]igger stores in predominately black neighborhoods might have black managers, but that otherwise the place for many minority applicants was “File 13,” the trash can. But there were other ways to note the race of black job applicants so they could be rejected: a simple “A,” for instance, which stood for “Ape”; or a colored-in “O” in the Shoney’s name on the application form.


232. The allusion here is to the Sam “Lightning” Hopkins blues song “Slavery Time” where Hopkins sings of Jim Crow: “On thousand years my people was a slave/ When I was born they teach me this way/ Tip your hat to the people/ Be careful, boy, what you say” and later, “I’m so glad, I’m so glad/ It ain’t slavery time no more.” Sam Hopkins, Slavery Times (Arhoolie Records 1967).
2. Wounding Words: Discrimination as Slur. Another approach for the plaintiff in the hypothetical case is to build on the indignities approach suggested above by showing the use of racial slurs or other words regarded as indicative of racial views. This approach seeks to find evidence in the decision maker's person that indicate that she might have made a racial decision. Racial slurs are the prototype form of this evidence, but it might be found in the decision maker's personal relationships, previous encounters with black people, or associations more generally.

Should the plaintiff be able to show that the decision maker made racially derogatory statements, either directed at the plaintiff or others, he might be able to show that the decision on his application was more likely than not to have been discriminatory. Courts have been suspicious of this kind of proof, especially in age discrimination cases.233 They have questioned the causal connection between the statements and the decision, returning the dispute into one over the plaintiff's qualifications by asking how reasonable it is to believe that the "stray remarks" of the decision maker reflected an intention to discriminate.234 In race cases, perhaps uniquely, the force of racial slurs is such that the plaintiff might be expected to overcome this hurdle, especially if the statements are directed at the plaintiff.235 However excessive reliance on this type of evidence should give pause.

The hypothetical plaintiff might, in the absence of racial slurs, seek to prove discriminatory intent by showing that the decision maker had bad relationships with other black people. Usually this argument is found in defense—the famous "I didn't discriminate; I have lots of black friends" argument. But should the plaintiff be able to show that the decision maker had no other-race friends, it is unclear how eager we should be to embrace this evidence. In other areas where intent

233. E.g., Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688 (5th Cir. 1999) (statements indicative of age bias—plaintiff "too damn old to do the job"—rejected as sufficient to sustain jury verdict for plaintiff), reversed in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000); Haas v. ADVO Sys., Inc., 168 F.3d 732 (5th Cir. 1999) (adverse recommendation by person making age-derogatory remark to supervisor insufficiently linked to decision).

234. Haas, 168 F.3d at 733.

evidence is crucial, courts have been reluctant to credit statements that are not part and parcel of the prohibited act. In criminal prosecutions, for example, evidence of prior criminal acts is generally excluded as is evidence of prior sexual encounters of rape victims. In both cases the justification is that the evidence is more prejudicial than probative, explaining perhaps the courts' reluctance to embrace stray remark cases generally, and suggesting that a law reliant on this type of evidence for success would come to be regarded as excessively intrusive on justifiably hallowed American notions of privacy and liberty. This is illustrated best by focus on other categories of slur-like proof.

The plaintiff might seek to prove discrimination by showing that the decision maker was a member of the Ku Klux Klan, or was a member of a shooting club where racist literature was distributed, or even visited racist web sites. This proof is undoubtedly probative, but if this is what employment discrimination law is reduced to, it provides protection only in the most extreme cases. Moreover, this type of proof raises a substantial question of the conflict between employment discrimination law and free expression. Ordinarily this kind of question is irrelevant to employment discrimination law; the commerce clause basis of the statute means nothing if not that Congress can prohibit certain types of employment decisions. That is what the statute addresses. But when the basis for the prohibition is behavior outside the workplace, the question seems much more akin to generating disputes over hate speech statutes. 236 This particular type of dispute was, in fact, played out several years ago when a New York City-based organization began "outing" current and former members of the Ku Klux Klan and pressuring their employers to fire them. 237 No liberal employment law can countenance this type of association-based trigger to employment discrimination liability. Employment discrimination law is made to appear to do just that, by forcing plaintiffs to rely so heavily on this type of evidence.

3. The Irrationality of Post-Hicks Employment Discrimination. The irrationality of employment discrimination law after Hicks derives from its requirement that plaintiffs prove discriminatory intent in the absence of a coherent definition of the concept. The lack of a


coherent definition derives from the ambiguity of the underlying protected categories and the consequent fact that decisions "based on" those categories are often indistinguishable from noncategory based decisions. In this context, the only means of proving discriminatory intent is to ascribe to the employer some widespread prejudicial attitudes, or attribute such prejudices to the particular decision maker who made the adverse decision. This approach departs from the nearly universal dicta in employment discrimination cases that discrimination can be proved without evidence of malicious views of race and defies the operative finding in the Court's invalidation of affirmative action, that there is no relevant distinction between malicious and benign uses of race.238

Moreover, categorizing the employer's workplace spirit as prejudicial amounts to proving that the employer was a "bad actor." It can be expected then that employers who engage in practices intended to show they care about the protected category could insulate itself from liability. So an employer who gave to the United Negro College Fund or contributed to Habitat For Humanity, could claim to be presumptively incapable of discriminating on the basis of race. General proof of the employer's basic nature also raises a more general presumption against discrimination claims because it is reasonable to assume that most employers' character is basically amoral and profit focused. Thus arguments of generalized discrimination seem irrational.

Similarly, focusing on the decision maker's motives seeks to show that the particular decision maker is basically "evil." While the previous approach seems an attack on the employer's freedom in running his business, this approach quite obviously reeks of sanctions on individual employee's free expression and association. Because evidence of the decision maker's motives is relatively more probative than general evidence of the employer's nature, employment discrimination law after Hicks is ever more dependant on this kind of proof. Successful race discrimination cases seem to say that there are evil people everywhere. The statute itself becomes a statute in search of evil. Nice people who discriminate stand relatively immune from sanction. The statute is transformed from a means of opening employment opportunity to a means of punishing the morally defective. Because the mechanism of this moral witch hunt is peoples' statements and associations, the statute seems to operate at the expense of hallowed notions of freedom. The justification for this sort of approach being lacking, the very operation of the statute appears irrational.

It is in this way that *Hicks*, and now *Reeves*, transforms employment discrimination into a species of equity, akin to the proof in other areas of civil rights law. "Discriminatory intent" operates as a causation test linking the adverse employment decision to the acts of an employer, which "shock the conscience" of a court by projecting an image of outrageousness. The more contemporary the practice or the more likely it is to reflect the plaintiff's "true character" the less outrageous and the less likely the plaintiff is to prevail. While it is tempting to think that *Hicks* had simply eliminated a high number of false positives and *Reeves* reminded the lower courts that *Hicks* preaches balance, the foregoing discussion shows that plaintiffs are nevertheless driven to gather the most troubling evidence in support of their claims. That is, the worst stereotypes of employment discrimination litigation have been fulfilled by *Hicks*. Rather than a legal sanction on unjustified decisions aimed at opening employment opportunities, the statute has become almost solely an equitable sanction for plaintiffs who happened to have been the victim of a bad actor. In this context, it is hardly surprising that the 1991 Act's *Price Waterhouse* based limitation on recovery for those plaintiffs who would, notwithstanding discrimination, be subject to the same decision threatens to swallow all of employment discrimination law.239

IV. ESCAPING THE MIRE: A PROPOSAL FOR A REVIVED *MC DON NELL DOUGLAS*

Even if *Hicks* changes the three-step approach in a way that transforms the cause of action into a form of equity and makes it difficult to prove race discrimination, that is probably not reason enough to return to a flawed *McDonnell Douglas* approach. Moreover, *Hicks* is the rare decision that seems to combine a common-sense realism with formal support from traditional common-law constructs. In replacing artifice with a simple requirement that the plaintiff prove the underlying fact, it builds on the traditional Anglo-American legal precept that the parties are required to present their own case, and the moving party must carry the persuasive burden. In this way, *Hicks* might remain compelling despite its troublesome effects.

But this view of *Hicks* is really a mirage. *Hicks* is not actually mandated by precedent, common law, or common-sense. In particular, *Hicks*'s support in legal formalism is exaggerated. An examination of the law of burdens reveals that *Hicks* is hardly required and that *McDonnell Douglas* is not without support. This exercise also suggests

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239. This is the argument of Professor Zimmer. See Zimmer, supra note 147.
a means of escaping the problem presented by undefined protected categories, while also addressing Justice Scalia's concerns with false positives in employment discrimination cases.

A. Understanding Burden Shifting in the Antidiscrimination Law Context

McDonnell Douglas offers little guidance on the operation of the three-step formula it created to structure employment discrimination cases. What guidance there is on the three-step approach is found, perhaps surprisingly, in the often overlooked reference to Dean Wigmore's treatise on evidence in Burdine.240 This reference is important because it helps clarify what Hicks decided and what it did not. The Wigmore reference is also important because it helps reveal the nature and context of Malamud's and Smith's arguments for the abandonment of the three-step formula. Turning to Wigmore, it becomes apparent that Malamud's and Smith's treatment of McDonnell Douglas passes too lightly on the possibility of a legal presumption. In each case it is perhaps because of the overconfidence they have in the protected categories. In any event, Wigmore can help reveal how a revived McDonnell Douglas formula can resolve the problem of indeterminate categories.

Given the significant attention paid the McDonnell Douglas three-step formula by Malamud and others, it is surprising that none of the above authors take up the origins of that formula as a means of understanding the meaning of what they see as an over complicated artifice.241 Indeed, the failure of the Court in McDonnell Douglas to cite or otherwise refer to the bases for this construct might explain some of this oversight, but because the Court in Burdine does cite Wigmore's treatise on evidence in support of the three-step approach, some attention to the meaning of that reference might have been expected.242 As it turns out, that citation is quite telling because, somewhat consistent with Malamud's conventional analysis of Burdine, it shows the Court seeking to distance itself from the idea that the prima facie case in McDonnell

240. 450 U.S. at 254 n.7.
241. Michael Selmi, in his excellent overview of all of the Court's intentional discrimination approaches makes this point. See Selmi, Proving Intentional Discrimination, supra note 9, at 324 & n.207. "Unfortunately, those who discuss the Court's proof structure routinely ignore this important aspect of that structure's development." Id.
242. Wigmore is cited in the text, Burdine, 450 U.S. at 253 ("burden of persuasion 'never shifts'"), and twice in the notes. Id. at 254 n.7 (prima facie case refers both to basis for presumption and requirement of going forward); Id. at 255 n.8 (presumption defined as tool for allocating production burden).
Douglas created a strong presumption of discrimination. Moreover, this choice reveals significant ambivalence, at least on the contentious discussion in Hicks, over whether the Court in McDonnell Douglas and Burdine had adopted the so-called “bursting bubble” theory of presumptions. In Hicks Justice Scalia casually associates the “bursting bubble” theory with McDonnell Douglas, underscoring his preference by citing Rule 301 of the Federal Rules of Evidence.\textsuperscript{243} Wigmore is nowhere cited. One is left to believe that McDonnell Douglas adopted the bursting bubble theory and that Rule 301 requires no less, although neither proposition finds any support.\textsuperscript{244} Whatever the necessity of attributing the bursting bubble theory to Rule 301,\textsuperscript{245} Justice Scalia and Professor Malamud’s conviction that both McDonnell Douglas and Burdine adopted such a theory is largely unsupported. Justice Scalia’s choice of Rule 301 over Wigmore is less than the choice of the controlling over the persuasive authority, it is revealed below as a means of transforming the policy choice of McDonnell Douglas and Burdine into a natural consequence of general proof structures, sapping it of any power and setting up the question of the force of the prima facie case on the “ultimate” question of discriminatory intent. This is neither necessary nor completely relevant to the questions involved in the McDonnell Douglas to Hicks line.\textsuperscript{246}

\textsuperscript{243} 509 U.S. at 510-11.

\textsuperscript{244} McDonnell Douglas is silent on these questions and Rule 301 is ambivalent. Indeed, Rule 301 was informed by a rejection of the “never bursting bubble” theory that had been inserted in the Uniform Rules of Evidence. The never bursting bubble adopted by the Uniform Rules and rejected by Rule 301 was the work of Professor Morgan, who was influential in the 1940s and 1950s. See 21 Charles Allen Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 5121, 5122 (1977). For Morgan’s view, see Morgan, How to Approach Burdens of Proof and Presumptions, 25 Rocky Mt. L. Rev. 34 (1952); Morgan, Further Observations on Presumptions, 16 S. Cal. L. Rev. 245 (1943); Morgan, Techniques in the Use of Presumptions, 24 Iowa L. Rev. 413 (1939); and Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906 (1931).

\textsuperscript{245} A “never bursting bubble” theory was rejected by the American Law Institute in its Model Code of Evidence and a bursting bubble provision adopted alongside Professor Morgan’s proposal by the Commissioners on Uniform State Laws in their Uniform Rules of Evidence. 21 Wright & Graham, supra note 244, § 5122, at 566. The latter was concerned that a never bursting bubble could raise Constitutional problems. See id.

\textsuperscript{246} An absolute limit may exist in the Constitution that would make some of the bursting bubble talk relevant. According to Wright and Graham, the Commissioners’ on the Uniform State Laws reluctance to embrace Morgan’s never bursting bubble derived from a concern that Constitutional issues would emerge if there were not some logical connection between the basis for the presumption and the basic fact litigated. Wright & Graham, supra note 244, § 5122, at 566 n.58, citing comment, U.R.E. 14 N.C.C.U.S.L. Handbook 171-72 (1953).
1. From Common Law to Statute: Presumptions, Wigmore and Rule 301. Reading McDonnell Douglas's critics, it would be fair to believe that the Court's creation of the three-step formula in McDonnell Douglas was a bit of slight of hand, fashioning a formula to obscure the underlying question in the case and giving the impression that the deck was not loaded against one party or the other. Indeed a conventional view of disparate treatment jurisprudence suggests that McDonnell Douglas favored plaintiffs, that Burdine added balance, and that Hicks in turn disrupted that balance in favor of defendants. Addressing this view, Malamud's basic point is that neither McDonnell Douglas nor Hicks are the unbalanced decisions they are said to be. There is a troubling dissonance to this claim of Malamud's as, in the end, she sees Hicks as a necessary corrective to McDonnell Douglas. In support of this claim is her rejection of the various justifications for McDonnell Douglas's three-step formula and especially its light prima facie case. Throughout, she sees the flaw in the inability of the prima facie case to support any lay view of discriminatory intent, pointing out that any number of factors may have motivated a decision maker to an adverse decision. The prima facie case is viewed by Malamud outside its context—as an artificial showing developed to aid litigation—and treated as though it constituted a definition of the elements of discriminatory intent. In short, Malamud crafts an argument of exaggerated force because she only views the prima facie case in the context least likely to be persuasive.

McDonnell Douglas did not magically conjure the three-step formula. It is a version of the commonplace means for creating presumptions in a civil suit. In fact the Supreme Court's approach is a distinct roll-back from the Eighth Circuit's construction. The circuit court defined the prima facie case as the substantive proof the plaintiff needed to make—a construct made possible because the circuit court read the act as prohibiting all barriers to employment. McDonnell Douglas picks up the circuit's requirement for the plaintiff (the prima facie case) and affirmative defense of the defendant (the rebuttal) and makes them components of a single process. Rejecting the applicability of Griggs in this context, the Court implies that the second showing is not an

247. Specifically the formula had been invoked by the circuit court, albeit in slightly different form. See McDonnell Douglas, 411 U.S. at 797.
249. 411 U.S. at 792.
affirmative defense, but something less. This is not to say the resulting formula was uncontroversial or that the force to be attached at each stage was clear. By compressing the distinct showings into a single proof process, the Court in McDonnell Douglas raised questions precisely over the weight and function of each component, though most of these problems had been presaged by commentators in this most theoretical area of evidence law.

The approach McDonnell Douglas adopted provided the new disparate treatment cause of action with a structure, but also infused it with the strength of a traditional common-law approach. This approach was a structure-as-substance method apparently invoked to undercut the Griggs-based implication that Title VII fundamentally barred barriers to integration of black workers, rather than the more narrow ban on distinct “discriminatory” decisions. At the root of the controversy was the question of the nature of presumptions created by judges and legislators. How and when presumptions were to be created and what effect they might have on litigation were significant questions, fiercely debated in the academic journals, before both the American Law Institute and the Commission on Uniform State Laws, then in Congressional debates surrounding the adoption in 1971 of the Federal Rules of Evidence. At the root of the debate over presumptions are concerns over whether presumptions can be created to compel juries to come to certain results (i.e., whether there was a distinction between presumptions and inferences) and second, what effect was to be accorded a presumption that was “met” by the defendant’s response (i.e., did the presumption go away or retain force). To understand the context of these events, a summary of the role of presumptions in civil litigation is in order. This Article builds the following discussion on Wigmore’s text for no better reason than the fact Burdine cites Wigmore.

a. The Context of Presumptions in Wigmore’s Treatise. Wigmore’s treatment of presumptions is placed in a general discussion of the duties of parties in litigation and the peculiarly American problems attendant to the judge-jury division. As the production of evidence is generally an obligation of the parties, the role of burdens of proof and sufficiency

250. Id. at 805-06.
251. See Wright & Graham, supra note 244, § 5122.
252. Id. § 5121.
253. Errors and innovations are of course this author’s.
254. 9 Wigmore, Evidence § 2483 (Chadbourn rev. 1981). Of course judges can call witnesses and examine them, or may consult sources via judicial notice, viewing of the scene and excluding inadmissible evidence, but the general approach is that excessive involvement of the judge in the evidence gathering sounds of prejudice or partiality. Id.
of evidence are as consequential as they are intertwined with the substantive elements of the case. By burden of proof, Wigmore spoke generally of the parties' mutual but differential risk of nonpersuasion. In this regard, the American apportionment of burdens of proof generally accords with the somewhat greater risk of nonpersuasion, usually borne by the party who wants to change the status quo. Thus, between two parties—one seeking to get a third party to do something, the other happy if the third party does nothing—the risk of nonpersuasion falls on both parties, but is greater on the advocate of change. For Wigmore, legal disputes are different only in that the law describes what must be shown to persuade the third party (the court) and the modes of doing so. This is done in two ways: first, through procedure and pleading rules and, second, through the substantive law. The former outlines when and how evidence should be presented. The latter allocates obligations of proof of certain facts to certain parties. Wigmore indicates that this latter allocation, what is usually called the burden of proof, is the crucial one. The burden of proof, generally is on the plaintiff asserting a cause of action or the defendant asserting an affirmative defense.

There is what might be called a "natural" burden of producing evidence on the party to whom the law allocates proof of certain facts (the burden of proof). This burden of production is comingled with the elements of the cause of action or affirmative defense. But this is only the beginning of the analysis; the division of duties between the judge and jury complicate this arrangement. Production of evidence necessary to persuade the jury is defined by and generally indistinguishable from the elements of the cause of action. This is because the need for parties to prove certain facts before the jury is based on the allocation of the fact-proving duties in the cause of action itself. Before the judge, however, this obligation splits into the burden of proof (and its implicit risk of nonpersuasion) and a duty of going forward with evidence, also called the burden of production. That is, the law allocates to parties the burden of producing evidence of a sufficient quality to render necessary a jury determination on the elements of the cause of action.

§ 2484.

255. Id. § 2485.

256. Id. For this reason Wigmore ultimately rejects single tests of burdens of proof such as the aforementioned rule that the party seeking to change the status quo bears the burden of proof. Id. § 2486.

257. Wigmore illustrates this by describing the prima facie elements of the intentional tort of battery and the elements of the affirmative defenses of consent or privilege. Id. §§ 2485-2489.

258. Id. § 2487.
Thus throughout the litigation, the party on whom is placed the burden of proving the elements of the cause of action retains the risk of nonpersuasion should the case reach a jury. But she also bears the burden of production to get to the jury in the first place. The plaintiff must produce enough evidence of each element of the cause of action to permit a reasonable jury to decide in her favor. Sufficiency questions of this kind usually arise in motions for summary judgment or directed verdict, when given the alleged evidence, the judge asks whether there are any consequential issues in dispute.

It is not surprising then, that Smith and others seek to view the burdens of production in *McDonnell Douglas* in the context of the conventional ordering of trials. This kind of structuring seems to be what the circuit court in *McDonnell Douglas* did, allocating to the plaintiff only the burden of proving his qualification and application for the job. Because it saw the statute as prohibiting obstructions to employment opportunity, the defendant then had an affirmative duty to prove the propriety of obstacles. But the ordering of trials is independent of the substantively created burdens in a case. The substantive law, moreover, guides the burdens in several ways. The law may provide, for example, that a plaintiff who shows a certain fact is entitled to prevail, absent perhaps a similarly defined response by the defendant. The key here is that burdens of production might arise naturally or might be created by legal designation. A party who faces a natural burden of production need produce evidence outlined in the elements of the underlying cause of action. A party who faces a “legal” burden of production must clear that hurdle as prescribed by the burden itself. While these obligations may overlap, this is not necessary.

What the Supreme Court did in *McDonnell Douglas* is ambiguous for two reasons. First, the Court combined the two showings required by the circuit court into one, making them both parts of the plaintiff’s case and implying what effects they would have. Immediately, the nature of the defendant’s burden was put in question as was the force of each step in the three-step process. Second, the Court rejected the circuit court’s definition of the substantive meaning of Title VII. Emphasizing that banning discrimination, not opening opportunities, as such, was the goal of the statute, the Court’s conflating of the circuit court’s distinct proof requirements can be read really only as the creation of a legal burden. This conclusion is underscored precisely because the Court then explains neither what the substantive fact at

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260. 411 U.S. at 798-900.
261. Id. at 800-01.
issue is (that is, what is discrimination) nor how the elements described relate to this substantive fact. This is made clearer with a look at the numerous burdens at play in McDonnell Douglas.

Through the distinction between risk of nonpersuasion, natural burdens of production, and legal burdens of production, inferences and presumptions can be distinguished. A party’s obligation to produce evidence, when satisfied, permits an inference in their favor. The risk of nonpersuasion is usually unaffected. Whether a natural or legal burden, the consequence is usually only that the party is entitled to have the jury decide the case; 262 but a party may go further. A party might produce so much high quality evidence or evidence of such great quality (however much) that the only reasonable view of the case is that they prevail. For example, the party may satisfy both the burden of production and risk of nonpersuasion by their production of evidence. This would create a presumption in their favor. Such a presumption would be a natural presumption in that it emerges from the great success of the party in proving what the underlying elements of the cause of action require. Parties on whom the cause of action places the burden of proof create a natural presumption in cases in which they prevail on motions for summary judgment or directed verdict. 263 So long as this presumption is not met with evidence sufficient to call it into question, the party creating the presumption prevails.

Nothing in McDonnell Douglas defines what a plaintiff must show to create this kind of presumption. Because the court rejected the circuit court’s use of the prima facie case in this manner, it would be surprising if the prima facie case was intended to be used in such a manner in the revised formula of McDonnell Douglas.

Presumptions might also be created by legal rule. A party meeting a legal burden of production might, if the law so prescribes, benefit from a legal presumption. In this context, there need be no necessary link between the elements of the cause of action allocated to the party and the basis for the presumption benefitting the party. 264 Here lies a bed of potential confusion. Legal burdens of production may or may not create legal presumptions when satisfied; they might only allow for an inference of the ultimate fact. That is, the consequence of satisfying a

262. See, e.g., 463 F. 2d at 342.

263. Such cases are exceedingly rare. Moreover, it is not necessarily the case when parties who do not bear the burden of proof have created a natural presumption because the law usually does not require anything of them. This is not unlike the legal presumptions described below.

264. Although, as noted, some see potential Constitutional difficulties if there is no link at all. See supra note 246.
legal burden of production may be that the party gets to reach the jury or it may also mean that the party has satisfied her risk of nonpersuasion.\textsuperscript{265} This ambiguity has led many a jurist to confuse inferences and presumptions, and perhaps more to confuse presumptions created by operation of law and natural presumptions created by sufficiency of proof.

On this Wigmore only points out that burdens of production might be satisfied by production of evidence probative of the cause of action or by evidence indicated by rule of law.\textsuperscript{266} He focuses more on the effects of presumptions, however created. In this regard he points out that the main consequence of a presumption is that it creates a burden of production on the opposing party who surely will lose if he does not respond. Wigmore overlooks the possibility of nonrebuttable presumptions, which are perhaps limited to strict liability cases and which, as legal presumptions, might violate due process when not closely linked to the elements of the cause of action. The main point is that the effect of a presumption usually births an obligation on the opposing party. Indeed there is something of a spiral effect created by presumptions raising burdens of production that might be so sufficiently satisfied that they create presumptions themselves. However, this is a rare occurrence as few cases are so readily, infinitely divisible that they may be litigated to the level of microscopic detail. Rather most presumptions create burdens of production that, when satisfied, allow an inference in favor of the party meeting it. That is, the case returns to the point where only risks of nonpersuasion exist.

So Wigmore is able to comment on so-called shifting burdens by stating that the risk of nonpersuasion never shifts, while the burden of producing evidence does.\textsuperscript{267} This standard understanding, however, overlooks implications of Wigmore's own text. First, where the elements of the cause of action dictate who must initially produce evidence, the risk of nonpersuasion is mutually, if differentially, borne by both parties, unless a presumption is created in one party's behalf. Second, when a presumption is created by law, rather than by greatly satisfying the natural burden of production generated by the elements of the cause of action, it \textit{is} possible that the burden of proof more generally "shifts." That is, the party creating the presumption may have no further

\textsuperscript{265} This is the basis for substantial confusion over whether presumptions are mere facts to be noticed by juries or compulsory, dictating how a jury is to decide. See Wright and Graham's discussion of Federal Rule of Evidence 301, \textit{supra} note 244, § 5124, at 585-88.

\textsuperscript{266} \textit{See Wigmore, supra} note 254.

\textsuperscript{267} \textit{See supra} note 254, § 2489.
obligation to produce evidence, and, in fact, usually does not until the other party responds. These minor contradictions derive from Wigmore's efforts at avoiding two consequential questions. Specifically, can there be legal presumptions independent of the elements of a cause of action, and, however a presumption is created, does it simply go away when the other party responds? Wigmore is associated with favoring the bursting bubble theory, which provides an affirmative answer to the latter question and which also implies negative response to the former.\textsuperscript{268}

\begin{itemize}
  \item \textbf{b. The Bursting Bubble.} The so called "bursting bubble" theory of presumptions provides that once a presumption is met by evidence from the respondent party, the presumption goes away, leaving both parties where they were at the start of the litigation with risks of nonpersuasion. The only consequence of the presumption is that it seems to allow the party who created it to at least reach the jury. So a party creates a presumption, temporarily eliminating both their burden of production and risk of nonpersuasion. The other party meets the presumption, satisfying their recently created burden of production. At this point, according to the bursting bubble theory, nothing is left of the presumption and the evidence presented in the case is to be judged in light of the risk of nonpersuasion.

Wigmore's position on the bursting bubble theory was not strong; however, he opposed Moore's never bursting bubble and is associated with Thayer, who supported the bursting bubble theory.\textsuperscript{269} But reference to Wigmore in \textit{Burdine} does not mean that the bursting bubble theory there applies or that \textit{Hicks} was unnecessary. The bursting bubble theory frames the issue in \textit{Hicks} but ultimately proves inapposite. Once the bubble of the presumption is burst, what result? There are two distinct possibilities. One might presume, as the previous paragraph suggested, that both parties will have satisfied their burden of production, allowing the case to go forward to the jury, when both parties bear the risk of nonpersuasion (but when the moving party's risk is clearly greater). Another view is that, when the bubble bursts, nothing remains of the prior presumption, and the parties retain burdens of production to reach the jury. This is where the difference between natural and legal presumptions and the weak link between

\textsuperscript{268} Both Wigmore and Thayer's advocacy for the bursting bubble theory has been questioned by some. See Gansewitz, \textit{Presumptions}, \textit{40 Minn. L. Rev.} 391, 408 (1956); Laughlin, \textit{In Support of Thayer's Theory of Presumptions}, \textit{52 Mich. L. Rev.} 195, 212 (1953); Reaugh, \textit{Presumptions and the Burden of Proof}, \textit{36 Ill. L. Rev.} 703, 819-21 (1952). See also Wright \& Graham, supra note 244, § 5122, at 573 n.86.

\textsuperscript{269} See Wright \& Graham, supra note 244, § 5122, 573 n.86.
them and the burdens of production make the analysis of presumptions difficult. Indeed, as in *Hicks*, the question is what value is to be accorded to evidence that the defendant’s rebuttal was false. In the former view, the plaintiff, having satisfied his burden of production, is entitled to a jury determination of his case. Under the latter approach, nothing remains of the prior presumption and the evidence already offered in the case is to be judged against the plaintiff’s still present burden of production.

As already indicated, the problem that inspires *Hicks* is *McDonnell Douglas’s* weak prima facie requirement. The presumption it creates is unquestionably a legal presumption and is undoubtedly poorly linked to the substantive question of intentional discrimination. Once the presumption is met on rebuttal and the presumption falls away, the evidence produced to establish the presumption cannot fairly support a verdict in favor of the plaintiff (according to any reasonable lay understanding of intentional discrimination). Thus judged anew, the plaintiff’s evidence is insufficient to support an inference in her favor and thus fails the natural burden of production in the case. Only if the legal presumption is seen as based on a legal burden of production can any weight be given the remaining evidence. This is not a refutation of the bursting bubble theory, only evidence that the theory is not really what is in issue in *Hicks*.

In *Burdine* Powell’s citation of Wigmore is fairly read as a rejection of Professor Moore’s theory of a never bursting bubble. However, it is not necessarily an adoption of the bursting bubble theory, as Wigmore was less the strong advocate of that position than Thayer. It is also telling that Rule 301 is cited only in a footnote seeking to define presumptions as only evidence-organizing devices;\(^{270}\) even then the reference to Rule 301 is part of a long string cite.\(^{271}\) The bursting bubble theory, in fact finds only minimal support in Rule 301 (except in certain congressmen’s rejected efforts to impose it) as efforts to impose the bursting bubble theory were rebuffed by Congress.\(^{272}\) The reference in *Burdine* was

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270. *Burdine*, 450 U.S. at 255 n.8 (citing F. JAMES & G. HAZZARD, CIVIL PROCEDURE § 7.9, 225 (2d ed. 1977); 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940); and J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW (1947)).

271. Id.

272. According to Wright and Graham, the efforts to impose a Thayerian view of presumptions were rejected in favor of a “middle ground,” resulting in, at best, a “muddled position.” WRIGHT & GRAHAM, supra note 244, § 5121, 543-45. Some commentators have suggested that the Senate’s rejection of both the advisory committee’s version of Rule 301 (a Morgan-based version of the “never bursting bubble”) and the House’s muddled compromise version represents an acceptance of the bursting bubble theory (see Krieger, supra note 9, at 118-19; Brown, Subrin, & Baumann, supra note 191, at 1521 n.161; and
Schmidt, *Plaintiff's Burden, supra note 68, at 969-70*, but neither cite any authority for that particular proposition. Support for the bursting bubble theory of Rule 301 is found in several cases. Allseas Maritime, S.A. v. M/V Mimosa, 812 F.2d 243, 248 (5th Cir. 1987):

At least three circuits, including this one, have concluded that [Rule] 301 adopted the bursting-bubble view of presumptions. An exception to this application of Rule 301 occurs when "the facts with regard to an issue lie peculiarly in the knowledge of one party," and it would therefore be "particularly onerous" to require the other party to bear the burden of persuasion on the issue.

*Id.* See also Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995); Linder v. Trump's Castle Assoc., 155 B.R. 102, 106 n.7 (D.N.J. 1993).

Despite statements to the effect that the bursting bubble theory was adopted in the committee hearings (see Schmidt, *Plaintiff's Burden, supra note 68, at 970* (quoting Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. On the Judiciary, 93rd Cong., 2d Sess. 138, at 196-97 (1974) (testimony of Richard A. Keatinge, former chair of California Evidence Reform Comm.))), the Senate and Conference reports highlight that, whatever support there was for the Thayerian approach, the focus of the Senate modifications, which were adopted by the Conference Committee, was the statement suggesting that presumptions were evidence. See S. REP. NO. 1277, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7055; H.R. CONF. REP. NO. 1597, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7099. Of course, the bursting bubble theory's existence in Rule 301 is a reasonable reading of the current text as evidenced by *Allseas Maritime*.

Why the bursting bubble theory is not in Rule 301 requires some elaboration. Perhaps a hypothetical case can help illustrate the role of the bursting bubble in presumptions. In Louisiana the husband is presumed to be the father of children born to his wife. See LA. CIV. CODE ANN. art. 184 (West 1993) ("The husband of the mother is presumed to be the father of all children born or conceived during the marriage.") See also LA. CIV. CODE ANN. arts. 185 to 187 (West 1993) (elaborating art. 185); Murphy v. Houma Well Serv., 409 F.2d. 804 (5th Cir. 1969) (under law of Louisiana, husband of mother presumed to be father of all children conceived by her during marriage); Boykin v. Jenkins, 140 So. 495 (La. 1932) (where facts are sufficient to raise presumption of marriage, further presumption that children of parties are legitimate also obtains). In a dispute over paternity, perhaps in a divorce case, the wife can establish a presumption of the husband's paternity for her children by showing only that he is her husband. Unless the husband meets this burden, he loses any contest over his paternity.

Two different responses of the husband illustrate the "bursting bubble." The husband might submit to DNA testing, a relatively effective means of determining paternity. See LA. CIV. CODE ANN. art. 187 (West 1993) (defining means of meeting presumption, including DNA testing, blood testing, sterility, physical impossibility, and "other scientific or medical evidence"). By meeting the presumption with DNA evidence showing he is probably not the father, the husband destroys the presumption; he also establishes facts very likely determinative of the basic fact in dispute and prevails on the question of paternity. The presumption falls away and has no further effect, but only because the defendant has carried the burden of proof. In this instance it matters not whether he was required to carry a burden of production or proof; by establishing the fact with decisive evidence, he renders the question moot. It seems that Malamud and others assume that this is the effect of the employer's rebuttal, though it is apparent from this example that this assumption is based less on the nature of the employer's burden, but their view of the power and effect of the employers response.
likely an attempt to reduce presumptions to an evidentiary-organizing tool, which it surely is, while discounting its facial, result-dictating character. Justice Powell also advocated this confused view by referring to "presumptions" and "inferences" interchangeably.

The effect of the bursting bubble is more apparent in the husband's second possible response. Suppose the wife, husband, and child all have religious objections to DNA testing, rendering that evidence unavailable. In response to the presumption the husband offers evidence of the wife's adulterous behavior, perhaps even strong evidence to this effect, such as the wife's infection with a sexually transmitted disease. None of this evidence, however, proves he is not the father of his wife's child. Thus the original version of Rule 301 would have been fatal to him because it would have required him to carry the burden of proof on this matter. And while a jurisdiction might determine that policy reasons necessitate this level of proof, Rule 301's current version saves him in this context. If his burden is only of production, the presumption against him is met and "falls away." But note that the falling away of the presumption is not in itself decisive.

Neither the wife or the husband has established determinative proof of paternity. She's established only that he is her husband; he has established only that she may have had unprotected sex with others. Together they have only shown that there was likely lots of sex. This is when the distinction between the House and Senate versions and Thayer's theory matter. Under the House version of Rule 301, the wife would be entitled to reach the jury and also would be entitled to an instruction that the now exploded presumption is evidence for the jury to consider. This is eminently confusing. Thus, the Senate version corrects this confusion by noting that the presumption is not evidence. However, it may still be appropriate for her to receive an instruction to the effect that the state presumes the husband is the father of the wife's children under the Senate construction because the facts that established the presumption, and the state's public policy underlying it, are relevant to the litigation. This is how both versions differ from Thayer's bursting bubble. If the bubble truly bursts, the wife is not entitled to reach the jury, much less receive any instructions on the presumed paternity of the husband, for she has only offered evidence that her husband is in fact her husband. If the presumption completely falls away, this evidence is not probative of much of anything concerning paternity.

The conference report makes it clear that the facts offered to establish the presumption may serve as a basis for an inference before the jury. H.R. CONF. REP. NO. 1597 (1974), reprinted in 1974 U.S.C.C.A.N. 7099. Rule 301 is undoubtedly ambiguous on the question of whether the presumption, even if met, entitles the plaintiff to reach the jury, but it clearly does not adopt any strong version of the bursting bubble which would largely foreclose a jury determination, absent additional evidence. In any case, it should be apparent that the strength of the policy reasons underlying the presumption determine the degree to which both jury access and instructions on the presumption ought to be available. It ought also be apparent that Rule 301 says nothing to bar jury access or instructions of this type.

273. Though in context, the footnote establishing this only seems to say that presumptions narrow the inquiry, implying that Powell had less than a sure grip on what effect the presumption might have. See Bardine, 450 U.S. at 255 n.8.

274. In a paragraph discussing presumptions, Powell refers to the "inference of discrimination" there created. Id. at 254. This may be only a slip, however; perhaps a consequence of Powell's reference to Justice Rehnquist's Furnco opinion because Powell's only use of "inference" is this one and is in a direct quote from Furnco. Id. at 254 (citing Furnco, 438 U.S. at 577). The reference passage in Furnco is a truly confusing use of the
Indeed this is the nature of Congress's original draft of Rule 301. If the citation is read in light of Malamud's study of Burdine, as Justices Powell and Stevens wily efforts to impose a bursting bubble theory on the McDonnell Douglas formula, that move is unsuccessful because the bursting bubble theory, if adopted, remains irrelevant to the outcome in Hicks. Rather the true question in Hicks concerns what policy undergirds the creation of the presumption and whether that policy counsels for a different response to proof of pretext in Hicks and Reeves.

c. The Constant: Policy Bases as the Grounds for Defining and Giving Effect to Presumptions. Numerous grounds are urged as the basis for creating presumptions in general. Wright and Graham's Federal Practice Series refers to several. In addition to substantive policy goals, presumptions might be created

(1) to make it unnecessary to introduce evidence on issues unlikely to be in actual dispute; (2) to avoid a procedural impasse where evidence of the presumed fact is lacking; (3) to produce a result in accordance with the preponderance of probability; (4) to require the party with peculiar access to the evidence to produce it; (5) to reach a result deemed socially desirable; or (6) a combination of these factors.

terms, perhaps indicating Justice Rehnquist's view that presumptions are little more than permissive bases for decisions: "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." Funko, 438 U.S. at 577.

275. "The code here . . . does not regard a presumption as conclusive of anything or exactly as evidence." 120 CONG. REC. 1419 (1974) (statements of Rep. Dennis) (quoted in Wright & Graham, supra note 244, § 5121, at 545). Language in the draft rule suggesting that presumptions were mere evidence was dropped by the Senate Committee. See id. § 5121, at 546. In any case, this kind of confusion about presumptions is widespread.

276. Professor Krieger makes a similar argument:

Perhaps . . . the Federal Rules of Evidence provide an inadequate set of tools for solving the particular problem illustrated by Hicks. As Professor Ronald Allen suggested in 1982, long before the pretext plus problem emerged, the univalent approach to evidentiary presumptions embodied in Rule 301 is inadequate to deal with the many and varied problems that burdens of proof and presumptions were designed to address. While the inference reasonably drawn from the elements of a plaintiff's prima facie case may in most cases be sufficiently weak as to justify only a Rule 301-style presumption . . . such may not be the case after a plaintiff has also demonstrated the falsity of the defendant's supposedly legitimate non-discriminatory reasons.

Krieger, supra note 9, at 126-27.

277. Wright & Graham, supra note 244, § 5122, at 569-70. The list is derived from Morgan, Basic Problems of Evidence 32-34 (1961).
Several of these are analyzed by Professor Malamud as the importance of identifying the policy basis for the McDonnell Douglas presumption. But there is a troubling degree to which her article and those of Professor Smith and others easily shift from McDonnell Douglas's legal presumption to natural burdens of production in analyzing the sufficiency of the plaintiff's showing after the presumption. This is troubling because it implies that the policy goal underlying the presumption is limited to the presumption itself and is relatively irrelevant to the substance of the case. This implication would be less troubling if, like in tort cases, the "elements" of a disparate treatment cause of action were clearly defined, apart from the presumption-creating structure itself. But what is never broached by the critics of McDonnell Douglas is the fact that there are no defined elements whatsoever to the disparate treatment cause.

The McDonnell Douglas formula is unique in that it is form without substance. If forced to articulate the natural obligations of a plaintiff in a disparate treatment case, all that can be said is that she must produce evidence of intentional discrimination. Just what constitutes intentional discrimination is nowhere spelled out. The plaintiff's risk of nonpersuasion is ever present as their natural burden of production is undefined. To this extent Smith's recommendation that a Restatement-like definition of discrimination be articulated is quite powerful. But this is not just a deficiency in the McDonnell Douglas construct; no such definition exists, at least not to the degree of specificity necessary to decide cases. This means that the plaintiff who has satisfied the legal burden of production seems to have satisfied all that is required of them to reach the fact-finder. It also means that if no effect is given the evidence used to establish the presumption, the plaintiff is forced to offer evidence of a fact without knowing the court's definition of that fact. The plane on which the natural proof operates shifts freely with the judges' disposition and view of the case. Indeed, just what a plaintiff must show to avoid summary judgment after the defendant has rebutted the presumption is nowhere known.

On this basis alone, Hicks is wrongly decided. Its analysis of presumptions, its implication of bursting bubbles and of a return to the ultimate issue of intentional discrimination is perhaps nominally correct, but it remains misguided because it proceeds on the false presumption that what constitutes intentional discrimination is known, even knowable. Professors Malamud and Smith attractively suggest that abandonment of the legal presumption structure would facilitate courts addressing the substantive question, implying that in short order what constitutes discrimination would be known. But it is the contention of this Article that something like the three-step presumption structure is
necessary precisely because a sufficiently precise definition is unknowable. As shown in Part II above, focus on proof of a discriminatory act naturally begets a structural approach because the underlying categories are fundamentally irrational and decisions based on them will always be explainable on other bases. As such, necessary and sufficient criteria for discrimination on the basis of the categories are impossible to articulate.

Nevertheless, an alternative to Hicks would still require justification in the law of presumptions. That justification is surprisingly easy to come to once the distinction between legal and natural burdens and presumptions is recognized and once the underlying policy basis for the articulation of each is remembered. Ordinarily, policy choices are found in the articulation of the elements of the cause of action and the affirmative defenses. Whether by legislative enactment or common-law development, the law's moral and social significance is found in the policy justifications for the elements that define the cause. Without the elements there is ordinarily no cause at all. The massive amounts of legislation in the past fifty years has altered that structure, in that it is often the case that a cause is created without elements, leaving to courts the job of defining a means to achieve the policy of the cause. For the Supreme Court in 1973, it would have seemed an audacious act of activism to articulate a detailed definition of discrimination, however necessary that might have been to giving meaning to the cause created by Congress. Moreover, as that definition would necessarily have failed, it would have been a significant calamity, severely undercutting the reputation of a Court already under siege. 278 Perhaps operating under the influence of what this author calls elsewhere an “activist insecurity,” the Court in McDonnell Douglas defined a structural approach to the proof that preserved the principle of antidiscrimination, while providing the flexibility to deal with the wide variety of cases and contexts likely to be presented.

That formula, if based on a policy goal, infuses the whole of McDonnell Douglas precisely because no substantive elements are defined. Such a policy goal might provide justification for the current Court to take a different path. Specifically, a plaintiff creating a presumption places on the defendant an obligation to produce evidence to meet it. Once the defendant does so, the case cannot return to the “natural” burdens of production, because those are undefined. Rather a plaintiff’s proof of

pretext should perhaps be treated as creating a second presumption. Of course McDonnell Douglas ends before addressing this point, suggesting the creation of a nonrebuttable presumption against the defendant, who is shown to have offered an unpersuasive explanation of the adverse decision. Hicks is based on the apparent undesirability of this outcome as employers' employees might have interests in hiding evidence of the true reason for an employment decision. Perhaps a viable alternative to Hicks might envision a potentially infinite series of presumptions and rebuttals, each of which would progressively narrow the case, while avoiding the resort to an undefined and undefinable natural showing.

B. A New Understanding of McDonnell Douglas

The McDonnell Douglas three-step formula was created in light of the law of presumptions. Much of this law, as this Article's version of Wigmore's formulation reflects, is built around the challenges of the judges' control of the case before the jury. In the absence of jury trials in early Title VII cases, the McDonnell Douglas formulation (unsurprisingly) took on a somewhat artificial character. The language of presumptions simply was made for a more complicated context that, never presenting itself, lent new meaning to the terms in its vocabulary. It was never clear that the Court meant the prima facie case to equal a proof of discriminatory intent. Such a conclusion would surely have been surprising even if Professor Malamud had not shown that subsequent courts did not think the Court in McDonnell Douglas had done so.

At the same time, the "automatic presumption" Professor Malamud rejects, what is called a legal presumption above, is not so easily dismissed. Of course no one talked of the prima facie case as creating a legal presumption; there was no need to get into the details of the presumption because there were no juries to be protected. Judges sitting as fact-finders, like the Supreme Court in Aikens, had no need to trouble themselves with the technicalities of the McDonnell Douglas three-step dance when they had before them all the evidence and arguments and possessed the power to decide. The McDonnell Douglas structure could accomplish its limited role of forcing the defendant to show up and thereby allowing the plaintiff to at least develop their case of intentional discrimination.

After the 1991 Civil Rights Act authorized jury trials, the stakes in Title VII cases suddenly rose and the meaning of the McDonnell Douglas presumption was suddenly much more consequential. At stake was not the requirement that the defendant show up, but access to the jury, an expensive and risky decision-making mechanism. Thus the time and expense of Title VII cases was potentially much greater for both the parties and the courts and the balance between plaintiffs and defendants
struck in *McDonnell Douglas* and *Burdine* was now upset insofar as defendants were averse to cases being presented to juries. Arguments about automatic presumptions take place in this context and highlight why *Hicks* has been regarded as pro-defendant and Professor Malamud's article has made plaintiff's supporters uncomfortable.

In any case, incorporating a legal presumption in the Title VII regime is not without difficulties. The rather harsh effect such a device could have on litigants who faced genuine difficulty determining the reason for an employment decision counsels for a cautious, even patient process. However, it is not uncommon for jurisdictions facing this problem to adopt hard and fast rules resolving this delicate problem.

It appears, for example, that the main consequence of the *Hicks* modification of the three-step formula is that judges with unfettered discretion are summarily dismissing cases on their view that, notwithstanding the prima facie case or rebuttal, the plaintiff would not be able to raise a genuine issue of material fact for the jury.\(^{279}\) Plaintiffs face a substantial problem in this context: complying with *McDonnell Douglas*, they state their prima facie case; the court looking at the context of the allegations might grant summary judgment to the defendant on the grounds that, aside from the defendant's rebuttal, it does not believe the plaintiff's adverse employment situation derived from discrimination. The plaintiff can anticipate this, but the basic problem of acquiring evidence of hidden mental functions compels them to offer only circumstantial evidence. One Louisiana court has resolved this problem in that state's employment discrimination statute via a blanket rule disfavoring summary dismissal in employment discrimination cases concerning motive and intent.\(^{280}\) Surely a blanket rule of this type would prove inappropriate under Title VII, but it shows the problem is neither unique nor as simply resolved as *Hicks* suggests.

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In fact, *McDonnell Douglas* itself implies the intermediary approach; its formula reflects a bifurcation of the distinct questions, when should the case go to the jury and when should a party prevail under the statute. Under the classic three-step formula (as modified by *Burdine*), the plaintiff's burden is light, but it creates a legal presumption that allows the plaintiff to win. The defendant is required to respond or lose per the presumptive effect of the prima facie case. Once the defendant responds with a legally sufficient response, the plaintiff is no longer entitled to a judgment. In this sense, the bubble has burst, but the question remains whether the plaintiff can reach the jury—that is, does the plaintiff have a burden of production to reach the jury. As proposed below, the plaintiff should get to the jury, but this is not what currently takes place.\footnote{In some circuits, courts have allowed some plaintiffs to reach juries on pretext-only evidence. See Brown, Subrin & Baumann, supra note 191, at 1323-28.}

*Hicks* is problematic precisely because it abandons the salutary aspects of the *McDonnell Douglas* three-step approach. In the aftermath of *Hicks*, plaintiffs have been held to an additional burden of production, probably because *Hicks* does not talk about burdens of going forward and because of the distance between the prima facie elements and the underlying question of discriminatory intent. *Reeves* says little on this question because it concerned an appellate reversal of a jury verdict. *McDonnell Douglas* implies as much as *Hicks*, though in the other direction; one would think that under *McDonnell Douglas* the plaintiff has no further production obligations after pretext. The prima facie elements are all that are required to meet the burden of going forward and reaching the jury. This is likely because *McDonnell Douglas* does not define any natural elements to discrimination. The talk about pretext and other evidence of discrimination concerns only what is necessary for the plaintiff to obtain a favorable verdict. *Hicks* is not inconsistent with this latter component; however the opinion, in never addressing what the plaintiff needs to show to reach the fact-finder, implies that the plaintiff must show additional evidence if the prima facie elements are not somehow inherently sufficient.

This is where the problem emerges. Unless *Hicks* decides that the bubble never bursts and allows the presumption to be viewed as unmet, the open question of what is necessary to reach the jury is destined to eventually be presented. Because Title VII cases were tried without juries for so many years the confusion of the language in *McDonnell Douglas* never became an issue. Basically, *Hicks* presents, for the first time, the true question of the effect of *McDonnell Douglas*, in a form that raised the stakes of the eventual answer. But because the question
concerned whether the plaintiff must prevail on a pretext showing, the underlying issue of what is necessary to reach the jury was never broached. Because the key issues surrounding McDonnell Douglas are presented in Hicks, it is not surprising that Hicks retains the McDonnell Douglas formula; but, because Hicks never addressed the complications of the judge’s role as guardian of the jury, its focus on the plaintiff’s obligation to show discriminatory intent obscured the lack of a substantive means of identifying discrimination.

Hicks missed the opportunity to resolve the issue because Justice Scalia’s opinion focused so heavily on chastising the dissent and undercutting the notion of a presumption existing in McDonnell Douglas. Perhaps Scalia, in Hicks, believed that the Court’s jurisprudence is full of definitions of discrimination. However its Constitutional equal protection jurisprudence, where a common law-like definition of the elements of the type Professor Smith desires might have been expected to have developed, concerns mostly facial discrimination cases. It focuses generally on determining what justifications might exist for such uses of race.282 The only guide in nonracial equal protection cases derives from Personnel Administrator of Massachusetts v. Feeney283 and is repeated in some of the Court’s reapportionment cases.284 In both instances, the Court completely avoids defining discrimination, rather only excluding impact proofs and insisting that plaintiffs must prove that the category was used.285 In employment cases litigated under the equal protection clause or the Fifth Amendment’s due process clause, the Court has borrowed the Title VII proof structure.

Building on Justice Rehnquist’s use of “inference” in Furnco—which suggests that the prima facie elements create a factual presumption286—Justice Scalia’s treatment of the McDonnell Douglas formula can be read as transforming the McDonnell Douglas presumption from a legal to a factual one (or less). This is evident in his repeated insistence that the McDonnell Douglas structure constituted only an ordering of facts.287 Having reduced the prima facie case to a factual

285. For a more extensive discussion see Selmi, Proving Intentional Discrimination, supra note 9.
286. “A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” Furnco, 438 U.S. at 577.
287. “The McDonnell Douglas presumption is a procedural device, designed only to establish an order of proof and production.” Hicks, 509 U.S. at 521.
description of some "elements" of discrimination, any force they might have exists only when unrebutted. Thus the key to Hicks is its assumption that there are no policy bases for establishing a presumption structure and indeed no true presumption ever created, neither legal nor factual. Of course, Malamud reproduces just this argument.

McDonnell Douglas is a much more promising source for resolving the burdens problem than Scalia acknowledges. McDonnell Douglas established a mechanism where reasonable allegations of discrimination were accepted unless the employer could cite job-related reasons for the decisions. This went a long way in requiring rational job criterion in the workplace while opening the workplace to previously excluded workers.

But because the issue was always a win-or-lose one, the question of what constituted discrimination never was raised except interstitially. Discrimination was an unjustifiable decision. Employers confident or cavalier enough to confess to otherwise illegal reasons that were not banned by Title VII could still prevail, but only to the extent it seemed believable that they would have violated that workplace requirement rather than discriminate on the basis of race.

Though McDonnell Douglas implies a resolution to the current crisis, the decision remains inadequate to the task. With the availability of jury trials, McDonnell Douglas simply does not work, mostly for the reasons suggested by Smith. The decision's goal of narrowing the issue for the fact-finder simply has not been realized. Thus, allowing the plaintiff to reach the jury on the basis of the prima facie elements and rebuttal alone would not lend much guidance to the jury, even if pretext evidence were shown. Still, the goal of McDonnell Douglas seems to hold the key to the current dilemma.

The problem is that there exists no definition of discrimination to allow the plaintiff to prove or defendant to disprove. As Smith argues, the parties always face the uncertainty that, not only might their definition differ from that of the other party or the judge, it might differ from the jury's. Because of this lack of agreement, discrimination seems to be necessarily a fact question. But submitting only the prima facie case and rebuttal to a jury would leave them unbounded discretion and eliminate the judge's guardian role. Employment discrimination cases would remain basically equity cases, but within the judgment of the jury (at least the current scheme places equitable discretion in the hands of its traditional agent, the judge). Unsatisfactorily, many judges have defended their guardianship of juries by dismissing close cases.

These problems can be easily resolved by slightly modifying McDonnell Douglas. A theoretically unending minuet would progressively narrow the question for the jury and present an issue capable of being judicially managed by segregating two bound questions: (1) what was the actual
decisional basis for the adverse employment decision, and (2) under all the circumstances, was that decision discriminatory?\textsuperscript{288} The initial showings under this modified approach would remain the same. The plaintiff would allege a light prima facie case that the defendant would be required to meet with a legally sufficient, admissible explanation of the adverse employment decision. The plaintiff would be allowed to show this reason is pretext, that it was not the reason for the adverse employment decision. If he does this, a new presumption of discrimination is created, requiring the employer to offer another legally sufficient explanation. If after several rounds of rebuttals and pretext showings, which could be done all at once, prior to or at trial, the court would finally reach an explanation that could not be shown to be pretext, setting the stage for a manageable jury question. The only limitation with this approach is the rough fit between what is proven (whether the employer used the reason offered) and the supposed issue (intentional discrimination). But because discrimination is so easily hidden behind various pretextual reasons, the approach has the benefit of ensuring that the offered rebuttal was really the reason for the decision.

C. A Proposal For a New Disparate Treatment Minuet

In the context of the severe criticisms of McDonnell Douglas, a revival of its presumption-based formula must overcome deep suspicion over the efficacy of its operation. The following pages show that such suspicion is unwarranted as the approach described above effectively facilitates Title VII litigation while avoiding the problems of McDonnell Douglas and Hicks.\textsuperscript{289} Precisely how a system of re-occurring presumptions would work is illustrated by returning to the “loser” case from Part II. Looking at several possible justifications for the adverse decision shows how the question of discrimination can be reduced to whether a jury is prepared to believe a particular employment practice is “legitimate.”

\textsuperscript{288} Judge Chin and Jodi Golinsky sense that the pretext issue is really a compound question, but they follow the usual assumption that discrimination could not be shown unless the employer’s “nondiscriminatory reason” is proved to have been false. Chin & Golinsky, supra note 11, at 667. This mistake derives from the Burdine injunction that the reason must be nondiscriminatory. But because the reason need only be produced, the usual approach gives the employer the benefit of the doubt on the quite consequential question of whether the offered reason is acceptable. A more efficient approach is to litigate the question of what was the reason and then ask whether that reason is an acceptable one under the circumstances.

\textsuperscript{289} Professor Catherine Lancot offers an interesting proposal designed to save the McDonnell Douglas formula while addressing the need for a definition of discrimination. See Lancot, Secrets and Lies: The Need for a Definitive Rule in Pretext Cases, 61 LA. L. REV. 539 (2001).
The loser case involves an employer whose hiring officer refuses to hire a black applicant. As illustrated in Part II, unless the plaintiff can usher evidence concerning the views of the decision maker and show a link between those views and the particular decision, the plaintiff's case is doomed. What exactly a decision maker says was the reason is largely beside the point after Hicks. Of course, under Reeves, the plaintiff might still prevail if he can show that the reason offered was false, but only if that showing implies that the employer actually discriminated (perhaps by offering the false reason, under the circumstances, discrimination seems more likely than not). In any event, the plaintiff's obligation to produce the elusive evidence of discriminatory intent today leads to the pursuit of racist statements, affiliations, etc., or evidence that the context of the discrimination resembles a popular historical example of discrimination, or perhaps more to the point "racism."

Under the formula proposed here, the loser case is given a closer look. The decision maker's statement of what happened becomes meaningful again. So she says that she picked the applicant with the "best" resume. During discovery that explanation is shown to be untrue. The plaintiff, having exposed the ruse of the decision maker, is now entitled to win—but, in accord with the limited import of this showing, has not earned an absolute right to prevail. Rather a contingent presumption is created that, like the presumption created by the prima facie case, can be destroyed by the showing of a legally sufficient explanation of the "real" reason for the adverse decision. With better access to information on what decision was made and, importantly, coercive mechanisms available to extract it, the employer's incentive to get to the bottom of the dispute is fully justified. The presumption provides the employer incentive to produce that reason. 290

Supposing then that the explanation offered is that the applicant "didn't seem professional," that justification might be investigated by the employer prior to offering it. The employer who kept offering reasons that were promptly exploded by the plaintiff risks seeming unbelievable before the jury. So employers might quickly determine the "real" reason for the decision. But even if they did not, this subsequent offered explanation is an improvement on the case examined on a pretext-only basis. Indeed, even if the plaintiff is required to offer evidence under a pretext-plus scheme or is held to produce evidence of some version of Smith's Restatement-like definition of discrimination, that evidence would prove less helpful to determining the truth of the situation than the subsequent explanations of what was the basis for the decision. In

290. This incentive is perhaps strong enough to overcome employers' strong incentives to appease its workforce, unions and image makers.
all of the other approaches that question is buried within the ambiguous notion of discriminatory intent.

If in this or another round of rebuttal and pretext showings, an explanation is offered that the plaintiff cannot disprove, the key question of the case is set. Indeed, rather than ending the inquiry at this point, the court has only just reached the pertinent question: does the adverse decision, which was had for this reason, constitute discrimination? Given all the evidence presented up to this point along with additional evidence the parties might usher, does that explanation constitute a discriminatory exclusion on the basis of race (or whatever category might have been used). This question is narrowly framed by the last offered reason, which by definition is the reason for the adverse decision. And the question so framed allows flexibility to account for the numerous ways that discrimination is manifest without transforming the reason into an all or nothing case for “racism.” That is, while certain practices might come to be regarded as more than likely discriminatory, no practice will necessarily indicate discrimination or the lack there-of—much as it seems McDonnell Douglas desired.

This last benefit is not to be underestimated. In one community, the “lack of professionalism” might be a resonate code for discrimination; in another, it might not. In some industries certain behaviors might be regarded as unprofessional; in others that same behavior might be the standard for professionalism. Indeed, the difference is likely to turn on the sophistication of the forum’s economy and the real and imagined requirements of the job in question. Because these are the same factors that constrain employers’ ability to reconfigure jobs, the end result is not unlike an accommodation requirement in religious and disability discrimination cases. That is, what constitutes “professionalism” differs for computer-industry jobs in Silicon Valley—where a culture of “dressing down” predominates—versus a sales job in the Northeast Corridor—where the Wall Street culture has tended to exert a more formal influence. Moreover, the job difference might matter significantly. In the end, this approach eliminates the need for unauthorized exceptions to the statute that have been crafted for dress codes and similar customer and workplace expectations that, though needed, threaten to swallow up the prohibitions of the act.291

291. For example, various hair styles of black workers have in succession been urged as the basis of discriminatory employment decisions. The cases have run up against a deference to dress and grooming codes established by certain courts, despite the close association between those styles and definitions of “blackness” during the given period. Indeed, grooming codes could be used to force applicants to comply with stereotyped notions of their race, gender or nationality, or require them to meet unattainable image
For the judge in our case, the question of regulating access to the jury becomes framed in a narrow question of whether the parties have offered evidence of the appropriateness of the urged reason as a job reason. It is already established that it was the reason used. And the court is not required to answer the fact sensitive question of whether the reason equals discrimination. Rather, the court would concern itself only with the existence or absence of evidence showing that the practice was consistent with community and industry norms. At some point, consistency with both industry and community norms (where appropriate) might indicate that there was no discrimination, but even in that situation the case might transform itself into a disparate impact case, which would be well narrowed for that examination into a particular decisional basis with a particular effect.

Before the jury, the narrowed question is especially well suited for what juries do. The parties can be expected to offer lots of evidence concerning what is done in the industry and at the particular company. They might show differences unique to the local market or particular to the job in question. In the end, the jury would be asked whether the reason offered was a ruse for imbedded prejudices or whether the applicant was treated fairly. This is a judgment, but that is what juries ought to be able to render.

It might be objected that this approach would extend litigation or effectively bar summary judgment. On the former, this approach could be easily accommodated in ordinary litigation practice. Much of the minuet would, like today, precede the trial or, if the decision maker’s lies become apparent only at trial, be handled effectively by post-trial motion practice and supplemental evidentiary hearings. And though parties might be tempted to sandbag or offer endless, baseless explanations, they would run the risk of offending the judge or fact-finder.

In fact, the structure of this approach to employment discrimination cases reveals why both parties would remain at risk. The plaintiff in the approach has succeeded in establishing a legal presumption as his only requirement in the suit. Unrebutted he wins, but when rebutted the plaintiff must bear the risk of nonpersuasion before the jury on the question of whether the decisional basis constituted discrimination. This is a very substantial burden and the plaintiff cannot afford to simply sit back on the hope that the defendant will be unable to come up with successive explanations. Indeed, the plaintiff must confront the standards of other races and genders. See, e.g., Wilingham v. Macon Telegraph Pub'g Co., 507 F.2d 1084 (5th Cir. 1975); Lanigan v. Barlett & Co. Grain, 486 F. Supp. 1388 (W.D. Mo. 1979). Cf. Devine v. Lonschein, 621 F. Supp. 894, 897 (S.D.N.Y. 1985), aff'd without opinion, 800 F.2d 1127 (2d Cir. 1986) (equal protection claim).
employer's proffered reasons, investigate them to determine if they are the true reasons, and then prepare to show that they are discriminatory. During discovery, the plaintiff retains the incentive they have today to discover the decisional basis at the earliest possible moment. Because disproving the defendant's rebuttal is not enough to automatically win (the defendant can proffer another reason), the plaintiff cannot just react to the defendant, but must actively search out evidence.

Having finally narrowed the defendant's decisional basis down, the plaintiff's real work begins. Investigating the workplace culture, the nature of the job, the industry standards and the community impressions are weighty burdens for a plaintiff. But when met, this information is invaluable to the court and fact-finder. Given the burden that producing this evidence constitutes and the risks and delay of waiting for the defendant's response, plaintiffs in this system would have every incentive to determine the true decisional basis on their own and raise it at the earliest possible moment in the trial.

Defendants also have incentives to move the issue toward examination of the true decisional basis. The defendant is first confronted with the prospect of losing the case outright if unable to produce a nonpretextual reason for the adverse decision. His burden of production carries with it a presumption against him. Should he satisfy this burden with pretextual explanations he will find himself back in this position later. Though delay is a technique usually associated with defendants, there is a reduced incentive for delay because a succession of pretext showings could be the basis of a decision of discrimination and would in any case probably prejudice the jury against them. Moreover, the judge, sensing obstruction, might grant summary judgment on the question of discrimination or sanction the defendant if the proffered reasons are deemed frivolous. An employer might then exert his efforts in defending whether the reason offered was discriminatory. Because employers treasure their ability to regulate their workplace as they wish, they would likely be inclined to raise and defend those very practices they treasure both to save the practice and to save their reputation.

In the end, this approach comports with traditional notions of presumptions and burdens to a far greater extent than McDonnell Douglas ever did. It allows the plaintiff to establish his basic case, despite the intrinsic limits of producing evidence of intent. It allows the employer to defend on grounds that are ascertainable and it narrows the question before the court into one that fact-finders can reasonably handle. As important, this approach frees the court from the treacherous and morally reprehensible quest to define the undefinable. Exiting the practices of defining race and requiring parties to joust over whether a decision maker embraced the particular definition embraced by the
Court is benefit enough, but it also has the advantage of eliminating court discretion rooted in the ambiguity of the definition of discrimination and the slippage between evidence of intent and the malleable categories.