Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison McDonnell Douglas

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OF BABIES, BATHWATER, AND THROWING OUT PROOF STRUCTURES: IT IS NOT TIME TO JETTISON MCDONNELL DOUGLAS

BY
WILLIAM R. CORBETT

I. INTRODUCTION

A. The Birth and Ascendancy of McDonnell Douglas

In 1973, the Supreme Court decided McDonnell Douglas Corp. v. Green,1 its first case involving the individual disparate treatment theory of employment discrimination under Title VII of the Civil Rights Act of 1964.2 In that case, the Court announced a three-part

2. 42 U.S.C. §§ 2000e-2000e-17 (1994). In a Title VII individual disparate treatment case, a plaintiff attempts to prove that her employer treated her less favorably than similarly situated employees because of race, color, religion, sex, or national origin. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). A plaintiff proceeding under the disparate treatment theory must prove that the employer acted with a discriminatory motive or animus. Id.

The Court's first Title VII decision was Griggs v. Duke Power Co., 401 U.S. 424 (1971). It involved the disparate impact theory or model of employment discrimination rather than the individual disparate treatment theory. Whereas disparate treatment is a theory based on intentional discrimination, disparate impact is based on either negligence or strict liability. See David Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899, 931-36 (1993) (recognizing that, although disparate impact is fundamentally a strict liability-based theory, it has evolved to include negligent discrimination). In a disparate impact claim, a plaintiff alleges that a facially neutral employment practice, such as a job skills test or degree requirement, has a significant disproportionate impact or effect on members of a protected class, and the practice cannot be justified as a "business necessity." Teamsters, 431 U.S. at 335 n.15. The disparate impact analysis, as articulated in Griggs and developed in subsequent cases, was modified by the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified at 42 U.S.C. § 2000e-2(k) (1994). Griggs also is so well known in employment discrimination circles that it probably can stand on its one-party name and conjure up an entire branch of employment dis-

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proof structure\(^3\) or analysis for intentional discrimination cases in which the evidence presented is circumstantial. Under the proof structure, a plaintiff makes out a prima facie case of intentional discrimination by proving the following: 1) plaintiff belongs to a protected class; 2) plaintiff applied and was qualified for the job at issue; 3) despite plaintiff’s qualifications, the employer rejected him; and 4) after the employer’s rejection of plaintiff, the position remained open, and the employer continued to seek applicants with qualifications like those of plaintiff.\(^4\) If a plaintiff proves her prima facie case, a rebuttable presumption of intentional discrimination arises,\(^5\) and the burden of production shifts to the employer to articulate a legitimate (non-discriminatory) reason for its employment action.\(^6\) If the employer satisfies its burden of production, the burden of production again shifts to the plaintiff to prove that the employer’s articulated reason is a pretext for discrimination.\(^7\) Although the burden of production shifts at the second and third stages of this proof structure, the ultimate burden of persuasion that the employer intentionally discriminated remains with the plaintiff at all times.\(^8\)

In the years following McDonnell Douglas, the Court has explained the reason it developed this proof structure: determining discrimination law. It does not rival McDonnell Douglas for celebrity status, however, because there are so many more individual disparate treatment cases under Title VII and the other federal employment discrimination statutes than there are disparate impact cases. Indeed, the Supreme Court has suggested that disparate impact may not apply under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994). See Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

3. In the first sentence of the opinion, the Court explained what it was creating—a proof structure: "The case before us raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964." McDonnell Douglas, 411 U.S. at 793.

4. Id. at 802. The Court was quick to point out that the elements of a prima facie case will vary depending on the facts. Id. at 802 n.13. For example, the Court in McDonnell Douglas actually stated as the first element of the prima facie case that the plaintiff must establish "that he belongs to a racial minority." Id. at 802. The Court later explained in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), a case involving white plaintiffs, that McDonnell Douglas did not restrict Title VII to racial minorities. Rather, "specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." McDonald, 427 U.S. at 279 n.6 (quoting McDonnell Douglas, 411 U.S. at 802 n.13) (internal quotation marks omitted). Furthermore, the elements of the prima facie case vary depending on the type of adverse employment action taken. McDonnell Douglas, as the statement of the prima facie case elements indicates, involved the adverse employment action of refusal to hire (actually, refusal to rehire).


6. McDonnell-Douglas, 411 U.S. at 802; see also Burdine, 450 U.S. at 255-56 (discussing employer’s burden of production).


8. Hicks, 509 U.S. at 507.
whether an employer intentionally discriminated on a prohibited basis is "both sensitive and difficult" and involves an inquiry into a person's state of mind.\textsuperscript{9} The proof structure assists those who believe they are victims of such discrimination in proving this when the alleged discriminators do not bestow upon them "direct evidence" of intentional discrimination.\textsuperscript{10} In \textit{McDonnell Douglas}, the Court proclaimed its belief that the development of the proof structure properly balanced the various societal and personal interests at stake and the uncompromising policy of Title VII to eliminate invidious discrimination in employment.\textsuperscript{11}

Since 1973, the \textit{McDonnell Douglas} analysis has flourished in the courts, becoming the predominant method for analyzing intentional employment discrimination claims.\textsuperscript{12} Indeed, \textit{McDonnell Douglas} has been so influential that it has spread beyond employment discrimina-


\textsuperscript{10} Id.

\textsuperscript{11} \textit{See} Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O, Connor, J., concurring) ("[T]he entire purpose of the \textit{McDonnell Douglas} prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").

\textsuperscript{12} \textit{McDonnell Douglas}, 411 U.S. at 801. The Court offered a succinct and eloquent statement of the interests and policies to be balanced when Title VII steps into the modern employment setting, dominated by the common law principles of employment at will:

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

\textit{Id.}

\textsuperscript{13} \textit{McDonnell Douglas} was a Title VII case, but the proof structure has been applied by courts under all of the federal employment discrimination laws. \textit{See}, e.g., O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 & n.2 (1996) (assuming arguendo, as courts routinely have done, that the analysis applies under the Age Discrimination in Employment Act, and collecting cases); Aka v. Washington Hosp. Ctr., 116 F.3d 876, 885 (D.C. Cir. 1997) (collecting cases applying analysis to claims under the Americans with Disabilities Act), \textit{opinion reinstated in relevant part on reh'g en banc}, No. 96-7089, 1998 WL 698396 (D.C. Cir. Oct. 9, 1998). The Equal Employment Opportunity Commission, the agency charged with enforcement of the federal employment discrimination laws, considers the proof structure applicable to claims under Title VII, the ADEA, the ADA, and the Rehabilitation Act of 1973. EEOC: Enforcement Guidance on \textit{St. Mary's Honor Center v. Hicks}, Fair Empl. Prac. Man. (BNA) 405: 7175, 7175 n.2 (issued April 12, 1994). The application of \textit{McDonnell Douglas} in ADA cases, however, has not been universally applauded. \textit{See}, e.g., Lianne C. Knych, Note, \textit{Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act}, 79 MINN. L. REV. 1515, 1517 (1995) (arguing that \textit{McDonnell Douglas} analysis does not take into account the differences between discrimination based on disabilities and discrimination based on the classes protected under Title VII and does not impose an appropriate allocation of burdens of proof under the ADA); Kevin W. Williams, Note, \textit{The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans With Disabilities Act}, 18 BERKELEY J. EMPLOYMENT & LAB. L. 98, 160 (1997) (arguing that \textit{McDonnell Douglas} is appropriate only in ADA cases in which employer claims employment action is unrelated to plaintiff's disability).
tion cases to employment actions brought under other types of federal and state employment laws and to discrimination cases in contexts other than employment law. Because the proof structure is ubiquitous in employment law, the mere name McDonnell Douglas conjures up much of the law prohibiting discrimination in employment. Consequently, any change in the law regarding the McDonnell Douglas proof structure necessarily has a far-reaching impact on employment discrimination law particularly, and employment law generally.

The year 1998 is the silver anniversary of the McDonnell Douglas analysis. In view of the prevalence of McDonnell Douglas in employment discrimination law and its laudable purpose, one might expect that employment discrimination law scholars, practitioners, and observers would celebrate the occasion and heap praise on the venerable proof structure. Sadly, that has not been the case. Notwithstanding the proliferation of the proof structure in the courts, it has been dealt some damaging blows by the Supreme Court that gave birth to it. Moreover, it has suffered attacks at the hands of commentators. If I were to plan a gala to celebrate the anniversary, I would be hard pressed to round up scholars who would join me in the celebration. Most of them who have written on the subject are ready to jettison McDonnell Douglas. I, for one, however, come not to jettison McDonnell Douglas, but to praise it.

B. The Assault on McDonnell Douglas

In 1989, the first event that began impinging on McDonnell Douglas' domain occurred, and since that time other events have continued the assault. In that year, a badly fragmented Supreme Court announced a second proof structure for intentional discrimination

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15. E.g., Simms v. First Gibraltar Bank, 83 F.3d 1546, 1556 (5th Cir.) (applying the analysis to a claim under the Fair Housing Act), cert. denied, 117 S. Ct. 610 (1996).

16. See supra notes 9-12 and accompanying text.

17. See sources cited infra note 25.
cases in *Price Waterhouse v. Hopkins.* Saying that *McDonnell Douglas* was being asked to "perform work that it was never intended to perform," the Court developed a proof structure to be applied in "mixed-motives" cases. With the advent of a new proof structure for disparate treatment cases, there was a chink in the walls, but even after *Price Waterhouse v. Hopkins,* the vast majority of cases were evaluated under *McDonnell Douglas.*

Then in 1993, the Court decided *St. Mary's Honor Center v. Hicks,* which diminished, somewhat, the *McDonnell Douglas* proof structure's role in intentional discrimination cases. Since 1993, some federal courts have interpreted *Hicks* in a way that further weakens *McDonnell Douglas* and deprives the proof structure of some of its

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19. *Price Waterhouse,* 490 U.S. at 247 (plurality opinion). The plurality was so disrespectful of *McDonnell Douglas* that it referred to the proof structure as "Burdine's framework." *Burdine* was merely the case that clarified stage two of the *McDonnell Douglas* analysis. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

20. The *Price Waterhouse* mixed-motives analysis was subsequently modified and codified by Congress in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (1991). In practice, most courts have applied the *McDonnell Douglas* proof structure to cases involving circumstantial evidence of discrimination and the mixed-motives proof structure to cases involving direct evidence of discrimination. See, e.g., Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1216 (5th Cir. 1995). Professor Michael Zimmer has argued that the Civil Rights Act of 1991 was intended to eliminate the application of different analyses to intentional discrimination cases depending on the type of evidence adduced. Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation,* 30 GA. L. REV. 563, 625 (1996) ("[A]ll individual disparate treatment cases, whether the cases might now be characterized as 'mixed motive' or 'pretext' cases, should be analyzed under the two step process of new sections 703(m) and 706(g)(2)(B) of Title VII . . . .") The Second Circuit addressed this argument in *Fields v. New York State Office of Mental Retardation and Developmental Disabilities,* 115 F.3d 116 (2d Cir. 1997). The court in *Fields* agreed with a piece of the argument, but not the whole. Plaintiff, who had lost his race discrimination claims in the trial court, argued that the trial court committed error in giving the jury a pretext instruction rather than a mixed-motives instruction. The court agreed with plaintiff that, regardless of whether a case is evaluated under *McDonnell Douglas* or the mixed-motives analysis, the Civil Rights Act of 1991 does impose "motivating factor" rather than "but for" as the standard of causation. *Id.* at 120-21. Thus, a plaintiff is not required to prove that the employer's articulated reason is pretextual. *Id.* at 120. The court disagreed with plaintiff (and Zimmer), however, that the two-part mixed-motives analysis of the 1991 Act applies to all individual disparate treatment cases. The court first stated that "the distinction between 'dual motivation' and 'substantial motivation' jury instructions survives the 1991 Act." *Id.* at 124. It then held that the "affirmative defense" at step two of the mixed-motives analysis only should be included in jury instructions in the same types of cases as before the 1991 Act. *Id.*

procedural significance. 22

The Court’s assault on McDonnell Douglas, which has rendered it a less potent weapon in the campaign against employment discrimination, has sparked criticism of the proof structure and calls for its abandonment by academics and practitioners. The most influential of these has been an article by Professor Deborah Malamud. 23 In that article, Professor Malamud first argues that the Supreme Court correctly decided St. Mary’s Honor Center v. Hicks. 24 She further contends that, because Hicks has rendered the McDonnell Douglas proof structure meaningless, McDonnell Douglas should be abandoned in favor of an open-ended standard for intentional discrimination in which the only question is whether the employer intentionally discriminated in violation of the relevant federal discrimination statute. 25

I emphatically disagree with Professor Malamud on both of her contentions.

In short, the last few years have not been very good ones for McDonnell Douglas. I intend to celebrate the silver anniversary by debunking Hicks and proclaiming that, although it has developed

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22. See infra notes 94-115 and accompanying text, discussing summary judgment and judgment as a matter of law under the McDonnell Douglas analysis after Hicks.

23. Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229 (1995). Professor Malamud’s fine article has been influential. For example, the U.S. Court of Appeals for the Fifth Circuit cited it in support of its decision to adopt the middle ground, rather than "pretext plus" or "pretext only," approach to summary judgment and judgment as a matter of law under the McDonnell Douglas analysis. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc). A panel of the U.S. Court of Appeals for the D.C. Circuit, although rejecting Professor Malamud’s recommendation on the pretext-plus/pretext-only debate, recognized Professor Malamud’s article as the scholarly standard bearer of that position. Aka v. Washington Hosp. Ctr., 116 F.3d at 882-83. (D.C. Cir.) (*We acknowledge that our colleague’s proposed contrary reading of Hicks, ... is not entirely novel, inasmuch as it reflects the approach taken by two of our sister circuits and advocated in a 1995 law review article ... *). Professor Malamud’s position fared better, however, when the full court reheard Aka. No. 96-7089, 1998 WL 698396 (D.C. Cir. Oct. 9, 1998) (en banc). The court, on rehearing, abandoned the panel majority’s pretext-only approach and joined the Fifth Circuit in adopting a middle-ground approach. Aka, 1998 WL 698396, at *8-9. Professor Malamud’s article also has generated criticism. See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 324-34 (1997) (criticizing Malamud’s argument that St. Mary’s Honor Center v. Hicks was decided correctly).


some problems, *McDonnell Douglas* has been instrumental in the efforts to eradicate employment discrimination. Moreover, it is still significant in 1998, notwithstanding *Hicks*. Rendering such a proclamation, however, requires me to take on Professor Malamud, whom I consider to have launched the strongest defense of *Hicks* and the most complete and potent attack on *McDonnell Douglas*. 26

II. THE FOLLY OF *HICKS* AND THE CONTINUING IMPORTANCE OF *MCDONNELL DOUGLAS*

Professor Malamud's article contains an insightful evaluation of *McDonnell Douglas* and a careful tracing of the evolution of the analysis. She is clearly correct about the shortcomings of the prima facie case. She chronicles the Supreme Court's unsuccessful attempts to address the substantive problems created by the weakness of the *McDonnell Douglas* prima facie case. Those failures resulted in the Court's minimizing the procedural consequences of the meager prima facie case. Professor Malamud's article then focuses on the evidentiary weakness of the prima facie case in support of her conclusion that the Court correctly decided *Hicks*. 27 In focusing on the weakness of the prima facie case, however, she undervalues the evidentiary strength of the "combined evidence" (prima facie case and proof of pretext). More importantly, she concedes, contrary to her sympathies, that the policy regarding federal employment discrimination laws as embodied in the Supreme Court's decisions did not compel a different result in *Hicks*. She makes this concession because of what she perceives to be the "essentially conservative" foundation of the Supreme Court's *McDonnell Douglas* line of cases. 28 Although the *McDonnell Douglas* decisions of the Court do not, in result, declare the primacy of the federal employment discrimination laws, there is recognition in many of the Court's decisions, including *McDonnell Douglas* itself, that the goal of eradicating employment discrimination is important. Moreover, the Court is not the only oracle of federal policy; even if the *McDonnell Douglas* line of cases were as bereft of sympathy for the policies favoring the discrimination laws as Malamud concludes, the whole of federal policy on employment discrimination, including congressional articulations, should have required a

26. "This was the most unkindest cut of all; ..." WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc.2.
28. Id. at 2262-66.
different result in \textit{Hicks}.

Professor Malamud reaches her second conclusion largely because she thinks that \textit{Hicks} has rendered the \textit{McDonnell Douglas} proof structure meaningless, and she believes that \textit{McDonnell Douglas} interferes with courts' and juries' ability to focus on the real issue in intentional discrimination cases. Even though \textit{Hicks} has rendered the analysis less helpful to plaintiffs, the proof structure remains important in pretrial stages of litigation, perhaps in instructions to juries, and in employer-employee relations outside litigation. \textit{McDonnell Douglas} requires an employer to give a nondiscriminatory reason for its actions and focuses attention on a plaintiff's challenge of the reason and the implications of a successful challenge. It is important for employers to understand that the employment-at-will doctrine does not reign over the landscape of employment law unchecked. Employers may not take adverse employment actions for all "bad" reasons.\textsuperscript{29} Some bad reasons have been prohibited by the federal employment discrimination laws. Because there is an ongoing battle between employment at will and the employment discrimination laws,\textsuperscript{30} the \textit{McDonnell Douglas} proof structure, even though weakened by \textit{Hicks}, retains vital symbolic value.\textsuperscript{31} It is the guardian of a

\textsuperscript{29}The classic statement of the employment-at-will doctrine recognizes that employers may terminate employees or take other adverse actions for good reasons, bad reasons, or no reason at all. \textit{See}, e.g. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-20 (1884), \textit{overruled on other grounds}, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915) ("All may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong."); \textit{cf. Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 3 (1992)} ("An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all.").


\textsuperscript{31}Professor Malamud recognizes the importance of symbols in discrimination law. She argues, for example, that replacing the discrimination statutes with legislation requiring just cause for termination would forsake "important symbolic and pedagogic ends" of the discrimination laws. Malamud, \textit{supra} note 23, at 2316-17. Indeed, Professor Malamud's main hesitation with recommending that \textit{McDonnell Douglas} be abandoned is the potential symbolic loss of declaring that there are no preferential rules for individual discrimination cases. \textit{Id.} at 2324. She addresses this concern with a question: "[W]hat is the symbolic significance of acting as though there are preferential standards for disparate treatment cases when, in fact, after \textit{Hicks}, there are none?" \textit{Id.} at 2324. The premise for this question is dubious. As I will discuss in part II.B, \textit{infra}, even after \textit{Hicks}, the \textit{McDonnell Douglas} proof structure retains greater symbolic value and practical value than Professor Malamud accords it.
fading but still discernible boundary between the federal employment discrimination laws and employment at will.

A. Why Professor Malamud Is Wrong About the Court Being Right in Hicks

Professor Malamud prefaces her discussion of why Hicks was correctly decided with a declaration, in the nature of an apology, that her sympathies were with the dissent and she wanted to side with those decrying the Hicks decision as a conservative Court’s abandonment of the pro-plaintiff decisions and principles developed in discrimination decisions of the early 1970s. Notwithstanding her sympathies, Professor Malamud embarks upon a tracing of the McDonnell Douglas proof structure from its origin through Hicks, which leads her “reluctantly” to conclude that the Court correctly decided Hicks. Although I agree in large part with Professor Malamud’s analysis of the Supreme Court’s decisions, in which she focuses on the weakness of the prima facie case, I do not believe that it is a sufficient ground on which to conclude that the Court “correctly” decided Hicks. Professor Malamud could have followed her sympathies. Arguing that Hicks should have been decided as the dissent contended is both intellectually defensible and consistent with the policies that undergird Title VII and the other federal employment discrimination statutes.

32. I am reluctant to say that the Court majority reached a wrong result in Hicks. See Estlund, supra note 30, at 1671 (“Whether [the Hicks] interpretation of Title VII is right or wrong (and it is not obviously wrong, . . ."). The Court did not wrongly interpret language in Title VII, and it did not wrongly apply holdings of prior Supreme Court decisions. It did, of course, rule contrary to dictum in Burdine, but the majority acknowledged that point. Hicks, 509 U.S. at 515-20. I thus must content myself with arguing that the Court did not decide Hicks well in view of the policies supporting federal employment discrimination law and that the Court did not decide the case correctly, in the sense that the dissent’s resolution would have been incorrect. See THE READER’S DIGEST GREAT ENCYCLOPEDIC DICTIONARY 303 (10th ed. 1975) (“Correct suggests that there are only two possibilities (correct and incorrect) and that discrimination between them is easy . . . .”). Professor Selmi, in his criticism of Professor Malamud’s defense of Hicks, labels Hicks a bad decision, not because it is inconsistent with precedent, but because it is about line drawing in employment discrimination cases and the Court chose to draw the line in favor of employers who may be subject to unfounded judgments rather than in favor of deserving employment discrimination victims who may lose cases. See Selmi, supra note 23, at 332-33.

33. Malamud, supra note 23, at 2236.

34. Id. at 2236-37.
1. Strength of the "Combined Evidence"\textsuperscript{35}

Professor Malamud recognizes that the majority in \textit{Hicks} was not constrained, as it declared, by Rule 301 of the Federal Rules of Evidence to hold that a plaintiff proving a prima facie case and pretext under \textit{McDonnell Douglas} is not entitled to judgment as a matter of law.\textsuperscript{36} Professor Malamud instead grounds her agreement with the \textit{Hicks} majority on her assessment of the evidentiary weakness of the prima facie case and the combined evidence of the prima facie case and pretext. I share Professor Malamud’s concern about the weakness of the prima facie case alone, although I support shifting the burden of production after a plaintiff establishes a prima facie case. Indeed, her careful chronicling of the Court’s struggles with the \textit{McDonnell Douglas} prima facie case demonstrates that the Court has recognized its weakness, but failed to buttress it, although presented with opportunities. I disagree, however, with Professor Malamud’s and the \textit{Hicks} majority’s assessment of the weakness of a plaintiff’s evidentiary showing once the plaintiff proves that the employer’s articulated reason for its action is pretextual.

Professor Malamud concludes that \textit{Hicks} was decided correctly, largely because she cannot accept the "basic assumption."\textsuperscript{37} The basic assumption is the label affixed by Professor Deborah Calloway to the proposition that "absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination."\textsuperscript{38} Professor Calloway posits that the Court’s decision in \textit{Hicks} represents a challenge of this basic assumption.\textsuperscript{39} Although Professor Malamud knows that Professor Calloway’s basic assumption and the \textit{Hicks} decision address the effect of the combined evidence of prima facie case and pretext, she at times loses this focus, discussing instead

\textsuperscript{35} Professor Malamud uses this term to refer to the evidence supporting the prima facie case and the evidence used to prove that the employer’s articulated reason is pretextual. \textit{E.g., id.} at 2243.

\textsuperscript{36} \textit{Id.} at 2262 n.110. The majority stated that the Court "ha[s] no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated." \textit{Hicks}, 509 U.S. at 514 (emphasis in original). Professor Malamud points out that Rule 301 controls instead the question of what effect proving a prima facie case has, and that question was answered in \textit{Texas Dept. of Community Affairs v. Burdine}.

\textsuperscript{37} Malamud, \textit{supra} note 23, at 2254-55.

\textsuperscript{38} Deborah A. Calloway, St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONN. L. REV. 997, 997-98 (1994).

\textsuperscript{39} \textit{Id.} at 998; \textit{see also} Selmi, \textit{supra} note 23, at 332 (criticizing the \textit{Hicks} majority for being "unwilling to accept the necessary implication of its proof structure: that discrimination remains a vital explanation for workplace . . . decisions").
the inadequacy of just the prima facie case to require a judgment for a plaintiff.\footnote{40} Professor Malamud’s focus on the weakness of the prima facie case causes her to undervalue the evidentiary strength of the combined evidence.

The Hicks dissent firmly grounded its position on the strength of the combined evidence:

Such proof [the prima facie case] is merely strengthened by showing, through use of further evidence, that the employer’s articulated reasons are false, since “common experience” tells us that it is “more likely than not” that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff.\footnote{41}

Although I agree with Malamud that the dissent “overplay[ed] the ‘morality’ card,”\footnote{42} by emphasizing the probativeness of an employer’s “lies” on the ultimate issue of intentional discrimination, the moralizing is not essential to support the dissent’s thesis that the combined evidence is strong enough to support a rule requiring judgment for a plaintiff. Unlike Professor Malamud, I think the dissent’s (and Professor Calloway’s) “basic assumption” reasonably describes the current situation in employment relations in the United States. Furthermore, to the extent the basic assumption may be overly broad in its description, it is important enough as a matter of policy that it should govern disparate treatment cases.

Professor Malamud rejects the basic assumption for several reasons. The first is that she finds the assumption underlying it\footnote{43} to be that, absent discrimination, employment decisions are “fair and reasonable” and can be proven to be so.\footnote{44} I think she states the “more basic assumption” imprecisely. Were I to subscribe to her formula-
tion of the underlying basis for the basic assumption. I would concur with her conclusion. What McDonnell Douglas rests on is not the assumption that absent a fair and reasonable explanation, discrimination is the most likely explanation for adverse employment actions taken against members of protected groups. Instead, the foundation is that discrimination is the most likely explanation when the following conditions are satisfied: employers, who know about the federal employment discrimination laws (and many know about the McDonnell Douglas proof structure itself), take adverse employment actions against members of protected groups, and then, during litigation, articulate explanations for their actions (and introduce evidence) which are disbelieved by the finder of fact. Stated in that way, I think the foundation for the "basic assumption" is a reasonable explanation of the state of employment relations in the United States.

Professor Malamud argues that her experience as a practitioner and teacher leads her to believe that many adverse employment decisions are "wrongful" (... arbitrary or based on incorrect assessments of the facts)" or "undefendable" (... employer cannot demonstrate that its actions were correct)."45 Although I do not dispute Professor Malamud's assessment of many employment actions, that does not undermine the evidentiary strength of the combined evidence. Rather, Professor Malamud's assertion misapprehends the meaning of "pretext" as used in the McDonnell Douglas analysis. The pretext that a plaintiff attempts to prove is that the reason given by the employer is not the reason for which it took the action. Such pretext is not necessarily proven by demonstrating that the employer was objectively wrong in its assessment of an employee46 or that it took the action for a morally bad (other than discriminatory) or trivial reason.47 Stated differently, employers do not have to introduce evidence that their articulated reasons are either laudable or factually accurate; instead, they must introduce evidence48 that those reasons, whether praiseworthy or contemptible (so long as not discriminatory within

45. Id.
46. Burdine, 450 U.S. at 259 ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.").
48. The burden of production that the employer bears at the second stage is light. Purkett v. Elem. 514 U.S. 765, 767-68 (1995). At the third stage, however, although the plaintiff bears the burden of production, the employer usually must join battle and attempt to prove that the reason given at stage two did in fact motivate its decision.
the meaning of the relevant discrimination statute) and whether factually accurate or inaccurate, did motivate their actions. 49 Professor Malamud recognizes this, 50 but she fails adequately to account for it in her argument that the "basic assumption" does not reflect the reality of employers' decision making.

I realize that employers who make incorrect assessments of employees and act based on those assessments are at risk of being disbelieved by factfinders. That does not, however, change the fact that an employer can, under the McDonnell Douglas analysis, successfully defend an adverse employment action taken for "bad" or factually incorrect reasons. Thus, I find the "basic assumption" to be a reasonable construction of how employment decisions are made because it addresses the probable reason of an employer, which, aware of the federal employment discrimination laws, takes adverse action against a member of a protected group, and then, in the context of litigation, is unable to produce adequate evidence for the factfinder to conclude that it took the action for its chosen nondiscriminatory reason(s).

A second reason that I accept the "basic assumption" and conclude that the dissent's position should have prevailed in Hicks is that I believe discrimination is still prevalent in our society and in employment relations. 51 I agree with the assessment of some commentators that discrimination based on conscious bias or prejudice is declining but that stereotype- or proxy-based discrimination is still prevalent. 52 If this assessment is correct, then individuals are still frequently having adverse employment actions taken against them be-

49. See Selmi, supra note 23, at 326 & n.217 (arguing that Professor Malamud misunderstands the second stage of the proof structure as requiring a reasonable rather than an articulable reason).

50. Malamud, supra note 23, at 2303-04 (discussing difference between arbitrary wrongful dismissals and discriminatory dismissals, and noting that "the actual truth or falsehood . . . relates to the question of liability only indirectly").

51. I do not read Professor Malamud as disagreeing with this belief. She does challenge the "basic assumption," however, because "discrimination is not a unitary phenomenon in American society . . . [Therefore,] the assumption that discrimination is the cause of all unjustified actions against members of protected groups is unlikely to be equally justified in all of these varied circumstances." Id. at 2257-58 (footnote omitted). Although the assumption of discrimination is not equally justified in all circumstances, I believe that discrimination based on group membership is still pervasive enough to justify application of the assumption under the circumstances described in the McDonnell Douglas proof structure. See Selmi, supra note 23, at 350 (arguing that discrimination in the world today is "pervasive and complex").

cause of their membership in specific groups; it is of no consolation that the decisionmakers are not consciously prejudiced or biased against the group. Moreover, such stereotype-based discrimination is more difficult to prove because much of it is unconscious.\footnote{Armour, supra note 52, at 746-49 (discussing aversive racism); see also Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 321-23 (1987) (discussing the difficulty in proving racial discrimination due to unconscious racism); Oppenheimer, supra note 2, at 915-17 (arguing that prevalence of unconscious racism necessitates adopting a negligence theory for employment discrimination to augment current theories based on intent and strict liability).}

Professor Malamud also takes issue with Professor Calloway's argument that the "basic assumption" is all the more important because society at large ("judges, juries, and members of this culture")\footnote{Calloway, supra note 38, at 1008.} does not believe that it is true. Malamud points out that imposing law which is contrary to societal beliefs will raise serious questions in American society about whether justice is being achieved by the discrimination laws.\footnote{Malamud, supra note 23, at 2260-61.} Two responses to this point are in order. The first is that both Professors Calloway and Malamud overstate, at least somewhat, the point that society does not believe that intentional discrimination is still common in the workplace. Professor Malamud offers as a highly visible example of society's questioning of the laws the current attacks on affirmative action.\footnote{Id. at 2260 n.105.} Both Professors Calloway and Malamud focus on affirmative action and its companion, the disparate impact theory of recovery.\footnote{Many employers undertake voluntary affirmative action to avoid potential liability under the disparate impact theory. See, e.g., George Rutherglen, Discrimination and Its Discontents, 81 Va. L. Rev. 117, 136-39 (1995) (describing relationship between affirmative action and disparate impact).} That focus is improper for two reasons. First, I suspect that many people who believe that discrimination is not prevalent enough to justify affirmative action are willing to admit that many individual employment decisions are made for discriminatory reasons.\footnote{Professor Rutherglen argues that disparate impact and affirmative action have stretched the commonly understood meaning of discrimination to the point that the average citizen is concerned with whether the federal discrimination laws are achieving just results. Id. at 128-29.} Second, it is disparate treatment, addressing \textit{intentional} discrimination, that is at the core of Title VII and the other discrimination statutes.\footnote{See, e.g. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . ."); Calloway, supra note 38, at 997 (referring to disparate treatment as "the most basic form of discrimination").} Even Professor Richard Epstein, who favors repeal of the discrimination statutes, concedes that disparate treat-
ment is consistent with the meaning of Title VII and that limiting race discrimination cases to disparate treatment would be a “practical compromise” to his proposal.\textsuperscript{60} If the employment discrimination laws are to remain a viable means of addressing employment discrimination, the necessity of prohibiting \textit{intentional} discrimination must be proclaimed without any apologies.\textsuperscript{61}

There is a second response to Professor Malamud’s concern with the Court’s imposing law inconsistent with societal beliefs: that is what the Court is supposed to do when society holds beliefs that would defeat justice.\textsuperscript{62} Professor Selmi explains the Supreme Court’s diluting of employment discrimination doctrine, in \textit{Hicks} and other cases, as tracking the desires of society to “wish away racial injustice.”\textsuperscript{63} Thus, although a majority in society may wish that discrimination no longer occurs based on the protected classes of Title VII, it is appropriate for the Court vigilantly to protect the statutorily created rights.\textsuperscript{64}

As Professor Malamud concedes, the Court could have held in \textit{Hicks} that the combined evidence under the \textit{McDonnell Douglas}

\textsuperscript{60} Epstein, \textit{supra} note 29, at 181.
\textsuperscript{61} One indicator of the centrality of disparate treatment to the discrimination laws is the argument in defense of the disparate impact theory that it is a means of uncovering camouflaged intentional discrimination.
\textsuperscript{62} In a strange and ironic sense, Professor Malamud and I are debating the countermajoritarian role of the Supreme Court. It is strange and ironic because generally one discusses that role when the Court is striking down laws enacted by the majority that violate constitutional rights of a minority. Here, Professor Malamud and I are discussing the role of the Court when a majority of society does not favor a judicial interpretation of legislatively enacted law. Is the proper role of the Court then to repudiate its own judicial gloss because of the beliefs of a majority? I do not think that either Professor Malamud or I would offer an absolute answer to that question, but I have less concern with the Court’s adhering to its interpretations of law even when many in society believe they are wrong if such interpretations are necessary to protect the rights of a minority as declared by the Congress. For recent scholarship on the classic “countermajoritarian difficulty,” about which much has been written, see Barry Friedman, \textit{The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy}, 73 N.Y.U.L. Rev. 333 (1998).
\textsuperscript{63} Selmi, \textit{supra} note 23, at 350.
\textsuperscript{64} Professor Malamud may have identified exactly what the Court is doing in its Title VII decisions of the past decade or so: according the greatest protection to the rights that enjoy the most support in society and eroding the protection accorded to less popular rights. It is interesting to note that, while \textit{Hicks} and other Title VII cases addressing racial discrimination have diluted the protections accorded by Court doctrine, the Court’s decisions on sexual harassment law have increased significantly the protections accorded by Court doctrine. In the 1997 term, for instance, the Court decided three sexual harassment cases in which the result favored plaintiffs. \textit{Oncale v. Sundowner Offshore Servs., Inc.}, 118 S. Ct. 998 (1998) (holding that same-sex sexual harassment is actionable under Title VII); \textit{Faragher v. City of Boca Raton}, 118 S. Ct. 2275 (1998) (holding that employers can be vicariously liable for harassment by supervisors and that no affirmative defense is available when harassment culminates in a “tangible employment action”); \textit{Burlington Indus., Inc. v. Ellerth}, 118 S. Ct. 2257 (1998) (holding that uniform analysis, articulated in \textit{Faragher}, applies to quid pro quo and hostile environment claims).
analysis required judgment for a plaintiff. The Court should have done so because the “basic assumption” underlying the *McDonnell Douglas* proof structure is, regrettably, still sound. Moreover, policy concerns favoring the employment discrimination laws should have been a significant factor in the Court’s decision.

2. Strong Public Policy On Which Federal Employment Discrimination Laws Are Based

Professor Malamud recognizes that it is appropriate for policy to play a role in courts’ decisions regarding sufficiency of the evidence. 65 I agree with this proposition, but I disagree with Professor Malamud on three matters: what policy the Court should have found in its own decisions; where it should have looked for policy; and what the policy considerations should have led the Court to do.

Professor Malamud restricts her policy inquiry to the Supreme Court decisions interpreting *McDonnell Douglas*. Since the proof structure is the Court’s creation, this may seem to be the appropriate inquiry. I do not agree that the inquiry should be so limited, however, for reasons I discuss below. The Court’s decisions are nonetheless an appropriate starting point. Professor Malamud traces the Court’s decisions from *McDonnell Douglas* through *Hicks* and finds in them “an essentially conservative foundation” 66 that does not square with the “nostalgic” view that *McDonnell Douglas* was animated by a policy of helping discrimination plaintiffs prove their cases. She attributes this conservative bent in the decisions to a desire to insulate the disparate treatment cases from the pro-plaintiff innovations in disparate impact cases. 67

Although I agree with Professor Malamud that most of *McDonnell Douglas*’ progeny exhibit, at least in result, a pro-defendant orientation, 68 I disagree with her on two points. First, I think that

65. Regarding the role of policy, Professor Malamud states: Courts routinely take into account the policy concerns animating a body of substantive law when deciding sufficiency-of-the-evidence questions, . . . . Thus, if the McDonnell Douglas-Burdine proof structure indeed expresses the Court’s policy judgment to look the other way when faced with the insufficiency of the "combined evidence," there would be good reason to adopt the "judgment for plaintiff required" position. Malamud, *supra* note 23, at 2262-63.

66. Id. at 2266.

67. Id. at 2263-66.

68. I identify a different objective in those cases than does Professor Malamud. I have depicted those decisions as being driven by the Court’s objective of protecting employers’ prerogatives under the employment-at-will doctrine against any substantial incursion by the federal employment discrimination laws. See generally Corbett, *supra* note 30. Professor Malamud also
McDonnell Douglas itself is not subject to being classified with its progeny as pro-defendant. Although Malamud's characterization of the Court's decision as "overturn[ing] a pro-plaintiff decision by a court of appeals,"\textsuperscript{69} is accurate as far as it goes, the decision should not be characterized as a defeat for the plaintiff. Although the Court rejected the Eighth Circuit's pro-plaintiff conclusion that subjective criteria carry little weight in rebutting a prima facie case,\textsuperscript{70} the Court did approve a proof structure which clearly was intended to assist plaintiffs who have only\textsuperscript{71} circumstantial evidence, as distinguished from direct evidence, in proving intentional discrimination. Indeed, the Court consistently has characterized the McDonnell Douglas proof structure as an aid to plaintiffs.\textsuperscript{72} Furthermore, the Court has in many of the disparate treatment cases limiting McDonnell Douglas, as Professor Malamud recognizes, extolled the discrimination laws and proclaimed their laudable goal of eradicating discrimination.\textsuperscript{73} One may characterize such statements as "mere lip service," but the Court has actually rendered decisions that are, at least to some extent, consistent with the recognized policies. For example, in \textit{McKennon v. Nashville Banner Publishing Co.},\textsuperscript{74} after offering a succinct statement of the objectives of the employment discrimination laws, the Court rejected the Summers\textsuperscript{75} rule for the after-acquired evidence defense, stating that "[i]t would not accord with this scheme" if after-acquired evidence precluded all relief in an employment discrimination action.\textsuperscript{76} In short, Professor Malamud perceptively cri-
tics the view of McDonnell Douglas and its progeny, pointing out that those cases are perhaps not as pro-plaintiff as the prevailing view describes them. She goes too far the other way, however, in essentially characterizing the McDonnell Douglas cases as pro-defendant. 77

Second, I think Professor Malamud recommends an inquiry into policy that is unduly restricted. Focusing on the Court’s disparate treatment cases fails to take into account that the Court has ravaged disparate impact, too, 78 and more thoroughly. 79 Moreover, focusing on the Court’s disparate treatment cases alone ignores the battle between the Court and Congress over the federal employment discrimination laws, with Congress having championed the more pro-plaintiff interpretations of the discrimination laws. 80

I recognize at least two arguments against the Court’s looking to Congress to identify policy that should have guided it to a different decision in Hicks. First, the McDonnell Douglas proof structure is the Court’s creation, not Congress’. My response is twofold: the federal employment discrimination laws were created by Congress; 81 and Congress has amended the employment discrimination laws and enacted new laws in light of its belief in the continued viability of the McDonnell Douglas analysis. Second, one could argue that the Court also held that, under certain circumstances, after-acquired evidence can be used to limit remedies. Corbett, supra note 30. I am not recanting here, but I am recognizing that there is a partial victory for the discrimination policies in McKennon.


79. Professor Malamud argues that in McDonnell Douglas and its progeny the Court was insulating disparate treatment against the pro-plaintiff innovations in disparate impact cases. Malamud, supra note 23, at 2237 & 2263-66.

80. The Civil Rights Act of 1991 was Congress’s response to several pro-defendant decisions of the Supreme Court. The Act overturned, in whole or in part, the following decisions: Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (diluting the “business necessity” defense and placing the burden of disproving it on plaintiffs); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (limiting the reach of 42 U.S.C. § 1981 in employment discrimination actions by holding that § 1981 does not apply to conduct occurring after formation of a contract); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989) (holding statute of limitations applicable to discrimination actions based on a facially neutral seniority plan begins to run on date of adoption of plan rather than date plan harms plaintiff); Martin v. Wilks, 490 U.S. 755 (1989) (holding that white plaintiffs harmed by affirmative action plan in consent decree in separate action were not precluded from challenging the plan); Independent Fed’n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (denying plaintiff class an award of attorney’s fees against union that intervened in class action to challenge settlement agreement).

81. Cf. William P. Murphy, Meandering Musings about Discrimination Law, 10 Lab. Law. 649, 654 (1994) ("If the statutes are intended to protect employees, is it proper judicial performance to render, over and over, single-minded interpretations that favor employers and that predictably produce congressional reversal?").
in *Hicks* must not have flouted Congress' view of federal employment discrimination policy; despite the proposal of legislation, Congress did not act to overturn *Hicks* legislatively. Congressional expressions, or the lack thereof, after *Hicks* obviously cannot indicate, however, what congressional expressions the Court should have considered in deciding *Hicks*. Given that Congress had recently, in the Civil Rights Act of 1991, overruled numerous pro-defendant decisions of the Court, one might have thought that the Court would discern and follow a congressional policy for interpreting the employment discrimination laws favorably for plaintiffs.

I attempt to determine the policy regarding employment discrimination from a broader perspective than did Professor Malamud. That perspective leads me to believe that the Court in *Hicks* should have determined that a significant public policy required it to hold that plaintiffs who establish prima facie cases and prove pretext are entitled to judgments.

In sum, the Supreme Court should have decided *Hicks* as four justices contended. Disagreeing with Professor Malamud, I think the Court should have accepted the "basic assumption" underlying the *McDonnell Douglas* proof structure. I also think, contrary to Professor Malamud's argument, that the Court should have been driven to that result by a strong public policy of eradicating employment discrimination.

Regardless of what the Court should have decided in *Hicks*, it decided it in a way that reduces the significance of *McDonnell Douglas*. Thus, Professor Malamud's second conclusion demands attention. Is a post-*Hicks* *McDonnell Douglas* analysis worth maintaining? Professor Malamud answers that it is not, and she further argues that plaintiffs would benefit from an open-ended, unrestricted inquiry regarding discrimination. I disagree.

82. See, e.g., Malamud, supra note 23, at 2235 n.28 (discussing the failure of proposed legislation).


84. Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 Rutgers L. Rev. 965, 1010 (1993) ("One might have thought that the conservative majority on this Court might have been chastened by Congress' actions in specifically rejecting several Supreme Court opinions . . .").
B. Why Professor Malamud Is Wrong About Abandoning McDonnell Douglas

Professor Malamud bases her argument for jettisoning *McDonnell Douglas* on her conclusion that the proof structure does not aid the trial court in its understanding of the pretrial factual record. She carefully goes through cases applying the proof structure at the summary judgment stage and concludes as follows: the prima facie case is troublesome; the Supreme Court has rendered the employer’s burden of production at the rebuttal stage almost nonexistent (although it is not consistently so applied by the district courts); and *Hicks* has left the federal courts uncertain what kind and quantity of evidence a plaintiff must produce to avoid summary judgment. I do not disagree with Professor Malamud on any of those points, but I do not think they justify abandoning the proof structure.

Professor Malamud’s point that *Hicks* left open the issue of what effect proving pretext has on motions challenging sufficiency of the evidence, motions for summary judgment and judgment as a matter of law, is one of the best arguments for retaining the *McDonnell Douglas* analysis. The proof structure still plays a significant practical role in the litigation of disparate treatment cases. Depending on how courts resolve that issue, the indirect route for producing sufficient evidence of intentional discrimination, and thus getting the issue of intentional discrimination before the jury, can be preserved. For those circuits that adopt the pretext-only approach, the *McDonnell Douglas* proof structure has an important role in courts’ assessment of challenges to the sufficiency of the evidence.

A related point made by Malamud is that dispatching with *McDonnell Douglas* would remove the cumbersome and restrictive steps to determining whether an employer discriminated and leave courts free to develop innovative concepts of intentional discrimination. A review of decisions in the Fifth Circuit since its adoption of a “no rules” approach to the sufficiency of the evidence suggests that,

85. For example, courts have difficulty determining what it means to be “qualified” in the context of different adverse employment decisions. Malamud, supra note 23, at 2282-90. Courts also struggle with what evidence is required to “create an inference of discrimination.” *Id.* at 2290-98. Finally, courts struggle with what effect a plaintiff’s failure to make out a prima facie case has. *Id.* at 2298-2301.
86. *Id.* at 2301-04.
87. *Id.* at 2304-11.
88. See infra notes 94-115 and accompanying text.
rather than encouraging innovative conceptualization of discrimination by courts, the rejection of special rules imposed by McDonald Douglas has resulted in courts not seeing discrimination, even when juries did.

Professor Malamud also rejects the notion that McDonald Douglas can be helpful to jurors in determining the ultimate question in employment discrimination cases: whether intentional discrimination occurred. Courts are divided on the issue of whether the McDonald Douglas analysis should be included in jury instructions. Those that include it seem to subscribe to the belief, inherent in the creation of the proof structure, that organizing the evidence into discrete and specific questions that explain its relevance leads to a better understanding of what intentional discrimination is than does the general question.

Finally, Professor Malamud concedes that discarding the "preference rules" that McDonald Douglas imposes on employment discrimination cases would have the symbolic effect of removing the "societal thumb on the scale." The symbolic value of stripping the special rules from employment discrimination cases gives Professor Malamud pause, but in the end, she concludes it is not enough to overcome her concerns with the practical meaninglessness of the McDonald Douglas proof structure. I think that Professor Malamud undervalues the symbolic significance of McDonald Douglas. It is the symbolic flame, reminding employers, employees, attorneys, judges, juries, and lawmakers that the employment discrimination laws restrict the omnipresent and almost omnipotent doctrine of employment at will.

1. McDonald Douglas' Role in Determining Whether Plaintiffs Satisfy Their Burden of Production: The Effect of Hicks

St. Mary's Honor Center v. Hicks is an overrated decision in terms of its devastating impact on plaintiffs in disparate treatment cases and its evisceration of the McDonald Douglas analysis. It was

90. Id. at 2323 ("Such legally complex instructions are hinderances (sic) to juror decision-making: psychological studies show that juries understand complex facts better than complex law.").
91. Not even the courts endorsing inclusion of a McDonald Douglas instruction would give the full statement including language regarding the shifting burdens of production. See discussion infra part II.B.2.a.
92. Malamud, supra note 23, at 2324.
93. Id.
94. See Developments in the Law: Employment Discrimination, supra note 77, at 1576,
heralded as a resolution of the "pretext-plus/pretext-only" split in the courts of appeals. The issue is whether proving pretext at stage three of the McDonnell Douglas analysis constitutes proof of discrimination. This is the so-called "indirect route" of proving discrimination articulated in Texas Department of Community Affairs v. Burdine. The courts following the pretext-plus approach rejected an indirect route of proving discrimination, requiring that plaintiffs produce evidence of pretext plus additional evidence of intentional discrimination. At the other pole, courts adhering to the pretext-only approach held that evidence of pretext alone was enough to prove intentional discrimination. Professor Lanctot described these distinct approaches to proving intentional discrimination under the McDonnell Douglas framework in a landmark article published in 1991. The context in which courts were grappling with this issue was almost always defendants challenging the sufficiency of plaintiffs' evidence by motions for summary judgment or directed verdict or jnov. Stated differently, the question before the courts was whether plaintiffs who had proved pretext could survive challenges to the sufficiency of the evidence, not whether plaintiffs who had proved pretext had necessarily proven intentional discrimination and thus won the case. The distinction is between a plaintiff satisfying her burden of production and a plaintiff satisfying her burden of persuasion.

St. Mary's Honor Center v. Hicks was a case in which a plaintiff argued that he was entitled to a judgment in a case because the trial court found that he had proved the employer's articulated reason was pretextual. Thus, Hicks was a case about the meaning of pretext in

1593.

95. 450 U.S. 248, 256 (1981) ("She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.").


97. I use the word in its legal procedural sense. Both motions for summary judgment and motions for judgment as a matter of law challenge the sufficiency of the evidence for a case to be submitted to the finder of fact. See, e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 & n.4 (5th Cir. 1996) (en banc); see also FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 7.15 (4th ed. 1992).

98. With the 1991 amendment of Federal Rules of Civil Procedure Rule 50, motions for directed verdict and jnov are now collectively known as motions for judgment as a matter of law.


100. See Hicks, 509 U.S. at 508-09.
the context of burden of persuasion, not burden of production. The
holding of *Hicks* that a plaintiff does not necessarily win a case by
proving pretext alone does not mean that courts are precluded from
holding that plaintiffs can survive challenges to the sufficiency of the
evidence by proving pretext alone (the pretext-only approach).
While *Hicks* removes the pretext-only sword from plaintiffs' hands, it
does not remove the more important pretext-only shield.

In view of the foregoing explanation of *Hicks* and the pretext-
plus/pretext-only debate, one may ask why *Hicks* should provide a
reason to jettison the *McDonnell Douglas* framework. The role of
the *McDonnell Douglas* analysis was always more important at pre-
trial stages than it was to the ultimate resolution by the finder of fact.
Indeed, with the availability of jury trials in Title VII cases after the
passage of the Civil Rights Act of 1991, some courts do not give jury
instructions based on *McDonnell Douglas*. Professor Malamud's
answer is not only that *Hicks* left the courts uncertain what pretext
approach to adopt, but more importantly, that she thinks neither
the pretext-plus nor the pretext-only approach should be adopted to
determine sufficiency of the evidence questions. She believes that
*McDonnell Douglas* does not do a good job of shaping the pretrial
decisionmaking, and any rules based on that analysis are likely to
"misfire." For policy reasons discussed above, I disagree with
Professor Malamud, and I favor the pretext-only approach. Moreo-
ver, I think the experience in the Fifth Circuit, which essentially
abandoned *McDonnell Douglas* pretext-based rules and adopted Pro-
fessor Malamud's no-rules approach, thus far has demonstrated that
plaintiffs in employment discrimination cases do not fare better on

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101. See, e.g., Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995); 2 MICHIGAN STANDARD JURY INSTRUCTIONS (CIVIL) § 105.04 (2d ed. 1991). However, the issue has generated a split in the circuits. See Smith v. Borough of Wilkinsburg, 147 F.3d 272, 279-81 (3d Cir. 1998) (describing the split, with the Seventh Circuit favoring not giving a pretext in-
tuction to the jury, and the Second and Third Circuits holding that "judors must be instructed
that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating
intentional discrimination by a preponderance of the evidence can be met if they find that the
facts needed to make up the prima facie case have been established and they disbelieve the em-
ployer's explanation for its decision"). See discussion infra part II.B.2. (discussing whether
*McDonnell Douglas* analysis should be included in jury instructions).

102. Malamud, supra note 23, at 2305.

103. Id. at 2311 ("[D]isparate treatment cases differ from each other in the strength of their
evidence, and . . . 'rules' are likely to misfire when they are based upon the assumption that
cases are equally strong once all the relevant McDonnell Douglas-Burdine hurdles have been
jumped.").

104. Id.

105. Id.

106. See supra part II.A.2.
motions for summary judgment and judgment as a matter of law without rules based on the proof structure.

There is a circuit split on the pretext-plus/pretext-only issue. The Equal Employment Opportunity Commission favors the pretext-only approach. Because courts are free to adopt, and some are adopting, the pretext-only approach on the sufficiency-of-the-evidence issue, the McDonnell Douglas analysis is still serving its original purpose of assisting plaintiffs who have only circumstantial evidence of discrimination. St. Mary's Honor Center v. Hicks has not changed that, and thus that case provides no reason to abandon the McDonnell Douglas proof structure.

The case for preserving McDonnell Douglas because of its role in determining sufficiency of the evidence is even stronger in light of the results in the Fifth Circuit, which adopted Professor Malamud's no-rules approach. In Rhodes v. Guiberson Oil Tools, the Fifth Circuit cited Professor Malamud's article in support of its decision to adopt a no-rules approach to the effect on the sufficiency-of-the-evidence issue of proving pretext. Even the Fifth Circuit, however, was unwilling to adopt Malamud's approach "hook-line-and-sinker": the court was unwilling to abandon the McDonnell Douglas proof structure. The court stated its no-rules version of McDonnell Douglas as follows:

We believe that the question [effect of pretext] does not yield a categorical answer. Rather, we are convinced that ordinarily such verdicts [supported by pretext evidence] would be supported by sufficient evidence, but not always. The answer lies in our traditional sufficiency-of-the-evidence analysis. [citing Malamud].

Despite the assurance that "ordinarily such verdicts would be supported by sufficient evidence," the progeny of Rhodes suggest that the no-rules approach is resulting in employment discrimination


109. 75 F.3d 989 (5th Cir. 1996) (en banc).

110. Id. at 993.

111. Id.

112. Id. (emphasis added).
plaintiffs losing cases (on appeal) on challenges to the sufficiency of the evidence on both motions for summary judgment and motions for judgment as a matter of law. Of course, plaintiffs should lose some cases without the jury deciding them, but the results in the two-and-a-half years since *Rhodes* was decided are eye-opening. Consider, for example, that the Fifth Circuit, under *Rhodes*, frequently is reversing judgments on jury verdicts in which the jury determined that there was discrimination.\(^{113}\) I am not suggesting that any one of these decisions is wrong, but I am suggesting that the use of *Rhodes* to overturn so many jury findings of discrimination is alarming. It may be that the Fifth Circuit would have reached the same results even if it had adopted the pretext-only approach, but that is highly unlikely.\(^{114}\) Indeed, the Fifth Circuit seems to be reveling in its *Rhodes* unusual case escape valve—the language “but not always.” For example, in one of its decisions overturning an employment discrimination plaintiff’s jury verdict, the court stated:

> [A]lthough evidence of pretext, in conjunction with a prima facie case, usually creates a jury question on the ultimate issue of discrimination, it does not always do so. We engage in “traditional sufficiency-of-the-evidence analysis” to determine whether reasonable jurors could find discriminatory treatment. In other words, it is possible for a plaintiff’s evidence to permit a tenuous inference of pretext and, by extension, discrimination, and yet for the evidence to be insufficient as a matter of law to support a finding of discrimination.\(^{115}\)

I do not think that the Fifth Circuit’s no-rules approach, in which

\(^{113}\) See, e.g., Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998) (reversing trial court’s denial of motion for judgment as a matter of law after jury verdict for plaintiff in age discrimination case); Bennett v. Total Minatome Corp., 138 F.3d 1053 (5th Cir. 1998) (reversing denial of motion for judgment as a matter of law after jury verdict in favor of plaintiff in age discrimination case); Nichols v. Lewis Grocer, 138 F.3d 563 (5th Cir. 1998) (reversing denial of motion for judgment as a matter of law after jury verdict in favor of plaintiff in state law sex discrimination case); Travis v. Board of Regents of Univ. of Tex. Sys., 122 F.3d 259 (5th Cir. 1997) (reversing trial court’s denial of motion for judgment as a matter of law after jury verdict in favor of plaintiff in state law sex discrimination case), *cert. denied*, 118 S. Ct. 1166 (1998); Swanson v. General Servs. Admin., 110 F.3d 1180 (5th Cir.) (reversing trial court’s denial of motion for judgment as a matter of law after jury verdict for plaintiff in sex discrimination case), *cert. denied*, 118 S. Ct. 366 (1997); Ontiveros v. Asarco, Inc., 83 F.3d 732 (5th Cir. 1996) (reversing trial court’s denial of motion for judgment as a matter of law after jury verdict in favor of plaintiff in national origin discrimination case).

\(^{114}\) The pretext-only approach does not insulate a judgment on jury verdict against reversal by an appellate court. Judge Garza, concurring in *Rhodes*, stated that this would be the effect of adopting the pretext-only approach, which he favored. *Rhodes*, 75 F.3d at 999 (Garza, J., concurring specially). This is wrong because an appellate court can determine that there was insufficient evidence of pretext. See Pledger, *supra* note 99, at 1407-09 (discussing Judge Garza’s concurrence).

\(^{115}\) *Travis*, 122 F.3d at 263.
plaintiffs frequently lose on appeal notwithstanding jury verdicts in their favor, is what Professor Malamud envisioned when she recommended rejecting pretext-plus and pretext-only and abandoning *McDonnell Douglas*. Nonetheless, it has happened, and I think it offers a good reason to keep *McDonnell Douglas* and to attach procedural significance to the third stage evidence of pretext by adopting the pretext-only approach.


Professor Malamud argues that not only has *McDonnell Douglas* been unhelpful and confusing to courts in deciding sufficiency of the evidence, but it is even less helpful and more confusing to juries when included in jury instructions.\(^\text{116}\) It is important to remember that, before passage of the Civil Rights Act of 1991, jury trials were not available in Title VII cases. As Professor Malamud points out, some courts do not include the *McDonnell Douglas* analysis, or a pretext instruction, in jury instructions. A major reason usually given is that articulated by the Supreme Court in *United States Postal Service Board of Governors v. Aikens*: \(^\text{117}\) once an employment discrimination case is fully tried, the court should not return to the question of whether the plaintiff adduced sufficient evidence to establish a prima facie case, but instead it should determine the ultimate question of whether the defendant intentionally discriminated. \(^\text{118}\)

Whether *McDonnell Douglas* should be included in jury instructions may be a large enough topic for an entire article, but it bears noting here that its inappropriateness is not as clear as Professor Malamud suggests. First, such an instruction is appropriate under current post-*Hicks* employment discrimination law. Second, such an instruction is helpful to jurors in determining whether intentional discrimination occurred.

*(a) Appropriate Under Current Law*

One way to consider this issue is whether, under the post-*Hicks* state of the law, it is appropriate to give a *McDonnell Douglas* jury instruction. The *Aikens* statement simply instructed courts not to go


\(^{117}\) *460 U.S. 711* (1983).

\(^{118}\) *Id.* at 775; see Hennessy v. Penril Datacomm Networks, Inc., *69 F.3d 1344, 1350-51* (7th Cir. 1995) (quoting *Aikens*).
back and determine sufficiency questions when they have moved beyond sufficiency determinations (burden of production) to the point where preponderance of the evidence (burden of persuasion) is to be decided. *Aikens* did not say that pretext evidence should not be considered expressly in determining whether the plaintiff satisfied the burden of persuasion. A couple of developments since *Aikens* call into question whether that case supports not including *McDonnell Douglas* in jury instructions. First, there are now jury trials in Title VII cases, and it is not obvious that the Supreme Court’s admonition to courts would apply equally to juries. Second, the admonition in *Aikens* was not to return to considering the prima facie case when the case is fully tried and the issue before the court is whether the burden of persuasion has been satisfied. That directive does not apply equally to the question of whether the defendant’s articulated reason was pretextual. Whereas the prima facie case at the first stage of *McDonnell Douglas* is about the plaintiff’s burden of production, the pretext question at the third stage is relevant to both burden of production and burden of persuasion. The Supreme Court stated in *St. Mary’s Honor Center v. Hicks* that “rejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.” This passage suggests that it would be appropriate to include an instruction regarding the third stage of *McDonnell Douglas* in jury instructions, stating that if the jury disbelieves the articulated reason it may find that the plaintiff has proven intentional discrimination. The two circuits that have endorsed including a pretext instruction have relied on *Hicks*. The fact that two circuits approve of a pretext jury instruction and at least one circuit rejects such a jury instruction, indicates that *Aikens* does not foreclose the jury from considering a part of the *McDonnell Douglas* analysis.

Even if *Hicks* permits such an instruction, however, Professor Malamud argues that it is inappropriate because such an instruction will simply confuse jurors. She is partially correct. The entire *McDonnell Douglas* analysis, with its language about shifting burdens of production, may confuse jurors. Furthermore, stages one and two

119. In *Aikens*, the sufficiency issue with which the lower courts were grappling was whether plaintiff had established a prima facie case. 460 U.S. at 713-14.

120. *Hicks*, 509 U.S. at 511 (emphasis in original).


primarily deal with sufficiency issues that are properly decided by the
court, not the jury, anyway. Nonetheless, the pared-down instruction
required by the Second and Third Circuits should be given:

[T]he jury needs to be told two things: (1) it is the plaintiff’s burden
to persuade the jurors by a preponderance of the evidence that the... job... was denied because of race (or, in other cases, be-
cause of some other legally invalid reason), and (2) the jury is enti-
tled to infer, but need not infer, that this burden has been met if
they find that the four facts previously set forth [facts proving
prima facie case] have been established and they disbelieve the de-
fendant’s explanation.121

In approving such an instruction, the Third Circuit rejected
other types of instructions as inadequate.124 At the heart of the court’s
rejection of other types of instructions as inadequate is the concern
that invidious employment discrimination is hard to ferret out, and
the issue is what kind of instruction that relates the law to the evi-
dence will help the jury with that ultimate question. The court sup-
ported its mandate of the pared-down McDonnell Douglas instruc-
tion, explaining that the “[permissible] inference of discrimination
arising from pretext” is based on common sense.125 The instruction is
needed, however, because

[w]ithout a charge on pretext, the course of the jury’s deliberations
will depend on whether the jurors are smart enough or intuitive
enough to realize that inferences of discrimination may be drawn
from the evidence establishing plaintiff’s prima facie case and the
pretextual nature of the employer’s proffered reasons for its ac-
tions. It does not denigrate the intelligence of our jurors to suggest
that they need some instruction in the permissibility of drawing that
inference.”126

(b) Appropriate Because of its Helpfulness in Determining the
Ultimate Question

All of the foregoing discussion about the appropriateness of a
McDonnell Douglas jury instruction takes place in a world governed
by the Hicks brand of McDonnell Douglas analysis. Professor Mal-
mud’s ultimate suggestion is that McDonnell Douglas be abandoned

123. Cabrera, 24 F.3d at 382 (footnotes and citations omitted); see also Smith, 147 F.3d at
280 (“[J]urors must be instructed that they are entitled to infer, but need not, that the plaintiff’s
ultimate burden of demonstrating intentional discrimination by a preponderance of the evi-
dence can be met if they find that the facts needed to make up the prima facie case have been
established and they disbelieve the employer’s explanation for its decision.”).
124. Smith, 147 F.3d at 280.
125. Id.
126. Id. at 281.
entirely. Thus, it is fair to ask whether *McDonnell Douglas* is helpful to jurors in determining the ultimate question. The Supreme Court established the proof structure because of the difficulty of determining the causation question in the absence of direct evidence. As the Court has recognized, the ultimate issue involves resolving a state of mind — discriminatory intent.127 In other contexts, the law has addressed this difficult determination of a subjective state of mind by creating a more objective determination that is more easily evaluated by factfinders. For example, it is basic blackletter law that the intent that is necessary to prove an intentional tort can be established by proving either that the tortfeasor had the purpose to produce the results (subjective state of mind) or that the tortfeasor knew to a substantial certainty that the results would be produced (objective standard to assess state of mind).128 Is a determination of pretext under the *McDonnell Douglas* analysis any less probative of intentional discrimination than knowledge to a substantial certainty is of intent in tort law? I say a determination of pretext is probative of intentional discrimination and appropriate on two grounds: as a matter of fact (employers who give pretextual reasons usually have intentionally discriminated);129 and as a matter of policy (even though the proxy of pretext results in errors, strong public policy justifies tolerating such errors).130 Professor Malamud disagrees.


Professor Malamud attempts to buttress her argument by positing that *McDonnell Douglas* “lacks the core of principle to which [Karl] Llewellyn would look for interpretive guidance.”131 She then explains that “the earlier cases in the McDonnell Douglas-Burdine line contain readily quotable passages explaining the need to eradicate discrimination,”132 but that the Court diluted those proclamations by including in “the same cases . . . passages, less quotable but more closely tied to the Court’s actual holding, that articulate a need to

129. See discussion supra part II.A.1.
130. See discussion supra part II.A.2.
131. Malamud, supra note 23, at 2312.
132. *Id.* at 2312-13.
protect management prerogative against undue incursions.\textsuperscript{133} Far from undermining the core of principle of \textit{McDonnell Douglas}, these passages in the Court's opinions vividly depict the clash between the employment discrimination laws and the employment-at-will doctrine. Thus, these passages evince not some flaw in \textit{McDonnell Douglas}, but rather a recognition that the employment discrimination laws "operate against the presumed backdrop of at-will employment."\textsuperscript{134}

The passages in the Court's opinions regarding employers' prerogatives and the results in many of the cases demonstrate why the \textit{McDonnell Douglas} proof structure remains vital to employment discrimination law even after \textit{Hicks}, or perhaps especially after \textit{Hicks}. Employment at will often has triumphed over the employment discrimination laws, as in \textit{Hicks}, and weakened \textit{McDonnell Douglas} as an aid to plaintiffs. Nonetheless, that proof structure still remains at the vanguard of the battle, serving as a constant reminder of the incursion of the federal employment discrimination statutes on the once inviolate domain of employer power and prerogative. As the sentinel guarding the border between employment discrimination law and employment at will, \textit{McDonnell Douglas} retains both practical and symbolic significance.

As discussed above, the employment-at-will doctrine is the ultimate manifestation of employer power and prerogative, entitling employers to take actions for a bad reason, good reason, or no reason.\textsuperscript{135} It is obvious that the employment discrimination statutes impinge on that doctrine to some extent, declaring particular "bad" reasons to be illegal.\textsuperscript{136} \textit{McDonnell Douglas} is an express recognition that the employment discrimination laws do check employers' formerly unbri-

\textsuperscript{133} \textit{Id.} at 2313.

\textsuperscript{134} Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1233 (3d Cir. 1994), \textit{judgment vacated}, 514 U.S. 1034 (1995); see also Kenneth G. Parker, Note, \textit{After-Acquired Evidence in Employment Discrimination Cases: A State of Disarray}, 72 TEX. L. REV. 403, 430 (1993) (asserting that Congress intended for Title VII to alter employment at will only "slightly"). During the debate over Title VII, Senator Hubert Humphrey stated as follows: "[E]mployers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin." 110 CONG. REC. 6549 (1964). See also Estlund, \textit{supra} note 30, at 1671 (stating that whether \textit{Hicks} is a correct interpretation of Title VII or not, "it vividly illustrates the gravitational pull of the at-will presumption even within the most entrenched province of wrongful discharge law").

\textsuperscript{135} See \textit{supra} note 29.

\textsuperscript{136} See Theodore Y. Blumoff & Harold S. Lewis, Jr., \textit{The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task}, 69 N.C. L. REV. 1, 71 (1990) (asserting that under the federal employment discrimination laws "[t]he nearly absolute freedom that the employer once enjoyed is gone").
dled prerogative. Under *McDonnell Douglas*, employers may not respond to charges of discrimination by asserting that they are free to act for any reason or no reason. Rather, the second and third stages of the proof structure require an employer to assert and defend its reason in order to ensure that the reason was not discriminatory. In view of the fact that many of the Court's decisions have both rhetorically and practically subordinated the discrimination laws to employer prerogatives, the *McDonnell Douglas* pronouncement is important to preserve the principle that employers charged with discrimination will be required to explain their reasons.

One could argue that even in an open-ended inquiry regarding employment discrimination, employers would defend by articulating and producing evidence regarding their legitimate reasons. I think that is true in the vast majority of cases. The *McDonnell Douglas* proof structure, however, mandates such a response. It gives procedural significance to both the employer's articulation of a reason and the employer's success or failure in responding to a plaintiff's proof of pretext. If an employer does not produce evidence of a legitimate, nondiscriminatory reason after a plaintiff makes out a prima facie case, the plaintiff is entitled to judgment. If an employer cannot meet an employee's evidence regarding pretext at the third stage, the analysis does not require a judgment for the plaintiff, but it does focus attention on the meaning of the employer's inability to credibly explain its actions. Although *Hicks* diminishes the functional significance of the third stage, it still will be unusual for a factfinder to disbelieve an employer's reasons but to conclude that the true reason was nondiscriminatory.

In a recent case, *Jordan v. Clay's Rest Home, Inc.*, the Virginia Supreme Court refused to adopt the *McDonnell Douglas* framework for a state wrongful discharge claim. The court's rationale supports

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137. *See supra* text accompanying note 132. Many of the Supreme Court's decisions subordinate employment discrimination law to employment at will. I trace these cases back to *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). In *Furnco*, the Court admonished courts not to reject employers' legitimate, nondiscriminatory reasons on the ground that less discriminatory practices are feasible. The Court explained that courts are not competent to restructure employers' business practices. *Id.* at 578. Later, the Court emphasized that employer prerogatives are preserved by Title VII, and proclaimed that "[t]his balance between employee rights and employer prerogatives turns out to be decisive in the case before us." *Price Waterhouse*, 490 U.S. at 239. Even in a case perceived to be a victory for plaintiffs because it rejected after-acquired evidence as a complete defense in employment discrimination cases, the Court conjured up the mantra regarding balance between employer prerogatives and employees' rights to permit use of such evidence as a limitation on remedies. *See McKennon*, 513 U.S. at 361-62.


139. 483 S.E.2d 203 (Va. 1997).
my argument that *McDonnell Douglas* is pivotal to employment discrimination law's holding its ground in its struggle with employment at will:

Given the Commonwealth's strong commitment to the employment-at-will doctrine, and because we conclude that Virginia's procedural and evidentiary framework for establishing a prima facie case is entirely appropriate for trial of wrongful discharge cases, we reject plaintiff's invitation to adopt the *McDonnell Douglas* indirect, burden shifting idea. The *McDonnell Douglas* outline, refined in later cases, was adopted by the Supreme Court in the context of Title VII actions under the federal Civil Rights Act. There was no focus, as here, on the employment-at-will doctrine.¹⁴⁰

In *Jordan*, the plaintiff alleged that she was wrongfully discharged for filing a workers' compensation claim and because of her race in violation of the public policy of Virginia.¹⁴¹ One month after plaintiff was terminated without any reason being given, the employer's attorney sent her a notice, stating in part: "You were an employee at will and as such your employer may terminate at anytime without cause, which was done."¹⁴² After rejecting the *McDonnell Douglas* framework for wrongful discharge actions, the court affirmed the granting of summary judgment for the defendant.¹⁴³ Although the concurring justices agreed that the plaintiff's case was very weak, the case demonstrates how employers might implement decisions and how courts might analyze cases if employment discrimination law were pitted against employment at will without the *McDonnell Douglas* framework.

In addition to *McDonnell Douglas*' role in the litigation context as guardian of the discrimination laws' "territory," I think that the proof structure has significance in day-to-day employment relations. Many employers, aware of the requirement of this formal proof structure that they articulate and defend their reasons in discrimination

¹⁴⁰. *Id.* at 207. A group of concurring justices joined battle on the proper balance between public policy prohibiting employment discrimination and employment at will:

[T]he majority seems to suggest that Virginia's strong adherence to the employment-at-will doctrine is more important than Virginia's strong public policy which prohibits gender and/or racial discrimination in the work place. . . . We have already determined that termination of employment based on racial discrimination violates clear state policy against such discrimination and gives rise to a cause of action for wrongful discharge, notwithstanding the employment-at-will doctrine. *Id.* at 208 (Hassell, J., concurring). Striking the balance differently than the majority, the concurring justices favored leaving open the question of applicability of the *McDonnell Douglas* proof structure. *Id.* at 209.

¹⁴¹. *Id.* at 204.

¹⁴². *Id.* at 205 (quoting the notice).

¹⁴³. *Id.* at 208.
cases, consider their decisions (and sometimes consult their attorneys) before acting. This stop-and-think function is particularly important in a society in which most of the employment discrimination is unconscious.\textsuperscript{144} If \emph{McDonnell Douglas} causes employers to pause to consider that they do not have unbridled freedom to act, it may enable them to identify their own unconscious discriminatory motivations. To the extent that the proof structure prompts such pre-litigation self-evaluation, it serves the objective of the discrimination laws to deter employment discrimination.

Finally, even if \emph{McDonnell Douglas} has little effect in preserving the incursion of employment discrimination law on employment at will either before or during litigation, it has symbolic significance. As Professor Malamud recognizes, symbolism is important. Such symbolism is particularly important when it defends against the primary threat to the discrimination laws. As long as \emph{McDonnell Douglas} declares that in intentional discrimination cases employers must state their reasons for their actions and have those reasons scrutinized, the discrimination statutes symbolically limit employment at will. I fear that loss of the symbolic limitation would be followed by the loss of all practical limitations.

III. CONCLUSION

Professor Malamud closes her article calling for the abandonment of \emph{McDonnell Douglas} by advising that it would be "better to let the cold winds of litigation blow."\textsuperscript{145} With the Court having thrown out the bathwater in \emph{Hicks}, I think we should keep the baby and swaddle it with whatever blankets we can find to protect it against those cold winds. Maybe, at the age of twenty-five, the baby is not as cute as it was in 1973. I still do not like throwing out babies or twenty-five year old proof structures. In both cases, too much is at stake. It is not time to jettison \emph{McDonnell Douglas}.

\textsuperscript{144} See supra notes 52-53 and accompanying text.
\textsuperscript{145} Malamud, supra note 23, at 2324.