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The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?

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THE NEW DISCRIMINATION LAW: *PRICE WATERHOUSE* IS DEAD, WHITHER *McDONNELL DOUGLAS*?

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I met a traveller from an antique land
Who said: Two vast and trunkless legs of stone
Stand in the desert. Near them, on the sand
Half sunk, a shatter'd visage lies, whose frown
And wrinkled lip, and sneer of cold command
Tell that its sculptor well those passions read
Which yet survive, stamp'd on these lifeless things,
The hand that mock'd them and the heart that fed;
And on the pedestal these words appear:
"My name is Ozymandias, king of kings:
Look on my works, ye Mighty, and despair!"
Nothing beside remains. Round the decay
Of that colossal wreck, boundless and bare,
The lone and level sands stretch far away.

—P.B. Shelley, *Ozymandias of Egypt*[1]

The process dictated by the Civil Rights Act of 1991 [in § 703(m)] is more useful than the analysis required by *McDonnell Douglas.*

—*Liu v. Amway Corp.*[2]

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[*] Professor of Law, Seton Hall Law School. I need to specially recognize Margaret Moses and Charlie Sullivan for both pushing me forward on this elusive trip I have undertaken. Charlie provided the apt quote from Shelley. I also want to thank Ken Adams, David "Jake" Barnes, Susan Bisom-Rapp, Bill Corbett, Tristin Green, Ann McGinley, Marc Poirier, Joe Slater, and Rebecca Hanner White for their insightful comments on various drafts. Finally, my research assistant, Dana Stumberger, Seton Hall Law School Class of 2005, provided significant help; she never complained when we seemed to be starting over. They all contributed greatly to this Article, though all mistakes are solely my responsibility.

[1] Percy Bysshe Shelley, *Ozymandias of Egypt, in* THE GOLDEN TREASURY OF THE BEST SONGS AND LYRICAL POEMS IN THE ENGLISH LANGUAGE 247 (Francis T. Palgrave ed., 1875).

[2] 347 F.3d 1125, 1141 n.6 (9th Cir. 2003).

Perhaps the most surprising decision of a rather surprising Supreme Court's 2002 Term[3] was *Desert Palace, Inc. v. Costa*.[4] While it was not unexpected that the Court might grant certiorari on an en banc decision of the Ninth Circuit favoring the plaintiff in an employment discrimination case,[5] it was startling that the Court was unanimous in affirming a proplaintiff outcome. Equally unexpected was the potential breadth of Justice Thomas's opinion for the Court.[6] While limiting the decision to a simple question of statutory interpretation—is "direct" evidence of discrimination required under § 703(m) of Title VII?—the logic of the Court's opinion will have a profound effect on individual disparate treatment cases. Section 703(m), which was added to Title VII in the Civil Rights Act of 1991,[7] provides: "Except as otherwise provided in this [title], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice."[8] Construing this provision for the first

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[3] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003) (striking down a voluntary affirmative action plan); Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (overruling Bowers v. Hardwick, 478 U.S. 1039 (1986)); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (rejecting a state sovereign immunity claim).

[4] 539 U.S. 90 (2003).

[5] Two notes describing the Ninth Circuit en banc decision, perhaps anticipating a reversal by the Supreme Court, both criticize it as inconsistent with Supreme Court precedent. *See* Brian W. McKay, Comment, *Mixed Motives Mix-Up: The Ninth Circuit Evades the Direct Evidence Requirement in Disparate Treatment Cases*, 38 TULSA L. REV. 503 (2003); Note, *Employment Law—Discrimination—Ninth Circuit Finds for Employee in a Mixed-Motive Case Without "Direct Evidence" of Discrimination*—Costa v. Desert Palace, Inc., 116 HARV. L. REV. 1897 (2003). *But see* Kelly Pierce, Comment, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in* Costa v. Desert Palace, Inc., 87 MINN. L. REV. 2173, 2212 (2003) (*"Costa* reached the correct conclusion.").

[6] Early attempts to answer some of the questions about the potential breadth of the decision can be found in several authorities. *See, e.g.*, William R. Corbett, McDonnell Douglas, *1972–2003: May You Rest in Peace?*, 6 U. PA. LAB. & EMP. L. 199, 219 (2003); Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 861 (2004); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003).

[7] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[8] 42 U.S.C. § 2000e-2(m) (2000) (emphasis added). Proving race or gender was a motivating factor guarantees plaintiff some relief but not necessarily full remedies. A companion provision, § 706(g)(2)(B), provides a "same decision" affirmative defense to full remedies in a § 703(m) case:

> On a claim in which an individual proves a violation under section [703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
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> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a

time, the Court applied a plain meaning approach, deciding that: "In order to obtain an instruction under [§ 703(m)], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[9] Rejecting literally hundreds of lower court decisions, the Court concluded that "direct evidence of discrimination is not required in mixed-motive cases."[10]

This straightforward application of a statutory provision—not reading a "direct" evidence threshold into a statute when Congress did not put one there—may not seem momentous. However, the decision is the latest in a series of employment discrimination cases by the Court, beginning in 1996 with *O'Connor v. Consolidated Coin Caterers Corp.*,[11] that take a sharply different tack from the cases that came immediately before. After a proplaintiff period in the early days of Title VII, the Court, between 1981 and 1993, appeared to implement antidiscrimination law by generating legal rules—i.e., rules that operated to keep plaintiffs from getting to trial or to sustain their verdicts in post-trial review. After 1996, however, the Court seems to have refocused individual discrimination cases away from the rules that keep plaintiffs from the jury and instead has focused on the evidence in the record and the inferences that can be drawn based on that evidence. By rejecting the pretext-plus rule and by carefully reviewing all of the plaintiff's evidence in the full record, *Reeves v. Sanderson Plumbing Products*[12] took a step in that direction. *Desert Palace* surely continues that evolution. Even more significantly, *Desert Palace* may revolutionize individual disparate treatment discrimination law.

This Article begins by briefly tracing the evolution of individual disparate treatment discrimination law. Part I develops the first approach adopted by the Supreme Court. In *McDonnell Douglas Corp. v. Green*,[13] the Supreme Court

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claim under section [703(m)]; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in [subsection] (A).

42 U.S.C. § 2000e-5(g)(2)(B) (emphasis added). Section 701(m) was also added which defines the term "demonstrates" which is used in both § 703(m) and § 706(g)(2)(B): "The term 'demonstrates' means meets the burdens of production and persuasion." 42 U.S.C. § 2000e-1.

9 *Desert Palace*, 539 U.S. at 101.

10 *Id.*

11 517 U.S. 308 (1996); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

12 530 U.S. 133, 150 (2000).

13 411 U.S. 792 (1973).

interpreted Title VII broadly, giving plaintiffs latitude to prove discrimination even in the absence of an employer's admission of discrimination and in the absence of substantial evidence of discrimination of any kind.[14] Almost immediately thereafter, however, the Court began to retreat from *McDonnell Douglas*. This second stage started with *Texas Department of Community Affairs v. Burdine*[15] and culminated in the extremely rule-oriented approaches in *Hazen Paper Co. v. Biggins*[16] and *St. Mary's Honor Center v. Hicks*.[17] These rules, and their progeny generated by the lower courts, made it increasingly difficult for plaintiffs, even those with compelling cases, to have their cases decided at trial.

Beginning in 1996, and before *Desert Palace*, the Court decided three cases, each reacting against rules created by the lower courts that operated to short-circuit plaintiffs' individual discrimination cases. However, these cases elaborated on the *McDonnell Douglas* mode of analysis. By the time *Desert Palace* was decided, the now heavily glossed *McDonnell Douglas* analysis offered a substantially more plaintiff-friendly law than that which had predominated previously. Part II develops the second approach of proof for individual disparate treatment created in the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[18]

Ironically, *Desert Palace* effectively expanded the reach of *Price Waterhouse v. Hopkins*, one of the few post-*McDonnell Douglas* cases viewed as plaintiff-friendly. *Price Waterhouse*, contrary to the prodefendant thrust of *Hazen Paper* and *Hicks*, favored plaintiffs by creating an alternative and more favorable method of analyzing disparate treatment cases.[19] But the benefits of

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[14] *McDonnell Douglas* can be seen as a "transformative" legal rule, i.e., a rule that operates to counter the application of typical approaches that, if applied, would undermine the purpose of antidiscrimination law. *See* Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AM. J. COMP. L. 89, 89–93 (1999).

[15] 450 U.S. 248, 252–53 (1981) (establishing a three-step litigation structure for *McDonnell Douglas* cases).

[16] 507 U.S. 604, 611–12 (1993) (evidence of pension discrimination is not probative of age discrimination even though age is correlated with pension status).

[17] 509 U.S. 502 (1993) (plaintiff must convince factfinder that she was the victim of defendant's intentional discrimination even if plaintiff proves a prima facie case and defendant's asserted reason is not worthy of credence).

[18] 490 U.S. 228 (1989).

[19] *Price Waterhouse*, 490 U.S. at 258. When the plaintiff could point to "direct" evidence of discrimination, the case would be analyzed pursuant to *Price Waterhouse*, whereby a prima facie case of discrimination could be established by showing that discrimination was a "substantial factor" in the employer's adverse action against the plaintiff. *Id.* at 240–42. The defendant, however, could escape liability by proving that it would have made the same decision even if it would not have discriminated. *Id.* at 242. If

Price Waterhouse were narrowly confined to a small subset of cases because of the boundary drawn between the two methods of proof—the presence or absence of "direct" evidence of the employer's intent to discriminate. Congress liberalized *Price Waterhouse* with amendments to Title VII in the Civil Rights Act of 1991,[20] but the extent of that liberalization was contested. The first two Parts set the stage for understanding *Desert Palace* and its ramifications.

Part III discusses the *Desert Palace* decision and the effect it had on cases brought pursuant to § 703(m). Part IV then shows that the *Price Waterhouse* method of proof has lost any independent significance apart from § 703(m). Part V analyzes the potential impact that *Desert Palace* may have on the *McDonnell Douglas* method of proving individual disparate treatment. Important for its core holding, *Desert Palace* may go well beyond its immediate predecessors in the *McDonnell Douglas* line of cases by creating the basis for a uniform method of proof for individual discrimination cases that focuses on the evidence and the inferences that can be drawn from that evidence, all without regard to differentiated rules regarding proof structures. In other words, without giving up the surviving advantages to plaintiffs created in the first round of interpretation of Title VII, discrimination litigation may increasingly resemble general civil litigation. Part VI discusses the implications for the litigation of individual disparate treatment cases under this more uniform structure of proof. It is the thesis of this Article that a new, uniform proof structure will evolve from *Desert Palace* and that the approach established in § 703(m) will apply to almost all individual discrimination cases.

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the plaintiff failed to point to "direct" evidence of discrimination, then as the default approach, *McDonnell Douglas* would apply. Using that approach, the plaintiff needed to prove that discrimination was the determinative influence in the employer's action she was challenging. She did this by proving that the most common legitimate reasons for the employer's decision did not apply to her and that the nondiscriminatory reason asserted by the defendant was not true. Such a showing would typically allow, but not require, the factfinder to draw the inference of discrimination because the reason advanced by the employer was pretext for discrimination.

[20] Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991).

I. THE EVOLUTION OF *MCDONNELL DOUGLAS* AND THE PRETEXT METHOD OF ANALYSIS

The story starts with the passage of Title VII of the Civil Rights Act of 1964.[21] While making it unlawful for an employer to discriminate "because of" an "individual's race, color, religion, sex, or national origin," Congress did not define "discriminate" or "because of."[22] That left it to the courts to develop the core prohibitions of Title VII and how they were to be applied. Two different definitions soon emerged. The first was "disparate impact" discrimination.[23] Intent to discriminate is not an element of a disparate impact case; instead, liability attaches if an employment practice of an employer has a disproportionate impact on a group protected by Title VII and if the practice is not justified by business necessity.[24] Subsequently, the Court developed the concept of disparate treatment discrimination, which has as its core the

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[21] 42 U.S.C. § 2000e (2000).

[22] The basic substantive provision of Title VII is § 703(a), which provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a). The terms "race, color, religion, sex, or national origin" were also undefined. Subsequently, "religion" was defined to require employers to reasonably accommodate the religious beliefs and practices of their employees, *id.* § 2000e(j), and "sex" was defined to include pregnancy, *id.* § 2000e(k).

[23] Griggs v. Duke Power Co., 401 U.S. 424 (1971). Disparate impact is consistent with § 703(a)(2), which makes it unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or *tend to deprive* any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added). The absence of an intent to discriminate element is also consistent with dictionary definitions of "discriminate." *See, e.g.*, THE NEW OXFORD AMERICAN DICTIONARY 488 (2001) (defining "discriminate" as "make an unjust or prejudicial distinction in the treatment of different categories of people or things, esp. on the grounds of race, sex, or age"); WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 564 (1996) (defining "discriminate" as "to make a distinction in favor of or against a person . . . on the basis of the group, class, or category to which the person . . . belongs rather than according to actual merit . . . ."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981) (defining "discriminate" as "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit").

[24] CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 4.01 (3d ed. 2002); *see also* Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473 (1999) (developing disparate impact theory to protect individuals from unintentional discrimination).

employer's intent to discriminate.[25] In distinguishing the two concepts, the Court in *International Brotherhood of Teamsters v. United States* noted that the disparate treatment notion was more intuitive:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .[26]

Describing disparate treatment as "the most easily understood type of discrimination" is, however, belied by the Court's next two sentences. The first one posits an unequal treatment concept of discrimination without an intent to discriminate element—"The employer simply treats some people less favorably than others"—while the next posits a state of mind notion—"Proof of discriminatory motive is critical." Presumably the synthesis of the two comes in the final clause of the second sentence providing that discriminatory motive is the key element but that it "can in some situations be inferred from the mere fact of differences of treatment."[27]

Within the category of individual disparate treatment (or intentional) discrimination cases, two separate methods of analyzing individual discrimination cases thereafter emerged:[28] the so-called *McDonnell Douglas* and *Price Waterhouse* approaches. The first method was articulated in *McDonnell Douglas Corp. v. Green*[29] where, without defining the terms "discriminate" or "because of," the Court established a process and method of

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[25] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (individual disparate treatment discrimination).

[26] 431 U.S. 324, 335 n.15 (1977). The Court distinguished disparate impact as follows:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Id. (internal citations omitted).

[27] Even if not unequal, some treatment of an employee can be disparate treatment if that treatment was motivated by discriminatory intent when it would not be discriminatory in absence of that intent.

[28] Another concept of what constitutes discrimination—systemic disparate treatment discrimination—which is intentional discrimination shown by employer policies or practices that discriminate, was also developed during this period. *See Teamsters*, 431 U.S. at 360.

[29] 411 U.S. 792; *see also* Van Detta, *supra* note 6, at 80 (arguing that *McDonnell Douglas* was wrongly decided in the first instance).

proof for individual intentional discrimination cases. The process was one of elimination[30] by which plaintiff could prove discrimination using circumstantial evidence without having to show that the employer had admitted that it was discriminating.[31] Plaintiff had to prove that the most common legitimate reasons[32] an employer might have for not rehiring the plaintiff in *McDonnell Douglas*—either that he did not meet the minimal qualifications or that no job was open—did not apply.[33] By doing so, plaintiff established a prima facie case. Eliminating these legitimate reasons for not rehiring plaintiff allowed the factfinder, without more, to draw an inference that an impermissible reason, here race discrimination, had motivated the employer.[34] Indeed, the prima facie showing *required* the inference unless the defendant responded by challenging the employee's proof or by providing another explanation. In short, the employer was required to respond. "The

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[30] *See* John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMP. L. REV. 145, 204 (1996) (describing *McDonnell Douglas* as involving a process of elimination).

[31] An admission against interest, such as a statement by the employer that "I didn't promote you because you are a women," would be significant evidence of discrimination. But, if Title VII was limited to such cases, the scope of application would be quite limited since employers have many interests in not making such admissions, especially if true. *See* Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1162–63 (1991).

[32] Eliminating the most common nondiscriminatory reasons still left open the possibility that some other nondiscriminatory reason or reasons may have motivated the employer.

[33] The Court elaborated the prima facie case requirements as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. The significance and scope of this rule-like statement has always been in doubt. While it clearly applied to the plaintiff in the case, it was not clear if it was case specific or if it set forth a more general rule. An accompanying footnote may be read as limiting the precise application of the rule to cases with similar fact patterns: "The facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

[34] In *Furnco Construction v. Waters*, 438 U.S. 567, 577 (1978), the Court described why this process of elimination set up in *McDonnell Douglas* supported drawing an inference of discrimination.

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we assume generally acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id. (emphasis added).

burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[35] In *McDonnell Douglas*, the defendant carried that burden by showing that Green, the plaintiff, had participated in illegal protest activities aimed at it and by claiming that it decided not to rehire Green because of that reason. With that rebuttal, the record included an alternative explanation that vied with plaintiff's claim of discrimination. Thus, the process of elimination was not satisfied. Nevertheless, the plaintiff had one more chance to win: He could prove "that petitioner's stated reason for respondent's rejection was in fact pretext."[36] Presumably, the plaintiff, by discrediting the defendant's supposedly legitimate reason, would re-establish the finding of discrimination supported by the prima facie case.[37] As we will see, however, things were not to be so simple.

A. The Period of Rule Generation Favoring Employers

By 1981, the Court began to change course by adopting rules for individual disparate treatment cases that favored employers.[38] In *Texas Department of Community Affairs v. Burdine*,[39] the Supreme Court rejected a lower court interpretation of *McDonnell Douglas* that shifted the burden of persuasion to the defendant to prove that the nondiscriminatory reason it asserted was in fact the actual reason for its conduct. Having decided that the plaintiff bore the burden of persuasion throughout, the Court then developed *McDonnell Douglas* into a three-step set of rules for litigating individual discrimination cases. First, if the factfinder believes the plaintiff's prima facie showing that the most common nondiscriminatory reasons do not apply and if defendant

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[35] *McDonnell Douglas*, 411 U.S. at 802.

[36] *Id.* at 804.

[37] The process of elimination involves a kind of Bayesian analysis. In the abstract, there are an almost infinite number of reasons that might motivate any given decision, but there are relatively few that are likely to be the actual reason. The plaintiff in *McDonnell Douglas* eliminated the most likely reasons to establish a prima facie case. While only a small subset of all the possible reasons, this showing is a larger subset of the likely reasons. That justifies requiring the employer to introduce evidence of other reasons. If, in turn, the defendant's reasons are held not to explain the action, it is fair to permit the factfinder to conclude that probability favors discrimination as the reason. *See generally* D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall,* Modus Operandi *and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 CARDOZO L. REV. 193, 200 n.15 (2002) ("Bayes' Theorem deals with sequential revision of probabilities from a starting point (the initial or prior probability) through the integration of new probability-affecting information."). My thanks to my colleagues: To Charlie Sullivan who pointed this out and to Mike Risinger who developed this theory as applied to evidence.

[38] While *McDonnell Douglas* involved the creation of a rule favorable to plaintiffs, the cases described in this section are defendant-friendly.

[39] 450 U.S. 248 (1981). Because of its emphasis on rules, *Burdine* can be seen as foreshadowing the period that was to come.

offers no alternative explanation, a presumption of discrimination is established. The plaintiff wins because it is reasonable to assume the employer did not act randomly, but with purpose.[40] Putting this another way, with no rebuttal reason from the employer, the only reason in the record is the plaintiff's claim that the employer discriminated.[41] Second, if the defendant does introduce evidence of a nondiscriminatory reason for its action, the presumption of discrimination raised by the prima facie case is rebutted. Since there is then evidence of two possible reasons explaining the employer's action[42]—either the reason the employer asserts or discrimination—there is no basis for drawing the inference of discrimination in preference to the employer's nondiscriminatory explanation. If the case goes no further, plaintiff loses for failing to carry her burden of persuasion that the adverse action taken against her by the employer was discriminatory.[43] The third and final step, however, gives plaintiff a last chance to win: The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may proceed 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 proferred explanation is unworthy of credence.[44]

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[40] The Court has indicated that it is to be assumed that employers make employment decisions for a reason. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[41] *Burdine*, 450 U.S. at 254 ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment because no issue of fact remains in the case.").

[42] There continues to be the possibility that other reasons, not in the record, actually motivated the employer. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993) (rejecting plaintiff's claim of discrimination and the nondiscriminatory reasons asserted by the defendant, the trial court nevertheless found that plaintiff failed to carry his burden of persuasion because the judge thought that the actual motivation for the employer's adverse decision was the personal animosity between plaintiff and his new supervisor, even though there was no evidence of that animosity in the record evidence).

[43] *Burdine*, 450 U.S. at 254–55.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff . . . . If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted . . . .

Id.

[44] *Id.* at 256. *McDonnell Douglas* involves a change from the standard approach in civil litigation for the surrebuttal of defendant's rebuttal. Generally, only evidence contradicting the defendant's factual assertion is

After all this, if there is evidence in the record sufficient to raise a question of fact on the ultimate question of whether the defendant's reason is pretext and, therefore, with other evidence supports drawing the inference that the plaintiff was the victim of discrimination, then the case goes to the factfinder, with the factfinder deciding whether to draw that inference. Thus, as of 1981, *McDonnell Douglas* and *Burdine* formed the basic structure of individual disparate treatment law.

Over time, the *McDonnell Douglas* method came to be identified by different nomenclature. One description labels it the "circumstantial evidence" test because it does not require evidence that amounts to an admission by the defendant.[45] Because this process eliminates reasons other than discrimination, *McDonnell Douglas* has also been called an "indirect" method of proof. Stripping away the reasons other than discrimination, which leaves discrimination as the likely explanation, is an "indirect" method of deciding whether the employer discriminated.[46] *McDonnell Douglas* also came to be identified as the "pretext" method because every case ultimately focuses on the third step set forth in *Burdine*. That step generally involves the plaintiff trying to prove that the nondiscriminatory reason the employer asserts is "unworthy of credence"—i.e., the reason asserted by the defendant does not really explain why the defendant acted as it did. With that proof, the factfinder can infer that

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admitted in surrebuttal. *See* 28 CHARLES ALAN WRIGHT & VICTOR GOLD, FEDERAL PRACTICE AND PROCEDURE § 6164 (2d ed. 1990). But, *McDonnell Douglas* allows a much broader range of evidence at the pretext stage:

> [E]vidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973). Further and "[e]specially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired." *Id.* at 804. This is less radical than it might seem, given that a Title VII trial follows the normal, two-step procedure of civil litigation. Thus, plaintiff puts in her case in chief, including all her evidence supporting a finding of pretext, followed by the defendant that puts in all its evidence in rebuttal.

[45] This also distinguishes *McDonnell Douglas* cases from *Price Waterhouse* cases that require "direct" evidence.

[46] "Indirect" is in contrast with a more "direct" way of deciding that discrimination was the motivating reason for the employer's decision. "Direct" could mean an admission against interest. But it might have a different meaning such as a violation of equal treatment: Despite being similarly situated but for their gender, the employer treated two employees differently. A violation of equal treatment seems at least more direct than the indirect process of elimination set up in *McDonnell Douglas*.

the employer's assertion was a pretext in the sense of covering up or hiding the real reason, which was discrimination.[47] Finally, the *McDonnell Douglas* approach has also been called the "single motive" method of proving discrimination because the question the factfinder is asked to decide can be articulated basically as an either/or proposition: Was the reason for the challenged action the reason asserted by the employer or was the reason discrimination as claimed by the plaintiff?[48]

In 1989, the Supreme Court rendered a series of decisions that involved a cutback in the scope of civil rights protections in a variety of areas.[49] Among them was *Patterson v. McLean Credit Union*,[50] where the Court discussed the scope of evidence that plaintiff could use to show pretext in a *McDonnell Douglas* case. On one hand, the Court reversed a lower court ruling that narrowed plaintiffs' range of possibly relevant evidence in the final, pretext stage to evidence specifically rebutting the nondiscriminatory reason asserted by the employer.[51] On the other hand, the range of evidence available to the plaintiff at the pretext stage was not described as broadly as that allowed in *McDonnell Douglas*.[52] Thus, the Court appeared to alter one of the distinctive

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[47] As the Court in *Burdine* recognized, this final step merges the issue of pretext with the ultimate issue of the defendant's motivation. That ultimate issue can be decided based on a direct, an indirect, or a combination of direct and indirect approaches.

[48] This "single motive" description does not, however, require plaintiff to prove that discrimination was the sole cause of the employer's action. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240–41 (1989), the Court noted that Congress did not intend the words "because of" in § 703(a)(1) and (2) to mean "solely because of." Further, Congress rejected an amendment to Title VII that would have established a sole cause standard. *See id.* at 241 n.7 (citing 110 CONG. REC. 13837 (1964)).

[49] *See* Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements In Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 983 n.196 (1994) (discussing the 1989 decisions of the Supreme Court that caused the 1991 Civil Rights Act to be enacted); *see also* 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991).

[50] 491 U.S. 164 (1989). The decision is notorious for its strained interpretation of 42 U.S.C. § 1981, wherein only contract formation was protected against race discrimination. *See* The Civil Rights Act of 1991, Pub. L. No. 122-166, § 101, 105 Stat. 1071 (1991) (amending 42 U.S.C. § 1981 to overturn this aspect of *Patterson* by adding new subsection (b) which states "for the purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship").

[51] "The District Court erred, however, in instructing the jury that in order to succeed petitioner was required to make [a] showing that she was in fact better qualified than the person chosen for the position." *Patterson*, 491 U.S. at 188. Had the lower court decision, which applied the rule for scope of surrebuttal evidence generally applicable in civil litigation, been upheld, that would have eliminated one of the distinguishing features of the *McDonnell Douglas* method: allowing plaintiff to introduce a broad range of evidence at the pretext step of an individual disparate treatment case.

[52] The Court described the range of pretext evidence that plaintiff might adduce:

> [P]etitioner could seek to persuade the jury that respondent had not offered the true reason for its promotion decision by presenting evidence of respondent's past treatment of petitioner, including

features of *McDonnell Douglas* by narrowing the evidentiary opportunities of plaintiffs.[53]

Much more significant cases generating prodefendant rules were the Supreme Court's two 1993 decisions interpreting *McDonnell Douglas.* The most notorious[54] decision was *St. Mary's Honor Center v. Hicks*,[55] which made

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> the instances of the racial harassment which she alleges and respondent's failure to train her for an accounting position.

Id. The opinion for the Court did not mention evidence of the general policy and practice of the employer concerning the employment of African Americans, especially statistical evidence. All of this was allowed as potentially relevant and probative evidence in *McDonnell Douglas. See Patterson*, 491 U.S. at 217 (Brennan, J., dissenting in part) (citing to the breadth of evidence that is potentially relevant and probative of pretext); *supra* note 29.

[53] Given that a trial of a Title VII case follows the normal civil trial practice of having the plaintiff first put in her entire case, including evidence of pretext, which is subject to defendant's cross examination, and then having defendant put on its entire case, also subject to plaintiff's cross, the breadth of the evidence admissible to prove "pretext" is not ultimately different from normal civil trial because the whole trial typically focuses on the "pretext" stage of the *McDonnell Douglas* analysis.

[54] *Hicks* has been severely criticized. Mark S. Brodin attacks *Hicks* for violating "two of the most basic tenets of American procedure . . . first, that the court is a passive tribunal, not an active player in the construction of arguments and theories; and second, that cases are to be decided solely on the basis of the evidence presented, not the conjecture of the factfinder." Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation*: St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 209–10 (1997). More broadly, he concludes that *Hicks* "stands as a veritable guide for avoiding liability. Title VII should not become the vehicle for legitimating the very conduct it is directed toward prohibiting." *Id.* at 239; *see also* Robert Brookins, Hicks, *Lies and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 994 (1995) (criticizing *Hicks* because "Title VII's rules must help plaintiffs pierce corporate and governmental veils of secrecy and . . . scrape away concreted discriminatory sediment"); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof of Structures: It's Not Time To Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMP. POL'Y J. 361, 366–67 (1998); Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green*: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 385 (1994); Ruth Gana Okejidiji, *Status Rules: Doctrine as Discrimination in a Post-*Hicks *Environment*, 26 FLA. ST. U. L. REV. 49, 52–53 (1998); Stephen Plass, *Truth: The Lost Virtue in Title VII Litigation*, 29 SETON HALL L. REV. 599, 629–32 (1998) (pointing out that, contrary to Justice Scalia's claim that even perjury does not warrant a verdict, employee lies in litigation are often outcome-determinative, including dismissal of their cases). Professor Henry Chambers argues:

> The Hicks Court also leaves the McDonnell Douglas structure in a somewhat confused state. By undervaluing the McDonnell Douglas structure and its implcations, the Hicks Court suggests that courts view evidence of pretext more skeptically than they should. Proving that an employer's LNRs [legitimate nondiscriminatory reasons] are untrue is not easy. Given that LNRs are provided by the employer presumably to fit the contours of its case and are vigorously defended by its counsel, convincing a factfinder that the LNRs are untrue or not credible is difficult and should be treated as powerful evidence of discrimination when it occurs. A plaintiff's showing of pretext should always be sufficient to avoid a directed verdict against a plaintiff and should generally yield a verdict for the plaintiff.

Henry K. Chambers Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573 (2001).

[55] 509 U.S. 502 (1993).

it much more difficult for plaintiffs to prove discrimination. The decision rejected the notion in *Burdine* that the *McDonnell Douglas* process operated to narrow the scope of the inquiry to a question of whether the reason for the employer's action was discrimination or the reason asserted by the employer, the "either/or" question. *Hicks* allows reasons for which there was no evidence in the record to be relied on by the factfinder to find against the plaintiff. While there would be no basis in the record to find that personal animosity was the real reason of the defendant for terminating the plaintiff, the plaintiff nevertheless lost because he failed to carry his burden of persuasion in proving the ultimate question, that the reason for the action was the intentional discrimination of the employer.[56]

Hicks dramatically limited the usefulness of the *McDonnell Douglas* process of eliminating all nondiscriminatory reasons as a threshold to drawing an inference of discrimination. Freeing the reasons requirement from any link to evidence in the record leaves open an almost infinite set of possible explanations other than discrimination. If the factfinder has a hunch the real explanation for defendant's action is some reason not even mentioned in the trial, the plaintiff may lose for failing to prove her case.[57]

Though subject to much less criticism than *Hicks*, *Hazen Paper Co. v. Biggins*,[58] written by Justice O'Connor, was arguably just as limiting to the full implementation of the prohibition against discrimination as was *Hicks*. Here, the Court restricted the range of circumstantial evidence from which a factfinder could draw an inference of discrimination by suggesting that any particular piece of evidence could be relevant only to one type of

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[56] The trial court rejected defendant's explanation that plaintiff was fired because of his disciplinary record but also failed to find discrimination because he thought that plaintiff was fired because of the personal animosity of his supervisor. The only evidence in the record concerning personal animosity was the denial by the supervisor that it played any role at all.

[57] Further, Justice Scalia's opinion suggested to some that, in the final, pretext stage of a *McDonnell Douglas* case, plaintiff could reach the factfinder only if she introduced evidence, in addition to proof, that the reason defendant asserted for its action was not the real reason. However, the holding of the Court, later confirmed in *Reeves*, is that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks*, at 511. But, Justice Scalia added language that "(1) the plaintiff must show '*both* that the reason was false, *and* that discrimination was the real reason,' and (2) 'it is not enough . . . to *dis*believe the employer.'" *Id.* at 511 n.4 (internal citations omitted) (emphasis in original). While Justice Scalia disclaimed that this language was inconsistent with the holding, *id.*, lower courts relied upon it to require the plaintiff to introduce additional evidence over and above evidence proving the prima facie case and proving that the defendant's asserted reason did not apply to the plaintiff in order to get to a jury.

[58] 507 U.S. 604 (1993).

discrimination. In *Hazen Paper*, plaintiff claimed both age discrimination and discrimination because of his pension status. Justice O'Connor concluded that relying on pension status is not a proxy for age, even though pension status does correlate with age.[59] While it is true that a decision based on years of service is not necessarily biased against workers over age forty,[60] *Hazen Paper* suggests that the correlation of pension status with the age of workers is not even circumstantial evidence that a factfinder could consider in drawing the inference of age discrimination. In *Hazen Paper*, the plaintiff proved that he was not discharged for the reason the employer asserted—doing business with competitors. The court said eliminating that as a nondiscriminatory reason, however, did not mean that it was reasonable to draw the inference that age discrimination was the motive for the employer's action. That was because there was another motive well supported by evidence in the record that explained the employer's action: the desire of the employer to prevent Biggins' pension from vesting. Given the ERISA violation for interfering with his pension, it would be difficult to infer that age discrimination motivated the employer: "[I]nferring age-motivation from the implausibility of the employer's explanation [that plaintiff was fired for doing business with competitors] may be problematic in cases where other unsavory motives, such as pension interference, were present."[61]

While it is possible that the employer's sole motivation for discharging Biggins was to prevent his pension from vesting, and so age discrimination was not at all implicated, it is also possible that his age was a factor in the decision. For example, the employer might not have discharged Biggins to prevent his pension from vesting if he had been much younger because receipt of any pension benefits would have been so much further off.[62] Failing to take

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[59] *Id.* at 611.

> On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service . . . . Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

Id.

[60] For example, an employee starting service at age eighteen will vest at age twenty-eight in a plan, like that in *Hazen Paper*, where pensions vested after ten years of service.

[61] *Id.* at 613.

[62] This is a variant on what is called "intersectional" discrimination. Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 193, 200–01 (David Kairys ed., rev. ed. 1990), describes intersectional discrimination based on race and gender:

account of the possible interaction of age and pension discrimination unduly narrows discrimination law by restricting the inferences that can be drawn from circumstantial evidence.[63] This suggests that evidence can be sliced and diced into separate pieces, with each piece tagged as relevant to only one issue. After *Hazen Paper*, some lower courts adopted just such a slice and dice approach to the evidence in *McDonnell Douglas* cases.[64]

The Court in *Hazen Paper* also expanded the scope available to employers for rebuttal, by taking the "legitimate, nondiscriminatory reason" phrase originated in *McDonnell Douglas* and removing any meaning to the term "legitimate." By accepting an illegal reason—interference with pension vesting—as a rebuttal to plaintiff's prima facie case, the Court allowed the defendant to advance any reason other than a reason that could be legally challenged by the plaintiff as a sufficient rebuttal.[65]

Finally, the Court appeared to adopt a high level of proof necessary to establish liability: "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role* in that process and had *a determinative influence* on the outcome."[66] This standard seems to be quite similar to a but-for showing; that is, the plaintiff must show that the defendant would not have made the decision it did but-for the age, sex, or race of the plaintiff.

I am suggesting that Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.

[63] Based on one sentence in the opinion—"Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly," *Hazen Paper*, 507 U.S. at 613 (internal citations omitted). Professor Gary Minda has teased out the possibility that such a showing of discrimination is consistent with *Hazen Paper*. *See* Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 537–39 (1997).

[64] See discussion of Fifth Circuit's approach in *Reeves*, *infra* notes 76–77 and accompanying text.

[65] In *Purkett v. Elem*, 514 U.S. 765 (1995) (per curiam), a case dealing with peremptory challenges to jurors, the prosecutor tried to explain the exclusion of blacks from the jury because of their hair length and facial hair. Relying on *Hazen Paper*, the Court held that even nonsensical explanations—"implausible," "fantastic," or "superstitious"—satisfied defendant's burden of producing a nondiscriminatory reason. (The *Purkett* Court did not cite *Hazen Paper*—it relied on *Batson v. Kentucky*, 476 U.S. 79 (1986).)

[66] *Hazen Paper*, 507 U.S. at 610 (emphasis added).

In sum, *Burdine*, *Patterson*, *Hicks*, and *Hazen Paper* all involved the Court generating rules that made it harder for a plaintiff's individual discrimination case to proceed to trial or to final judgment. Only three years after *Hicks* and *Hazen Paper*, however, the Court began to shift its focus in individual discrimination cases.

B. Moving Away from Narrowing Rules

Since *Burdine*, *Hicks*, and *Hazen Paper*, each of which reversed decisions for plaintiffs, the Supreme Court has decided four individual discrimination cases, all of which were unanimous victories for plaintiffs. Further, these decisions moved away from the prior approach of the Court by eschewing narrowing rules that prevent plaintiff from proving discrimination. Three of these cases have substantial impact.[67]

In *O'Connor v. Consolidated Coin Caterers Corp.*,[68] the Court unanimously overturned a rule developed by the Fourth Circuit for age discrimination cases that had created a "safe harbor" for defendants as long as the person who replaced the terminated plaintiff was also over forty-years old.

> The fact that one person in the protected class [of age 40 or over] has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out *because of his age* . . . . Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.[69]

At the time it was decided, *O'Connor* was widely seen as the Court's correction of the Fourth Circuit—which had gone too far in the direction

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[67] The fourth involves notice pleading of complaints of discrimination. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Second Circuit had dismissed the plaintiff's complaint under Rule 12(b)(6) of the *Federal Rules of Civil Procedure* for failure to state a claim upon which relief can be granted because the complaint did not plead the four factual claims used to establish a *McDonnell Douglas* prima facie case. In a unanimous decision, the Court, led by Justice Thomas, reversed. Rule 8(a) of the *Federal Rules of Civil Procedure*, which deals with pleading, establishes a notice pleading rule. The plaintiff's complaint satisfied that rule's requirement that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Under the Court's view, the four prongs of a *McDonnell Douglas* prima facie case do not "apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss," *id.* at 511, because "the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination." *Id.* at 510.

[68] 517 U.S. 308 (1996).

[69] *Id.* at 312–13.

envisioned by the Court in its 1993 decisions.[70] By providing such a safe harbor from age discrimination claims involving discharges, the Fourth Circuit in effect had created a partial judicial nullification of the Age Discrimination in Employment Act.[71] That was seen as taking the rule approach of *Hicks* and *Hazen Paper* to cut off plaintiffs' cases too far.

The second in time, but the most important, decision in the sequence of cases before *Desert Palace* was *Reeves v. Sanderson Plumbing Products*[72] Here, it became clearer that the Court was changing direction. Justice O'Connor, again for a unanimous Court, took two important steps away from the approach she and the Court had taken before 1996. First, the "pretext-plus" rule that Justice Scalia had suggested in dicta in *Hicks*,[73] which had been taken up by some of the lower courts including the Fifth Circuit that decided *Reeves*, was rejected. The "pretext-plus" rule operated to support summary judgment or judgment as a matter of law when the plaintiff had "only" evidence making out a prima facie case and evidence disproving defendant's asserted reason.[74] The "plus" rule required more evidence than that to go to trial or to uphold a verdict if the case had been sent to trial.[75] Rejecting that rule, the Court held that "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[76]

The Fifth Circuit's justification for the "pretext-plus" rule was language from *Burdine* (later quoted in *Hicks*) that the presumption of discrimination

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[70] MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 115–16 (5th ed. 2000).

[71] 29 U.S.C. §§ 621–34 (2000).

[72] 530 U.S. 133 (2000). For a fuller treatment of *Reeves*, see Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL'Y 177, 182–86 (2001) [hereinafter Zimmer, *Leading by Example*]; Michael J. Zimmer, *Slicing & Dicing Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577, 581–92 (2001) [hereinafter Zimmer, *Slicing & Dicing*].

[73] *See supra* note 57 for a description of the dicta of Justice Scalia in *Hicks* relied on by some lower courts to create the "pretext-plus" rule.

[74] Since most all the evidence of why the defendant acted the way it did toward the plaintiff is in the hands of the defendant, the "pretext-plus" rule substantially undervalues the accomplishment of a plaintiff in discrediting the defendant's asserted reason for its action.

[75] In *Burdine*, the Court rejected a rule that would give the plaintiff judgment as a matter of law when she proved her prima facie case and proved that the defendant's reason was unworthy of credence. The courts that adopted the "pretext-plus" rule would give the defendant judgment as a matter of law in that situation unless the plaintiff introduced additional evidence of discrimination. *See* Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 541 (2001); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 66–67 (1991).

[76] *Reeves*, 530 U.S. at 135.

created when the plaintiff initially proved the prima facie case "drops out of the picture" if the defendant introduces evidence of a nondiscriminatory reason for its action.[77] The Fifth Circuit read this language as dropping not only the presumption but also the probative value of the evidence supporting the prima facie case. The fact that the plaintiff had eliminated the most common nondiscriminatory reasons for the employer's decision was no longer considered when deciding whether to draw the inference of discrimination. With that evidence excluded from consideration, the process of elimination at the core of the *McDonnell Douglas* method meant that, with the only probative evidence being evidence that the defendant's reason was not credible, there was not sufficient evidence to allow a jury to draw the inference of discrimination. It is not surprising, therefore, that the court found that more evidence was necessary before the plaintiff would be able to prove discrimination. Hence, the "pretext-plus" rule.

Justice O'Connor rejected this extension of the language of *Burdine,* stating, "[A]lthough the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and 'inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'"[78] The rule that the evidence supporting the plaintiff's case must be considered when deciding summary judgment motions and motions for judgment as a matter of law brings *McDonnell Douglas* cases more in line with the approach used in general civil litigation. And in so doing, the Court seems to be turning away from the approach of *Hicks* and *Hazen Paper* that individual disparate treatment law should be dominated by legal rules that create obstacles for plaintiffs taking their cases to trial or in maintaining the fruits of their victories if they did win a verdict at trial.

In the second step away from the Court's approach in the preceding period of time, Justice O'Connor called for a more realistic review of the evidence when courts were deciding motions for summary judgment and for judgment as a matter of law. While reaffirming the rule that evidence supporting the plaintiff's case must be reviewed with every inference drawn in favor of the plaintiff,[79] Justice O'Connor found that the Fifth Circuit had misapplied the

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[77] *Hicks*, 509 U.S. at 511.

[78] *Reeves*, 530 U.S. at 143 (citations omitted).

[79] The Court described the appropriate way to apply Rule 50 of the *Federal Rules of Civil Procedure*:

rule in two significant ways. First, "the court disregarded critical evidence favorable to [Reeves]—namely, the evidence supporting [Reeves's] prima facie case and undermining [defendant's] nondiscriminatory explanation."[80] That meant that *McDonnell Douglas*'s process of elimination could again be used to draw an inference of discrimination.[81] Second, in addition to disregarding the evidence of a prima facie case and the evidence showing defendant's reason was not worthy of credence, the evidence of age-based comments of one decisionmaker, Chesnut, and the evidence that he was the actual decisionmaker behind Reeves's firing had not been considered since that evidence did not satisfy the Fifth Circuit's stringent definition of "direct" evidence.[82] That was error: "[W]hile acknowledging 'the potentially damning

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> [I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe . . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Id. at 150–51 (citations omitted).

[80] *Id.* at 152.

[81] In a criminal case, *Old Chief v. United States*, 519 U.S. 172, 187, 189 (1997), the Court described inference drawing:

> [Evidence] has a force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them . . . . A syllogism is not a story . . . .

Telling a compelling story is an important part of convincing a jury how to decide a case. Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 472 (2001), describes the decision process as follows:

> [J]urors generally want to do what they believe is morally right, . . . jurors are most likely to be persuaded when they are told a compelling story, and . . . a trial lawyer must be attuned to jurors' beliefs and expectations. Every good trial lawyer knows, for example, that she maximizes the likelihood of victory if she tells the jurors a credible story that makes them feel morally compelled to return a verdict for her client.

Contemporary evidence theorists argue that imagination is a crucial part of the process of drawing inferences that pulls the story together. *See, e.g.*, Vern R. Walker, *Theories of Uncertainty: Explaining the Possible Sources of Error in Inferences*, 22 CARDOZO L. REV. 1523, 1559–70 (2001) (explaining how jurors may derive conclusions from incomplete or conflicting evidence by using imagination).

[82] This approach of the Fifth Circuit was based on the boundary between *McDonnell Douglas* and *Price Waterhouse* cases. To utilize the *Price Waterhouse* approach, the plaintiff had to point to "direct" evidence of discrimination. According to the Fifth Circuit, that was evidence that proved intent to discriminate without the need to draw any inferences. Given that state of mind cannot be directly observed, arguably no plaintiff could

nature' of Chesnut's age-related comments, the court discounted them on the ground that they 'were not made in the direct context of Reeves's termination.'"[83] The Supreme Court further concluded that "the court also failed to draw all reasonable inferences in favor of [Reeves]."[84] The contrast with *Hazen Paper* is clear. In *Hazen Paper*, evidence that the plaintiff's vesting of pension rights was within weeks of occurring could only support drawing an inference of ERISA discrimination and could not, therefore, be used to draw an inference of age discrimination. Now, in *Reeves*, the fact that some evidence did not satisfy *Price Waterhouse* did not disqualify that evidence from being relevant in a *McDonnell Douglas* case. Evidence could be used to support any theory or method of proof as long as it was probative of the ultimate issue of defendant's intent to discriminate.

By requiring lower courts to consider, rather than disregard, all of the plaintiff's evidence in the record when deciding the defendant's motions for summary judgment and for judgment as a matter of law—and by reviewing

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satisfy the court's definition of "direct" evidence and so plaintiffs could never utilize *Price Waterhouse*. Even if slightly watered down to mean admissions against the defendant's interest, few cases would qualify for analysis pursuant to *Price Waterhouse*. With *Price Waterhouse* not applicable, the default method of analysis was *McDonnell Douglas*. In *Reeves*, the Fifth Circuit then held that ageist comments that did not satisfy its strict definition of "direct" evidence for a *Price Waterhouse* case were, therefore, not probative as circumstantial evidence of intent to discriminate in a *McDonnell Douglas* case.

[83] *Reeves*, 530 U.S. at 152–53. Thus, so-called "stray comment" evidence is circumstantial evidence of intent to discriminate. *See* Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001); Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 433 n.6 (1st Cir. 2000); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000); Russell v. McKinney Hosp. Venture, Inc., 235 F.3d 219, 225–26 (5th Cir. 2000); Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 922 (8th Cir. 2000). *But see* Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1140 (10th Cir. 2000) ("Age-related comments referring directly to the plaintiff can support an inference of age discrimination, but 'isolated [or] ambiguous comments' may be, as here, too abstract to support such an inference.") (alteration in original); Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219, 255 (2002) (arguing that stray remarks evidence should be treated the same as other circumstantial evidence).

[84] *Reeves*, 530 U.S. at 152. In addition to disregarding the evidence of defendant's ageist comments, the lower court also erred in how it evaluated other evidence:

> And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was "no evidence to suggest that any of the other decisionmakers were motivated by age." Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive . . . . In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

Id. at 152–53 (internal citations omitted).

that evidence carefully to draw all inferences that favor the plaintiff—the Court in *Reeves* both allowed *McDonnell Douglas* to continue to function and opened a path toward treating the litigation of individual discrimination cases the way civil litigation is treated generally. By rejecting the "pretext-plus" rule, which implicitly rejects the use of circumstantial evidence, and by rejecting the slicing and dicing away of circumstantial evidence, Justice O'Connor took important steps to redirect individual disparate treatment law toward a more holistic approach. This is directly at odds with the same slice and dice approach Justice O'Connor herself used in *Hazen Paper* and the Court took in *Hicks*.

When it was first decided, *Reeves* could have been yet another narrow case because, in one sense, it merely reaffirmed *Hicks* and then applied that holding to the facts of the case.[85] It could also be viewed as another decision, like *O'Connor*, that cut back a lower court that had simply gone too far in restricting anti-discrimination law. But, in fact, the effect of the Court's decision in *Reeves* should be seen as much more significant. The Fifth Circuit had in effect judicially nullified Title VII's prohibition of individual disparate treatment discrimination. That court's treatment of *Price Waterhouse* and *McDonnell Douglas*, separately and then together, had foreclosed most plaintiffs from getting a chance to prove their cases. First, given the Fifth Circuit's very strict definition of "direct" evidence, there were extremely few *Price Waterhouse* cases that could get to trial since so little evidence qualified as "direct."[86] Second, the evidence of sexist or racist comments by the employer that did not qualify as "direct" evidence was also deemed nonprobative as "circumstantial" evidence when the case proceeded as a *McDonnell Douglas* case.[87] By not qualifying as "direct" evidence, this evidence was simply disregarded as if it had been dropped from the record of the case. Third, the evidence proving the plaintiff's prima facie case was also dropped from the case, along with the presumption of discrimination, once the defendant introduced evidence of a nondiscriminatory reason for its action.[88]

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[85] Of course, some of what have become classic decisions transforming the law have been deceptively mild in their statements. *See, e.g.*, MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916) (where Judge Cardozo set up the modern law of products liability).

[86] Zimmer, *Leading by Example*, *supra* note 72, at 182.

[87] *Reeves*, 530 U.S. at 153; *see also* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218–19 (5th Cir. 1995) (concluding that a supervisor's statements to the plaintiff that he wanted to replace with a "younger and cheaper" worker and to a coworker that he was "going to get rid of the older employees with higher salaries" was not direct evidence of discrimination).

[88] *Reeves*, 530 U.S. at 143.

The "pretext-plus" rule then required plaintiff to introduce additional evidence in order to get to a jury. But, with the circumstantial evidence of racist, sexist, or ageist comments found nonprobative, it is not clear what that evidence could be. This nest of interrelated rules operated to deny most plaintiffs a trial or a verdict in their behalf after trial. The Supreme Court in *Reeves* changed this, though it did so in the relatively mild manner of applying the facts of the case to the general rules concerning motions for judgment as a matter of law.

In sum, *O'Connor* and *Reeves* were both unanimous decisions of the Court. Both rejected unduly restrictive approaches to individual discrimination that the lower courts had adopted in line with the Court's earlier decisions in *Hicks* and *Hazen Paper.* Looking at each case individually, the message the Court may have been sending was simply that the lower courts in these particular instances had cut back more than the Court intended in its decisions in *Hicks* and *Hazen Paper.* But, looking across all three decisions,[89] it is possible to see that the Court was doing more than that. These decisions may foreshadow a seismic shift in the Court's approach away from its earlier decisions in *Hicks* and *Hazen Paper* and perhaps away from *McDonnell Douglas* and *Burdine.* As will be seen, a parallel development appears to be occurring in the alternative method of proving individual disparate treatment discrimination that began with *Price Waterhouse,* led to the addition of §§ 703(m) and 706(g)(2)(B) to Title VII, and then to *Desert Palace.*

II. *PRICE WATERHOUSE* AND THE "DIRECT" METHOD OF PROVING DISCRIMINATION

A new method of proving discrimination had its genesis in 1989 in the Supreme Court's split decision in *Price Waterhouse v. Hopkins.*[90] The plurality opinion by Justice Brennan would find liability when plaintiff established that race, color, religion, sex, or national origin was "a motivating part" in defendant's decision but would then allow the defendant to escape liability completely if it could prove "that it would have made the same decision even if it had not allowed gender to play such a role."[91] Had Justice

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[89] The third decision is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), in which the Court rejected the idea that a complaint must plead the *McDonnell Douglas* elements in order to withstand a motion to dismiss for failure to state a claim upon which relief could be established. Notice pleading suffices. *Id.*

[90] 490 U.S. 228 (1989). *See generally* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 51 n.274 (1990) (proposing that lower courts would follow Justice O'Connor's approach).

[91] *Price Waterhouse*, 490 U.S. at 244–45. This approach to so-called mixed-motive cases has a history

Brennan garnered a majority, *Price Waterhouse* would have drastically expanded the possibilities for plaintiffs to prove discrimination, even if the exact relationship between *McDonnell Douglas* and *Price Waterhouse* was unclear.[92] To construct a decision of the Court, however, it was necessary to look to one of the concurring opinions.[93] In her concurrence, Justice O'Connor raised the level of showing from the plurality's "a motivating part" to "a substantial factor."[94] More important, she required the plaintiff to introduce "direct evidence of intentional discrimination" in order to use the "a substantial factor" test of liability.[95] This created a new method of proving individual disparate treatment discrimination that was independent of *McDonnell Douglas*. In dissent, Justice Kennedy characterized the holding of the Court in terms of Justice O'Connor's concurrence:

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision.[96]

The lower courts basically followed Justice O'Connor's approach as suggested by Justice Kennedy.[97]

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preceding *Price Waterhouse*. In *Mt. Healthy School District Board of Education v. Doyle*, the Court used an approach similar to *Price Waterhouse* in a case in which a public school teacher claimed he had been fired because he exercised his free speech rights. 429 U.S. 274 (1977). In *Wright Line*, the National Labor Relations Board established a similar way to deal with mixed-motive cases involving union discrimination. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). The Supreme Court, in *NLRB v. Transportation Management Corp.*, held that *Wright Line* was a permissible interpretation of the National Labor Relations Act. 462 U.S. 393 (1983).

[92] *See* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 579–83 (1996).

[93] In his concurrence, Justice White agreed with Justice O'Connor that the plaintiff needs to show that gender was "a substantial factor" in the defendant's decision in order to justify shifting the burden of persuasion to the defendant to prove the same-decision defense to liability. He did not say that the plaintiff needed to point to direct evidence in order to utilize the "a substantial factor" test.

[94] *Price Waterhouse*, 490 U.S. at 265–66. Justice White's concurrence agreed with the substantial factor level proposed by Justice O'Connor. *Id.* at 259.

[95] *Id.* at 276. Justice White did not indicate in his concurrence that he would require the introduction of direct evidence to use the substantial factor showing to establish liability.

[96] *Id.* at 280.

[97] *See generally* Blumoff & Lewis, *supra* note 90.

As of 1989, therefore, there were two different methods of analyzing individual disparate treatment cases: *McDonnell Douglas* and *Price Waterhouse*. This model dominated Title VII litigation in the lower courts for more than a decade. This bifurcated approach to individual discrimination cases made sense for the first two years after *Price Waterhouse* was decided, but it became curious in light of Congress' expansion of *Price Waterhouse* in its amendments to Title VII in the Civil Rights Act of 1991.[98] Congress added new §§ 703(m) and 706(g)(2)(B) to develop the *Price Waterhouse* approach in an even more plaintiff-friendly manner.[99] Section 703(m) provides that plaintiff can establish liability by proving that "race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice."[100] "A motivating factor" means that race or gender played any role, however minor, in the employer's decision.[101] This changed *Price Waterhouse* in two ways. First, the "a motivating factor" level of showing adopted the plurality's approach in place of the concurring opinion's "substantial factor" test. Second, the amendment changed the consequences of that showing. *Price Waterhouse* merely created a presumption of discrimination subject to the affirmative, same-decision defense, which was a full defense to liability. Under the amended statute, proving that race or gender was "a motivating factor" for the employer's

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[98] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[99] Section 107 of the Act amends Title VII to include §§ 703(m) and 706(g)(2)(B), 42 U.S.C. § 2000e-(2)(5) (2000). Describing the link between the defendant's conduct and discrimination as one involving the showing of "a motivating factor" adds for the first time to Title VII an explicit reference to the state of mind or intent of the employer. *Id.*

[100] 42 U.S.C. § 2000e-2(m) (emphasis added). By using the term, "motivating" in §§ 703(m) and 706(g)(2)(B), Congress for the first time expressly added a state of mind element in Title VII.

[101] The House report on the bill that became the 1991 Civil Rights Act provides:

> To establish liability under proposed Subsection 703[m], the complaining party must demonstrate that discrimination *actually contributed* to or was otherwise *a factor in* an employment decision or *action*. Thus, in providing liability for discrimination that is a "*contributing factor*," the Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.

H.R. REP. NO. 102-40, pt. 1, at 48 (1991) (emphasis in original). The change from "contributing factor" as referred to above to "motivating factor" was not intended to suggest any change in concept. In the House report accompanying the bill as finally passed by Congress, the change is described as follows: "The substitute's new language changes the grounds upon which an individual may bring suit against a company for discriminatory intent from that intent being a 'contributing' factor to a 'motivating' factor. *This change is cosmetic and will not materially change the courts' findings.*" 137 CONG. REC. H3922, 3944–45 (daily ed. June 5, 1991) (emphasis added); *see also* Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 893–95 (2004).

decision established liability. The affirmative defense merely allowed the defendant to limit the plaintiff's full remedies. Thus, if the plaintiff establishes liability using the "a motivating factor" approach, defendant has the opportunity to limit remedies, though not escape liability, by proving according to § 706(g)(2)(B), that it "would have taken the same action in the absence of the impermissible motivating factor."[102] The new provisions make no mention of the "direct" evidence requirement that had been required by most lower courts' reading of *Price Waterhouse*.

The lower courts, however, generally viewed the amendments as leaving the bifurcated approach of *McDonnell Douglas* and *Price Waterhouse* intact while liberalizing the *Price Waterhouse* strand. Thus, they accepted that Congress had lowered the threshold showing from Justice O'Connor's "substantial factor" to the "a motivating factor" test and had shifted the consequences of a defendant successfully carrying out the same-decision defense from a defense to liability to a diminution of full remedies. But most courts held that the plaintiff still had to have "direct" evidence of discrimination in order to utilize the approach that § 703(m) added to Title VII.[103] Absent plaintiff pinpointing some "direct" evidence, the *McDonnell Douglas* method based on "circumstantial" evidence continued to be applied by default. *Price Waterhouse* also came to be known as the "mixed-motive" test, since it provided for liability even though the employer acted with more than one motive, as long as one motive was discrimination.

Creating two separate methods of analysis and drawing the boundary between them based on the characterization of "direct" evidence set up a structure for individual disparate treatment law that proved impossible to implement coherently. The evidence in every individual discrimination case had to be parsed to determine if any of it qualified as "direct" evidence. If enough "direct" evidence was found, the case would proceed as a *Price Waterhouse* case. The "a motivating factor" level of showing would establish liability, but there would also be the possibility that the defendant could prove the same-decision defense to deny plaintiff full remedies. In the absence of "direct" evidence of discrimination, the default method of analysis was *McDonnell Douglas*, which would require the plaintiff to prove that

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[102] 42 U.S.C. § 2000e-(5)(B) (2000). While the provision uses the language "same action," this is a classic example of a same-decision defense.

[103] *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Bd. of Trs. of Univ. of Ala., 91 F.3d 1449, 1453–54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995).

discrimination played a role in and was the determinative influence in the employer's decision.[104] Such a bifurcation might have worked if the boundary between the two methods of analysis was coherent. But the lower courts could not begin to agree on what constituted "direct" evidence.[105]

By mid-nineteenth century, classical evidence theory had rejected the usefulness of the concept of "direct" evidence.[106] That is because "direct" evidence, if it means anything, must prove the fact at issue without the need to draw any inferences.[107] This is hard to apply to most facts that are legally relevant. It is impossible to apply to certain facts. The principal fact at issue in individual discrimination cases is the employer's intent to discriminate, or, in other words, its state of mind. There is, however, no method for directly observing a person's state of mind.[108] Therefore, even if "direct" evidence might be a useful concept in some other contexts,[109] it cannot apply to anyone's state of mind.[110] Nevertheless, several courts appear to have adopted this classical test and then, not surprisingly, found outrageously discriminatory statements by employers not to satisfy their strict definition of "direct" evidence.[111] In these circuits, plaintiffs were typically left to use the default *McDonnell Douglas* method.[112] Other courts adopted a broader view of

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[104] *See* Jones v. Union Pac. R.R., 302 F.3d 735, 742 (7th Cir. 2002) (holding that *McDonnell Douglas* requires that plaintiff show impermissible motive was the "determining factor").

[105] *See generally* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000).

[106] Evidence theory rejected the distinction between "direct" and "circumstantial" evidence in the nineteenth century. *See* Zimmer, *supra* note 92, at 613–16.

[107] *Id.* at 614–15.

[108] Many of us lack capacity to know our own state of mind at any particular moment much less be able to observe the state of mind of another. Lie detector tests supposedly uncover liars. But they work by measuring galvanic skin responses triggered by nervousness. The nervousness is assumed to be triggered by lying. Flunking a lie detector test is at best circumstantial evidence of lying because it is necessary to draw several inferences—that lying makes the liar nervous and that nervousness causes a galvanic skin response. Skilled liars may not get nervous when they lie and truth tellers may get nervous when given a test challenging their veracity.

[109] A classic example would be an eyewitness, in a case charging the defendant with driving through a red light, testifying that the light was red when the defendant's car entered the intersection. Even this requires, however, a conclusion that the witness is testifying truthfully as a threshold to accepting as fact that the defendant did drive through the red light.

[110] *See* Zimmer, *supra* note 92, at 602–04; Sullivan, *supra* note 31, at 1118–19.

[111] *E.g.*, Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1208 (10th Cir. 1999) (manager's statement calling the plaintiff an "incompetent nigger" within a day of his firing her was not direct evidence); Idurante v. Local 705, Int'l Bhd. of Teamsters, 160 F.3d 364, 366 (7th Cir. 1998) (decisionmakers statement that "all Italians were going to be fired" was not direct evidence).

[112] And in "pretext-plus" jurisdictions, such as the Fifth Circuit in *Reeves*, the plaintiff would lose at the summary judgment or judgment as a matter of law stages without evidence in addition to proof of a prima facie case and proof that defendant's asserted reason for its decision was not true.

"direct" evidence sufficient to trigger the use of *Price Waterhouse*, but those approaches, however phrased, really amounted to a showing of very good circumstantial evidence.[113] Those courts recognized that there was no real "direct" evidence of discriminatory intent. Therefore a broader definition of "direct" evidence was necessary if the *Price Waterhouse* method of proving discrimination was ever to be used.[114] But a distinction between circumstantial evidence and very good circumstantial evidence is no more stable than the distinction between "direct" and "circumstantial" evidence. In a word, individual discrimination cases sank into a quagmire. Placing evidence in "direct," "very good circumstantial," or "circumstantial" piles was impossible to do in any coherent way. This confusion set the stage for *Desert Palace.*

III. DESERT PALACE, INC. V. COSTA:[115] THE DECISION

Catharina Costa was a trailblazer. She was the only woman working in a warehouse, where she operated a forklift and pallet jacks.[116] Challenging her discharge that the employer said resulted from escalating disciplinary sanctions, Costa introduced evidence of unequal treatment.[117] She showed, for example, that when men were late for work, they were given overtime to make up the time lost; even when she was only a minute late, she was issued a written reprimand. Men were given overtime to make up for time lost for medical reasons; she was disciplined when she missed work for medical reasons. A male coworker was favored with the grant of overtime because he "had a family to support." She was singled out for "intense 'stalking' by one of her supervisors." Supervisors began to "stack" her disciplinary record in order to bring "this problem with Costa to a 'head.'" There was also testimony that she was the victim of sexual stereotyping, including being called "the lady

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[113] *See, e.g.*, Griffiths v. CIGNA Corp., 988 F.2d. 457, 470 (3d Cir. 1993); Ostwrowski v. Atl. Mut. Ins. Cos., 968 F.2d. 171, 182 (2d Cir. 1992).

[114] *See, e.g.*, Deneen v. Northwest Airlines, Inc., 132 F.3d 431, 436 (8th Cir. 1998); Thomas v. Nat'l Football League Players Assn., 131 F.3d 198, 204 (D.C. Cir. 1997).

[115] 539 U.S. 90 (2003).

[116] For a more complete statement of the facts than are recited by the Supreme Court, see the lower court opinions, *Costa v. Desert Palace, Inc.*, 268 F.3d. 882 (9th Cir. 2001), *rev'd en banc*, 299 F.3d 838 (9th Cir. 2002), *aff'd.* 539 U.S. 90 (2003).

[117] Relying on § 703(m), the plaintiff claimed discrimination because of unequal treatment. "[T]he evidence she presented showed that Costa was definitely treated differently than her male co-workers and a reasonable mind could conclude that it was because she was a woman." *Id.* at 888; *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (discharged white employees made Title VII claim by showing that similarly situated black employee was not discharged for theft of property from truck dock). *Costa* did not rely on either *Price Waterhouse* or *McDonnell Douglas.*

Teamster" and a "bitch;" she was described as having "more balls than the guys." She received a three-day suspension for complaining after the coworker called her a "f-----g c--t;" her coworker escaped all punishment. The culminating event involved a physical altercation in an elevator where another coworker shoved her against the wall, bruising her arm. As a result of this incident, Costa was terminated, with her termination order signed by her supervisor who had earlier expressed an intention to "get rid of that bitch."[118] Although her coworker was the aggressor, he received only a five-day suspension for his altercation with Costa. The employer claimed he received such a comparatively minor punishment because he had no prior disciplinary record in his twenty-five years on the job.

At trial of the plaintiff's claim of unequal treatment because of her sex, the trial judge gave two instructions to the jury that formed the heart of the issue on appeal. First, without objection from the employer, the trial judge instructed the jury with language crafted from § 703(m) of Title VII: "[T]he plaintiff has the burden of proving . . . by a preponderance of the evidence that she 'suffered adverse work conditions' and that her sex 'was a motivating factor in any such work conditions imposed upon her.'"[119] Second, the trial judge, over the defendant's objections that the plaintiff had failed to introduce any "direct" evidence, gave an instruction tying § 703(m) to the same-decision defense of § 706(g)(2)(B):

> If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff

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[118] There apparently was no attempt to treat this as "direct" evidence for purposes of invoking *Price Waterhouse.*

[119] *Desert Palace*, 539 U.S. at 96. The pattern civil trial instructions used in the Ninth Circuit use the "a motivating factor" showing for all individual discrimination cases. *See* Manual of Model Civil Jury Instructions for The Ninth Circuit § 12.1, 12.2 (2003) (using the "a motivating factor" standard both in *McDonnell Douglas* cases, in § 12.1, and in *Price Waterhouse* cases, § 12.2, with mixed-motive apparently defined as a situation where defendant introduces sufficient evidence to raise as a question of fact that it would have made the same decision even if it had not considered a prohibited characteristic such as race or gender).

> similarly, even if the plaintiff's gender had played no role in the employment decision.[120]

The jury awarded plaintiff a verdict of $364,377.74.[121] After the trial judge denied the employer's motion for judgment as a matter of law,[122] the employer appealed claiming that the trial judge erred in giving the mixed-motive instruction in the absence of any "direct" evidence that gender motivated Costa's discharge. A panel of the Ninth Circuit initially vacated.[123] The panel was unanimous in accepting Desert Palace's argument that all of Costa's evidence of gender discrimination was inferential, i.e., that it was circumstantial evidence requiring an inference of discrimination to be drawn. Since there was no "direct" evidence, the plaintiff's claim should have been assessed under the traditional *McDonnell Douglas* standard, not *Price Waterhouse*.[124] The Ninth Circuit then heard the case en banc. In a 7-4 decision, it affirmed in part and reversed and remanded in part.[125] Rather than enter what was characterized as the "quagmire"[126] over what was "direct" evidence, the court instead looked to the language of § 703(m) and concluded that, "the best way out of this morass is to return to the language of the statute, which imposes no special requirement and does not reference 'direct evidence.'"[127] By downgrading the employer's same-decision defense in § 706(g)(2)(B) from an affirmative defense to liability to a mere limitation on the plaintiff's remedies, Congress had abrogated "the premise for Justice O'Connor's comment"[128] in *Price Waterhouse* regarding "direct" evidence. The en banc court thus upheld the instructions as appropriate, whether or not "direct" evidence was introduced.

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[120] *Desert Palace*, 539 U.S. at 96–97. Presumably, the defendant objected not because the instruction gave it a possible affirmative defense, but because the plaintiff would establish liability even if the employer's asserted reason for its action (here the different disciplinary records of the two employees) was found to be the but-for cause of defendant's action. This would be so because the jury could find that sex was "a motivating factor" even though a very minor factor in the defendant's decision, and that would suffice to establish liability.

[121] This award was made up of $200,000 in compensatory damages, $100,000 in punitive damages, and $64,377.74 in backpay. *Desert Palace*, 299 F.3d at 846.

[122] The trial judge, however, granted a motion for remittitur and persuaded Costa to accept a 50% reduction in compensatory damages. *Id.* at 846–47.

[123] Costa v. Desert Palace, Inc., 268 F.3d 882 (9th Cir. 2001), *rev'd en banc*, 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

[124] *Desert Palace*, 268 F.3d at 888–89.

[125] *Desert Palace*, 299 F.3d at 865. The remand concerned the question of the application of *Kolstad v. American Dental Ass'n* to the punitive damages award. 527 U.S. 526 (1999); *see also supra* note 5.

[126] *Desert Palace*, 299 F.3d at 851.

[127] *Id.* at 853.

[128] *Id.* at 850–51.

The dissent by Judge Gould viewed the 1991 amendments to Title VII as merely amending portions of *Price Waterhouse*, leaving the rest unaffected.[129] He argued that "Congress, in amending Title VII, did not respond at all to Justice O'Connor's direct evidence requirement."[130] Congress did not eliminate the "direct" evidence threshold to the application of *Price Waterhouse* because the consequence—that *McDonnell Douglas* "would be effectively overruled"[131]—was too radical to infer from mere Congressional silence.

The Supreme Court, in an opinion by Justice Thomas, with a concurrence by Justice O'Connor, affirmed unanimously.[132] The first question raised was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under [§ 703(m)]."[133] The answer was no. "In order to obtain an instruction under [§ 703(m)], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[134] Thus, "direct evidence of discrimination is not required in mixed-motive cases."[135]

Reaching that conclusion was straightforward since Justice Thomas focused on the statutory language and its plain meaning:[136]

> [T]he starting point for our analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the "judicial inquiry is complete." Section [703(m)] unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration with respect to "any employment practice."

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129 *Id.* at 866 (Gould, J., dissenting). The vision apparently is that the judicial holding in *Price Waterhouse* is somehow equivalent to a section of Title VII itself. When Congress added the new provisions, it only changed the existing judicial interpretation by whatever explicit amendments were made in the same way that an amendment to an existing statute is limited to the express changes added to or deleted from the original statutory language. Judge Gould's vision was not accepted. The Supreme Court did not treat the judicial gloss on a statute as if it were the statute itself. Instead, the Court looked at the terms of the statute independent of any judicial gloss.

130 *Id.*

131 *Id.* at 867.

132 Costa v. Desert Palace, Inc., 539 U.S. 90 (2003).

133 *Id.* at 92.

134 *Id.* at 101.

135 *Id.* at 101–02.

136 *Id.* at 98. The Court looked at § 703(m) as a freestanding addition to Title VII. While addressing what the Court had decided in *Price Waterhouse*, the amendment was to Title VII and not to its judicial interpretation in *Price Waterhouse*. The Court did not even mention *McDonnell Douglas*. *Id.* at 98–99.

> On its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.[137]

Beyond its unambiguous terms, the way § 703(m) dovetails with the rest of the statute suggests that Congress did not intend to require a "special evidentiary showing."[138] First, § 703(m) uses the term "demonstrate," which is separately defined in § 701(m) as "meets the burdens of production and persuasion."[139] If Congress had meant to require direct evidence, it could have included language in either §§ 701(m) or 703(g)(2)(B), as it had unequivocally done elsewhere when that was its intent.[140] Further, if "demonstrate" were construed to require the plaintiff to use direct evidence to establish liability under § 703(m), then it would seem to follow that the defendant would also have to use direct evidence to prove the same-decision limitation to remedies under § 706(g)(2)(B) because that provision also uses the term "demonstrates."[141] Since the same term would carry the same meaning in both provisions, the Court stated: "Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue."[142]

Second, like law generally, discrimination law allows the plaintiff to prove her case by circumstantial as well as direct evidence.[143] Significantly, the Court very strongly endorsed the value of circumstantial evidence: "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[144]

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[137] *Id.* (citations omitted). For an early argument for the result in *Desert Palace* based on the plain meaning of the statute, see Zimmer, *supra* note 92, at 602–04.

[138] *Desert Palace*, 539 U.S. at 99.

[139] 42 U.S.C. § 2000e-1 (2000). Section 105 of the 1991 Civil Rights Act also codified the disparate impact theory of discrimination in Title VII by adding new § 703(k), which also uses the term "demonstrates" to define the burdens of proof and persuasion for plaintiffs and defendants in disparate impact cases. Reading a "direct" evidence requirement into the prima facie case and defense to a disparate impact case would make the entire provision incoherent if "direct" included a state of mind notion in it.

[140] *See* 42 U.S.C. § 1158(a)(2)(B) ("demonstrates by clear, and convincing evidence" for asylum application); *id.* § 5851(b)(3)(D) (same-decision defense to whistleblower claim must be "demonstrate[d] by clear and convincing evidence").

[141] *Desert Palace*, 539 U.S. at 100–01. It is not clear that this would, in fact, pose much of a problem. Defendant could introduce testimony of its decisionmaker that she did not discriminate but would have made the same decision even if she had.

[142] *Id.* at 101 (citation omitted).

[143] *See id.* at 99.

[144] *Id.* at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).

Justice O'Connor, whose concurrence in *Price Waterhouse* created the dichotomy between "direct" and "circumstantial" evidence, concurred briefly in *Desert Palace* to explain her position. At the oral argument, she appeared almost surprised that her use of the term "direct" in *Price Waterhouse* had subsequently taken on such significance.[145] As she indicated during the oral argument, her concurrence stated that Congress simply had changed the law when it passed the Civil Rights Act of 1991. In enacting § 703(m), "Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII."[146] Since Congress did not specifically incorporate her direct evidence requirement in the new provision, it was not part of the law.

Desert Palace is short and sweet. By focusing just on the interpretation of § 703(m), the Court did not reach broader questions or the potential implications of what it did decide. In one footnote, the Court appeared to be claiming that its decision was narrow: "This case does not require us to decide when, if ever, [§ 703(m)] applies outside of the mixed-motive context."[147]

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[145] The context is the colloquy between Justice O'Connor and Mark Ricciardi, the lawyer for the employer, about the source of the "direct" evidence requirement in *Price Waterhouse*:

> QUESTION: What—what was it—the it [requirement of direct evidence] that was said in *Price Waterhouse?* Not in the—not in the plurality opinion. The direct evidence rule doesn't come out of the plurality—
> QUESTION: Concurring opinion.
> MR. RICCIARDI: Well—
> QUESTION: It came out of a concurring opinion that bore my name, did it not?
> (Laughter.)
> MR. RICCIARDI: That is correct, Your Honor.
> QUESTION: Yes. And I don't think it appeared in the plurality opinion, nor in Justice White's concurring opinion, did it?
> MR. RICCIARDI: No, it did not. Your Honor. What I believe the—
> QUESTION: I know a number of courts have followed it, but I—it's hard to extract a—rule under those circumstances.
> MR. RICCIARDI: I—I—
> QUESTION: Congress, in making its amendments in 1991, did not mention anything about direct evidence, did it?
> MR. RICCIARDI: No, it did not, Your Honor.

Oral Argument, No. 02-679 (Apr. 21, 2003) (Oral Argument of Mark J. Ricciardi on Behalf of the Petitioner in *Desert Palace, Inc. v. Costa*), 2003 WL 20011040, at 8–9. In making the comment that it is hard to extract a rule in this situation, Justice O'Connor may be referring to the difficulty of applying the "narrowest grounds" doctrine, where no single rationale commands the votes of a majority of Justices. That doctrine was advanced in *Marks v. United States*, 430 U.S. 188, 193 (1977).

[146] *Desert Palace*, 539 U.S. at 102 (O'Connor, J., concurring).

[147] *Id.* at 94 n.1. Since the Court decided that "direct" evidence was not necessary in order to pursue a case under § 703(m), it also did not need to answer the second question on which it had granted certiorari: "What are the appropriate standards for lower courts to follow in making a direct evidence determination in

In sum, the plain meaning of § 703(m) carried the day and that appears to doom any independent significance for the *Price Waterhouse* method of proof.[148]

IV. *PRICE WATERHOUSE* IS DEAD

As the separation of the two methods of analysis of individual discrimination cases evolved, *Price Waterhouse* came to be identified by the nomenclature as the "direct" evidence method or the "mixed-motive" method of proof. With the death of the "direct" evidence requirement announced in *Desert Palace*, the question is whether *Price Waterhouse* retains any significance independent of the application of § 703(m). If there is any, it presumably would lie in viewing *Price Waterhouse* as involving "mixed-motive" cases.[149] Instead of applying only where the plaintiff can point to "direct" evidence, *Desert Palace* makes clear that § 703(m) at least applies to all situations that can be characterized as involving mixed-motives. It is,

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'mixed-motive' cases under Title VII?" *Id.* at 101 n.3. The question of what "direct" evidence was had been rendered irrelevant. Perhaps the difficulty of answering that second question influenced the Court in how it decided the first question.

[148] Since *Desert Palace* was a Title VII case and since §§ 703(m) and 706(g)(2)(B) amend only Title VII, the issues connected with the possible application of *Desert Palace* to Title VII retaliation cases as well as ADEA and 42 U.S.C. § 1981 cases are beyond the scope of this paper. *See* Estades-Negroni v. Assocs. Corp. N. Am., 345 F.3d 25, 30 (1st Cir. 2003) (applying *Desert Palace* to ADEA cases).

[149] One argument is that the Court's approach in *Desert Palace* is so centered on the language of § 703(m) that it leaves *Price Waterhouse* untouched as an interpretation of § 703(a). Justice Thomas's opinion is structured in a way that could support this separation of § 703(m) from *Price Waterhouse* as a § 703(a) case. Part I.A of the opinion lays out the background leading up to the enactment of § 107 of the 1991 Act, including the fact that Congress was responding to *Price Waterhouse.* Part I.B then discusses the case at hand, while Part II deals with the interpretation of § 703(m), citing *Price Waterhouse* only in the context of the ultimately unsuccessful arguments the employer raised.

The separation of *Price Waterhouse* from § 703(m) would essentially mean that there would now be two approaches to Title VII cases involving mixed-motives—the traditional *Price Waterhouse* approach and § 703(m). Justice Thomas' opinion, however, appears to have foreclosed that by the following footnote, "This case does not require us to decide when, if ever, § 107 [of the 1991 Civil Rights Act that added §§ 703(m) and 706(g)(2)(B) to Title VII] applies outside of the mixed-motive context." *Desert Palace*, 539 U.S. at 94 n.1. While in one sense indicating a limit to the potential scope of application of the Court's decision to only mixed-motive cases, in another sense this language supports the conclusion that § 703(m) does apply whenever a case is *inside* the mixed-motive context, whether under § 703(m) or § 703(a). Further, even if in some abstract sense both the traditional *Price Waterhouse* method and § 703(m) had continued independent existence as two separate methods of dealing with mixed-motive cases, no plaintiff would have an incentive to pick the more difficult and risky *Price Waterhouse* approach over § 703(m). The holding in *Desert Palace* appears to put that decision in the hands of the plaintiff. Finally, it is reasonably clear that in adopting § 107 of the Civil Rights Act of 1991, Congress was addressing issues raised by the Court's decision in *Price Waterhouse* and that *Desert Palace* explains the effect of that legislation on prior case law.

therefore, no longer appropriate to characterize mixed-motive cases as those involving "direct" evidence. It is, however, appropriate to characterize all cases involving "mixed-motives" as § 703(m) cases, even though they can now be proved using circumstantial, direct, or a combination of circumstantial and direct evidence. With "direct" evidence irrelevant and "mixed-motive" cases governed by § 703(m), there is nothing distinctive left about the *Price Waterhouse* method of proof.[150] In other words, there is no longer any reason to characterize any individual discrimination case brought under Title VII as a *Price Waterhouse* case since that appellation adds nothing beyond what §§ 703(m) and 706(g)(2)(B) provide. In short, *Price Waterhouse* is dead.[151]

The next question is the potential scope of application of *Desert Palace* beyond "mixed-motive" cases, a question not addressed by the Court. That question is another way of asking whether *McDonnell Douglas* has also died, with the consequence that all Title VII individual disparate treatment cases will be treated as § 703(m) cases.

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[150] What does remain of *Price Waterhouse* is its holding that evidence of the decisionmakers' use of stereotypical language concerning the plaintiff is circumstantial evidence of discrimination. In that case, Dr. Susan Fiske, a social psychologist and psychology professor, testified that, based on the overt sex-based comments as well as even some gender-neutral remarks of some of the decisionmakers, the promotion process used by defendant was "likely influenced by sex stereotyping." Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). Stereotyping has long been held to be discriminatory. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 611–12 (1993) (stereotypes about older workers are the essence of age discrimination); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

[151] At least for Title VII individual disparate treatment cases—it is beyond the scope of this Article to address the effect, if any, of *Desert Palace*'s interpretation of § 703(h) on age discrimination cases.

V. DOES *MCDONNELL DOUGLAS* SURVIVE?[152]

If the § 703(m) method governs whenever a case involves mixed-motives, even if all the evidence is circumstantial, does *McDonnell Douglas* survive *Desert Palace*? And, if *McDonnell Douglas* survives, what role does it now play in individual disparate treatment discrimination law? At the broadest, the argument that *McDonnell Douglas* died along with *Price Waterhouse* is as follows: Since *Desert Palace* destroyed the boundary between *McDonnell Douglas* and *Price Waterhouse* by eliminating the "direct" evidence threshold to the use of the *Price Waterhouse* theory, the dichotomy between the two methods itself collapses, merging them into one. To say it another way, after *Desert Palace*, circumstantial evidence alone, direct evidence alone, or a combination of the two can all be used in all § 703(m) cases—which means at least every case involving mixed-motives. And if, after *Reeves*, circumstantial evidence, direct evidence,[153] or a combination can be used in every *McDonnell Douglas* case, the two methods have collapsed into one. That method is the "a motivating factor" test of liability established in § 703(m).

This is a powerful argument. But it is predicated on the notion that all that separated the two methods was the type of evidence plaintiff needed to make out a case: By removing the "direct" evidence boundary between *Price Waterhouse* and *McDonnell Douglas* cases, there no longer is a distinction between § 703(m) cases involving "mixed-motives" and *McDonnell Douglas* cases. The question remains, however, whether there is another boundary—with § 703(m) cases involving mixed-motives and *McDonnell Douglas* cases

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[152] Professor Davis argues that *McDonnell Douglas* lives. *See* Davis, *supra* note 6, at 859, 862. While the "a motivating factor" test applies to all individual discrimination cases, the "single-motive" notion means that *McDonnell Douglas* and not the "mixed-motive" approach of § 703(m) applies if the plaintiff is proving pretext, with pretext meaning that the plaintiff must prove the employer's asserted reason played no role in the challenged decision. Thus, that is a "single-motive" case. Professor Corbett argues that *Desert Palace* killed *McDonnell Douglas* in the sense that its "determinative influence" level of showing was replaced with § 703(m)'s "a motivating factor" showing. *See* Corbett, *supra* note 6, at 199–200. Therefore, they both agree that the "a motivating factor" test applies to all individual disparate treatment cases brought under Title VII.

In *The Supreme Court, 2002 Term*, 117 HARV. L. REV. 400, 407 (2003), the assessment of *Desert Palace*'s impact on *McDonnell Douglas* appears to support the position of Professor Davis that the plaintiff must prove "that the claimed legitimate motive never entered the employer's calculus." But with § 703(m) being available, plaintiffs will no longer bring pretext claims because of the easier burden of persuasion available with the "a motivating factor" standard under the mixed-motive framework. The change in focus from *McDonnell Douglas* to § 703(m) is "a welcome development." *Id.* at 409.

[153] *Reeves* involved ageist comments characterized as circumstantial evidence, at least as evaluated under the strict definition followed in the Fifth Circuit. In other circuits, that same evidence may well have been characterized as "direct" enough to justify the use of the *Price Waterhouse* method of analysis.

involving only single motives, or whether some distinction remains based on the characterization of *McDonnell Douglas* as involving "pretext." The distinction between single and mixed-motives, while not robust in the cases, is reflected in the nomenclature "mixed-motive," used to describe *Price Waterhouse* cases and by the *Desert Palace* Court, to describe § 703(m) cases. The next section of the Article will discuss whether *McDonnell Douglas* involves "single-motives." The section following will address the consistency of the "a motivating factor" standard with but-for causation. The final section of this part will discuss the residual meaning to the description of *McDonnell Douglas* as involving "pretext."

A. McDonnell Douglas *Cases Do Not Involve "Single-Motives"*

It has been true virtually from the beginning that *McDonnell Douglas* does not actually require a showing that discrimination is the "single motive" of the employer in order to establish liability. While, of course, a factfinder can find that a particular employer's decision was based on just one reason,[154] there can be liability in *McDonnell Douglas* cases even if the employer's action is not motivated just by one discriminatory reason. One of the holdings in *Price Waterhouse* is that Congress did not intend to establish a sole cause standard under Title VII because it had rejected an amendment that would have set a sole cause standard of liability.[155] So, the plaintiff never needs to prove that discrimination was the only motive or cause of the employer's challenged action. That means that liability can be established in all Title VII cases with a showing that is less than sole cause. If liability is established with something less than sole cause, a reason or motive in addition to discrimination can have played a role in the employer's decision but the plaintiff can still win.[156]

Traditionally, the first level of showing short of sole cause is but-for cause. That is, using a but-for or determinative factor standard, plaintiff can win with a showing that is less than sole cause, less than proving that discrimination was the "single motive." She wins even if the factfinder finds another reason is

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[154] The plaintiff wins if a jury would find that discrimination was the single motive for the employer's decision and defendant would win when if a jury would find that the nondiscriminatory reason asserted by the defendant was the single motive for the action. The question is what happens when the factfinder believes the reason asserted by the defendant played a role in its decision but so did discrimination.

[155] *Price Waterhouse*, at 490 U.S. at 241 n.7. A "sole cause" level of showing was rejected in *McDonnell Douglas* cases in *Miller v. CIGNA Corp.*, 47 F.3d 586, 593–94 (3d Cir. 1995) (en banc).

[156] Even if the plaintiff need not prove discrimination was the sole cause of her harm, there is an argument, addressed below, that she does have to prove that the defendant's asserted nondiscriminatory reason played no part in the action she challenges.

involved, as long as discrimination is the but-for reason or the determinative influence for the employer's action. Liability will be established as long as the decision would not have been made but-for the gender (or race, etc.) of the plaintiff.

Justice O'Connor has articulated this standard both in her concurrence in *Price Waterhouse* and in her opinion for the Court in *Hazen Paper*. For example, in *Price Waterhouse*, one of her stated reasons for not joining the plurality was the language of Justice Brennan suggesting the words "because of" did not mean "but-for."[157] She thought that the plurality's approach was inconsistent with the intent of Congress in enacting Title VII: "The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."[158] In *Hazen Paper*, a *McDonnell Douglas* case, Justice O'Connor, writing for the Court, articulated "a determinative influence" standard: "[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that [decisionmaking] process and had a determinative influence on the outcome."[159]

While Justice O'Connor was concerned that a showing of less than but-for or determinative influence could too easily lead to liability, neither she nor the Court demanded any more than such a showing to establish liability. Thus, using the but-for or determinative influence test, liability can be found in a *McDonnell Douglas* case—even though more than a single cause is found to have motivated the employer—as long as discrimination was the but-for or determinative influence in the decision.[160] More concretely, the employer's asserted reason can have played a role in the decision as long as the decision would not have been made but for discrimination. That means that the description of *McDonnell Douglas* as involving a "single motive" has, at least

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[157] *Price Waterhouse*, 490 U.S. at 262–63 (O'Connor, J., concurring).

[158] *Id.* at 262. The issue ultimately is the employer's state of mind, its motivation, but causation is a way of talking about linking that state of mind to the action it took. *See* Blumoff & Lewis, *supra* note 90, at 47–48; Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motive Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 19–20 (1991).

[159] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "Determinative influence" or "determinative factor" is quite close to "but-for" causation. Professor Davis argues that there is only one standard for all individual discrimination cases, the "a motivating factor" test, and that it would be illogical to vary the level of showing depending on the evidence in the case. *See* Davis, *supra* note 6, at 861–63.

[160] While but-for causation requires a finding that the employer would not have made its decision if discrimination had not been involved, there can be liability if some other reason was implicated as a motive for the employer's action so long as discrimination was the determinative influence.

since *Hazen Paper,* been metaphorical.[161] Thus, with no requirement that plaintiff prove discrimination was the single motive for the decision, there is no basis for a dichotomy between "single motive" *McDonnell Douglas* cases and "mixed-motive" § 703(m) cases. In short, under *McDonnell Douglas* as well as § 703(m), liability can be established even though the factfinder finds that the employer's decision involved mixed-motives, as long as one of those motives is discrimination.[162]

Even using the determinative factor level to trigger liability—applied in the *McDonnell Douglas* cases before *Desert Palace*—the plaintiff did not have to prove that discrimination was the sole cause of her treatment by the defendant. The question was whether a plaintiff, relying on *McDonnell Douglas*, had to prove that the defendant's asserted nondiscriminatory action was completely false.[163] Looking back at cases starting with *McDonnell Douglas*, there are no clear holdings that the plaintiff must show that a defendant's reason played no role whatsoever in the decision plaintiff challenges. In *McDonnell Douglas*, the pretext stage involved a showing that the "presumptively valid reasons for . . . rejection were in fact a coverup for a racially discriminatory decision."[164]

Even if a reason were in some sense true, it could still be used to cover up discrimination. An employer could scurry around to find a legitimate complaint about the employee and assert that as its nondiscriminatory reason, even though discrimination was the actual motivation. *Burdine*, however, has language that is somewhat supportive of the notion that the plaintiff must disprove the defendant's reason completely, but has other language that need not be read that strictly. In describing the pretext stage, the *Burdine* Court said that the plaintiff "now must have the opportunity to demonstrate that the proferred reason was not the true reason for the employment decision."[165] This

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[161] Professor Tristin K. Green put it this way: "[E]ven those cases in which the plaintiff proves discrimination by proving the proffered reason false, the necessary inference is not that the defendant was solely motivated by an impermissible factor, but that the defendant was not motivated by the proffered factor." Tristin K. Green, Comment, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1004 (1999).

[162] In deciding what instructions to give to the jury in a *McDonnell Douglas* case, the judge has to assume the possibility that the jury will find that it involved mixed motives on the part of the defendant. While the jury could theoretically find that discrimination was the sole cause for defendant's conduct or that the reason asserted by the defendant is the only cause, the jury could decide that both discrimination and defendant's asserted reason played a role. Thus, every case is potentially a mixed-motive case.

[163] Professor Davis thinks that this is required in a *McDonnell Douglas* case. Davis, *supra* note 6, at 860.

[164] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

[165] Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). This language is echoed in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989).

sounds more like the either/or description sometimes used to describe the *McDonnell Douglas* method and which supports the idea that it involves a "single-motive." Then, however, the Court, in describing how the question of pretext merges with the ultimate question of intent to discriminate, describes what the plaintiff needs to show:

> She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the [factfinder] that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the [factfinder] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence.[166]

Proving the defendant's reason was "not the true reason" carries with it the possibility that the factfinder could find that the defendant's reason played a role but was not the only true reason for the decision. Being "unworthy of credence" sounds less like a question of absolute denial of any involvement and more like disbelief that the defendant's explanation is the whole story. That language therefore supports the looser approach suggested in *McDonnell Douglas* itself.

While it is clear that the plaintiff can win despite reasons other than discrimination playing some role in the defendant's decision, it would seem quite strange that the defendant's asserted nondiscriminatory reason could not be among them. That would be the result if the plaintiff had to prove that the defendant's asserted reason played absolutely no role in defendant's decision in order to prove pretext. The reason for rejecting the sole cause standard in the first instance is that employees who are not perfect should nevertheless be protected from discrimination. For any plaintiff who is not perfect, the employer might have some basis for taking action against her; that, however, should not foreclose plaintiff from proving that she nevertheless was the victim of discrimination. But since *Desert Palace*, it is even clearer that liability can be established even if a factfinder could reasonably conclude that the reason asserted by the employer played some role in the action plaintiff challenges, as long as discrimination was "a motivating factor" for the action.

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166 *Burdine*, 450 U.S. at 256 (citation omitted).

McDonnell Douglas is often inaccurately described as a "single motive" method because its process of elimination can be described as asking the factfinder to answer something like an either/or question: Was the employer's proffered reason a nondiscriminatory one as it asserts or is it discrimination as plaintiff asserts? Since *Hicks*, however, that way of describing a *McDonnell Douglas* case is only a metaphor. As the Court concluded in *Hicks* and reaffirmed in *Reeves*, the question ultimately is not the either/or question of asking the factfinder to believe *either* the employer's asserted reason *or* the employer's claim of discrimination. *Hicks* made clear that the defendant could still win even if the factfinder found that plaintiff's prima facie case was established and rejected the employer's asserted reason. In *Hicks*, for example, the factfinder accepted plaintiff's prima facie case and rejected the reason asserted by the employer for its actions—the severity and the accumulation of rules violations by Hicks. Nevertheless, the factfinder, thinking that the personal animosity of the supervisor toward Hicks was the real reason Hicks was fired, found no liability since the plaintiff failed to convince him that discrimination was the real reason for the employer's action.[167]

In the *Price Waterhouse* era it made some sense to describe *McDonnell Douglas* as a "single motive" test to distinguish cases using that method of proof from the "mixed-motive" approach in *Price Waterhouse*—even though it was never accurate to describe *McDonnell Douglas* in this way. With *Price Waterhouse* supplanted by § 703(m), the courts will have to confront this inaccurate circumlocution. Given *Hicks* and *Desert Palace*, there is no basis to continue it.[168]

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[167] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 542–43 (1993) (Souter, J., dissenting). What makes such a finding hard to accept is that the only evidence in the record as to personal animosity was testimony by the supervisor denying that he had any animosity toward Hicks. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).

[168] Before *Desert Palace*, lower courts continued to use these inaccurate characterizations and rejected the attempts of a few judges to adopt more accurate language. *See, e.g.*, Wright v. Southland Corp., 187 F.3d 1287 (11th Cir. 1999) (attempt by Judge Tjoflat to adopt more accurate nomenclature in individual discrimination cases); Miller v. CIGNA Corp., 47 F.3d 506, 599–607 (3d Cir. 1995) (Judge Greenberg, concurring in part and in the judgment, also attempted to clarify the language used).

Judge Magnuson in the federal district of Minnesota in *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 994 (D. Minn. 2003), has taken the first plunge, rejecting any difference between § 703(m) and *McDonnell Douglas* based on a difference between single and mixed-motives. Having earlier found that the plaintiff would not be able to introduce evidence that could be characterized as "direct," the court applied *Desert Palace* and held that the plaintiff was nevertheless entitled to use § 703(m)'s "a motivating factor" standard of liability in what he characterized as a *McDonnell Douglas* "single motive" case. Liability could be established using § 703(m) even if the plaintiff proved that discrimination was the single motive for the employer's action.

Even if courts try to maintain a distinction between "single-motive" cases where § 703(m) does not apply and "mixed-motive" cases where it does, every *McDonnell Douglas* case turns, at least potentially, into a "mixed-motive" case once the defendant asserts a nondiscriminatory reason. During oral argument, one of the Justices made this point in a colloquy with Costa's attorney:

> QUESTION: Is—is this correct, that *McDonnell Douglas* survives on your reading in a case in which the defendant does not go forward with anything? The plaintiff puts in enough to make a prima facie case. Defendant sits mute. *McDonnell Douglas* controls the result there. If the defendant does go forward with something at that point—and—and here I'm not sure of this, but I think—by definition, it then becomes a mixed-motive case, doesn't it? Under [§ 703](m)?
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> MR. PECCOLE: I believe it does.[169]

Whether the case will actually be found to involve a single-motive or is a mixed-motive case awaits the decision of the factfinder. Nevertheless, when the trial judge is faced with plaintiff's evidence supporting an inference of discrimination and defendant's evidence that it acted for a nondiscriminatory reason, the case potentially involves mixed-motives: The factfinder could find

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> [T]he plain language of the statute allows a plaintiff to prevail if he or she can prove by a preponderance of the evidence that a single, illegitimate motive was a motivating factor in an employment decision, without having to allege that other factors also motivated the decision . . . . [B]ecause the Civil Rights Act of 1991 unambiguously prohibits any degree of consideration of a plaintiff's race, gender or other enumerated classification in making an employment decision, it must also extend to single-motive claims.

Id. at 991. More importantly, after *Desert Palace*, there was no longer any reason to maintain the fiction that *McDonnell Douglas* cases involved single motives. Thus, the district court held that the § 703(m) "a motivating factor" standard applies in *McDonnell Douglas* cases.

> The dichotomy [presented to the factfinder to decide that either the action was based on the employer's asserted reason or it was discrimination] produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on the basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational. The Court does not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court's ruling in *Desert Palace*. When possible, this Court seeks to avoid those machinations of jurisprudence that do not comport with common sense and basic understandings of human interaction.

Id. at 991–92.

[169] Oral Argument, No. 02-679 (Apr. 21, 2003) (Oral Argument of Mark J. Ricciardi on Behalf of the Petitioner in *Desert Palace, Inc. v. Costa*), 2003 WL 20011040, at 34–35; *see also* Corbett, *supra* note 6, at 210 n.67.

that the single-motive for the action was either discrimination or the reason asserted by the defendant.[170] Rather than find that the employer's action was either discrimination or the reason asserted by the defendant, the jury could find that the defendant's asserted reason played some role in the decision but that discrimination did as well. Thus, at least at the time of instructing the jury, every *McDonnell Douglas* case in which defendant asserts a nondiscriminatory reason is potentially a mixed-motive case. As such, plaintiff is entitled to request an instruction based on § 703(m).

In sum, the distinction between "single-motive" and "mixed-motive" cases has lost its significance as a way of describing any real difference between § 703(m) cases and *McDonnell Douglas* cases. Even if the term "single-motive" was continued to be used metaphorically, as a practical matter, every *McDonnell Douglas* case would be turned into a "mixed-motive" case and thus a § 703(m) case once the defendant introduced evidence of its alleged nondiscriminatory reason. The next section deals with the problem of whether using § 703(m) for all individual disparate treatment cases undermines the but-for standard of causation implicit in the use of the term "because of" in § 703(a).

B. *The "A Motivating Factor" Standard Is Not Inconsistent with But-For Cause*

Once the descriptions of "direct" versus "circumstantial evidence" and "single-motive" versus "mixed-motives" both cease to establish a boundary between *McDonnell Douglas* and § 703(m), a difference that arguably remains is the difference between the levels of showing necessary to establish liability.[171] To establish liability, § 703(m) requires the plaintiff to prove only that discrimination was "a motivating factor" in the employer's decision. In

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[170] Since *Hicks*, there is another possible single-motive: some reason not in the record that the factfinder thinks explains the employer's decision.

[171] Another way of stating this is to ask whether *McDonnell Douglas*, because its level of showing to establish liability is the "determinative influence," retains independence as a claim upon which relief can be granted from the claim under § 703(m) that liability is established by showing that an impermissible characteristic was "a motivating factor." This approach is foreclosed by the Supreme Court's decision in *Swierkiewicz v. Sorema N.A.*, in which the Court found that it was wrong to apply *Federal Rule of Civil Procedure* 12(b)(6)'s failure to state a claim upon which relief could be granted approach wherein the plaintiff in an individual discrimination case failed to plead the elements of a *McDonnell Douglas* case. 534 U.S. 506, 510–11 (2002). Instead of treating *McDonnell Douglas* as a claim of relief upon which relief could be granted, the Court decided that a simple claim by the plaintiff that he was a victim of employment discrimination sufficed to withstand dismissal by way of Rule 12(b)(6). *Id.* at 511–12. The adequacy of the complaint was judged by the notice pleading standards of Rule 8(a). *Id.* at 512–13.

contrast, in *McDonnell Douglas* cases, the courts have typically required the plaintiff to prove that discriminatory motivation was the but-for or the determinative influence in the employer's decision.[172]

Despite those two apparently different levels of showing, proof that an impermissible characteristic was "a motivating factor" in a §§ 703(m) and 706(g)(2)(B) case should ultimately satisfy the "determinative influence" showing required by *Hazen Paper* once the shifting burdens of the plaintiff and the defendant are taken into account. The "a motivating factor" showing appears easier for a plaintiff to establish than the "played a role . . . and had a determinative influence" showing described in *Hazen Paper.* That, however, does not make the two standards ultimately inconsistent in light of the interaction between § 703(m)'s "a motivating factor" showing and the same-decision defense in § 706(g)(2)(B). It is hard to find any real difference between "a motivating factor" in § 703(m) and the first part of the *Hazen Paper* formula, showing that discrimination "played a role."[173] With that showing, the plaintiff has established liability under § 703(m). In that sense, Title VII has created liability for conduct which does not necessarily change any particular outcome.[174]

But that does not end the matter because establishing liability operates to shift the burden of persuasion to the defendant to prove the § 706(g)(2)(B) same-decision defense; that is, that it "would have taken the same action in the

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[172] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). *See* Jones v. Union Pac. R.R., 302 F.3d 735, 742 (7th Cir. 2002) (*McDonnell Douglas* case requires showing that protected characteristic was a "determinative factor" in the employer's decision). *But see* Davis, *supra* note 6, at 859–60.

[173] Starting with the most difficult to prove and moving to the least difficult, "sole cause" is most difficult to prove, followed by "but-for." Following "but-for" is "the determinative factor," which is followed by the slightly nuanced, "a determinative factor." Less difficult to prove than "a determinative factor" is "the substantial factor," followed by "a substantial factor," and then "the motivating factor," and finally the "a motivating factor" test. Justices White and O'Connor in their concurring opinions in *Price Waterhouse* thought that "a substantial factor" was more difficult to prove than the plurality's "a motivating factor." Price Waterhouse v. Hopkins, 490 U.S. 228, 259–61 (White, J., concurring); *id.* at 277–79 (O'Connor, J., concurring).

All of these competing tests are evocative of tort law. That seems appropriate, given that antidiscrimination statutes have tended to be tort-like in character. With the addition of §§ 703(m) and 706(g)(2)(B) to Title VII, Congress appears to cut through all of the difficulties inherent in differentiating the meaning of these various linguistic ways of describing the linkage between plaintiff's harm and defendant's conduct by using the "a motivating factor" standard.

[174] This is not unique to Title VII. For example, in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, the Court permitted the plaintiffs to attack the defendant's affirmative action plan even though there was no showing that the plaintiff or any of its member contractors would have won an award even absent the use of an allegedly invalid affirmative action plan. 508 U.S. 656 (1993).

absence of the impermissible motivating factor."[175] If the defendant carries that burden, then, in the language of Justice O'Connor in *Hazen Paper*, discrimination is shown *not* to have had "a determinative influence on the outcome."[176] In other words, full relief is denied to the plaintiff because a discriminatory motive was not the but-for cause for the employer's action. In contrast, if the defendant fails to establish its same-decision defense, then it is reasonable to conclude that discrimination was the "determinative influence" in the employer's decision. Thus, the plaintiff is entitled to full remedies only when the but-for level of showing is deemed to have been met—that is, when the plaintiff shows "a motivating factor" and the defendant fails to show the same decision would have been made even if it had not considered the impermissible factor.[177] Justice O'Connor used this type analysis to support her concurring opinion in *Price Waterhouse* that allowed liability to be established by a showing that discrimination was "a substantial factor" while maintaining that the language "because of" in § 703(a) applied throughout Title VII.[178]

That leaves only two slight differences between the final operation of the traditional *McDonnell Douglas* approach and § 703(m). First, the consequences of neither party being able to carry her burden of persuasion can mean that a few cases might be decided differently depending on which party has that burden. If, using the traditional *McDonnell Douglas* approach, the plaintiff fails to prove that discrimination was "the determinative influence" in the employer's decision, the plaintiff loses entirely. However, if § 703(m) had been applied to the same evidence, the plaintiff may have been able to establish liability under the easier "a motivating factor" standard even though she would not have been able to show that race or gender was the determinative influence in the decision. If, in that case, the defendant fails to carry its burden of persuasion on its § 706(g)(2)(B) same-decision defense, the plaintiff gets full relief, even though she would not have been able to prove discrimination to the but-for or determinative influence level in the first instance.[179] Second, § 706(g)(2)(B) is not a full affirmative defense to liability but is only a limit on plaintiff's full remedies. If the defendant successfully carries its burden of proving the same-decision defense, the plaintiff will be

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175 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

176 *Hazen Paper*, 507 U.S. at 610.

177 As will be seen, a violation can be established with less.

178 *Price Waterhouse*, 490 U.S. at 274–79 (O'Connor, J., concurring).

179 This is simply an example of the consequences of imposing the burden of persuasion on different parties.

entitled to declaratory relief, attorney fees, and costs but not reinstatement, backpay, or frontpay—even though race or sex was not the but-for cause of the defendant's action.

These slight differences do not justify maintaining the complicated and unmanageable system of having two separate methods of analyzing individual discrimination cases. There is no sufficient justification to maintain the "determinative influence" level of showing as necessary to establish liability in any individual discrimination cases brought under Title VII, given that at the end of the analysis that standard is largely met through the operation of § 703(m) and § 706(g)(2)(B). Thus, the "a motivating factor" showing should suffice in all Title VII cases claiming individual discrimination. Moreover, even if, as the next section will show, a dual system divided by the "a motivating factor" standard for § 703(m) cases and the "determinative influence" standard for *McDonnell Douglas* cases were maintained, it would result in only a tiny subset of individual disparate treatment cases that use the *McDonnell Douglas* standard.[180]

C. *Pretext and the Process of Elimination in* McDonnell Douglas *Cases*

After *Desert Palace*, all that remains of *McDonnell Douglas* is its process of elimination—the core notion of proving discrimination by convincing the factfinder that the defendant's reason is pretext. One way to show discrimination was involved in an employer's action is to show that the other plausible reasons do not apply. As the Court has emphasized, employers typically make decisions based on reasons, not on whimsy. When no reason other than discrimination is present as an explanation for defendant's action, it is reasonable, though not necessary, to find that the reason for the action was discrimination. This raises the bedeviling aspect of *Hicks*: Hicks proved a *McDonnell Douglas* prima facie case and proved that defendant's asserted reason was not true.[181] Yet he lost because the factfinder thought the real reason, though not established by any evidence in the record, was personal animus against Hicks by his supervisor.[182] Thus, plaintiff Hicks lost because he was unable to convince the factfinder that he was discharged because of

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[180] Up until *Desert Palace*, only a small percentage of individual discrimination cases were analyzed using the "a motivating factor" standard of § 703(m), with the vast majority analyzed pursuant to *McDonnell Douglas*. If the "determinative influence" standard survives at all, *Desert Palace* will have flipped the percentages.

[181] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993).

[182] *Id.* at 519.

discrimination.[183] *Hicks* shows that this process of elimination technique may sometimes prove difficult for the factfinder because the factfinder may rely on reasons that are extraneous to the record to find no discrimination. Nevertheless, the *McDonnell Douglas* process of elimination is a fundamentally sound way of persuading the factfinder that discrimination was involved in the decision of the defendant that the plaintiff challenges.

Desert Palace certainly does not change the process of elimination as a method of proving discrimination. If anything, the Court in *Desert Palace* emphasized the usefulness of both circumstantial evidence and the process of elimination based on that evidence to prove discrimination:

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves*, we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." The reason for treating circumstantial evidence and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[184]

With that affirmation of value of the process of elimination, it appears that this technique first accepted in *McDonnell Douglas* will continue to play a role in Title VII individual disparate treatment cases. The next section will describe how that role plays out in the litigation of individual discrimination cases.

VI. LITIGATING INDIVIDUAL DISCRIMINATION CASES AFTER *DESERT PALACE*

Swierkiewicz v. Sorema N.A.[185] makes clear that Rule 8(a) of the *Federal Rules of Civil Procedure* requires only notice pleading for an individual disparate treatment case.[186] In addition to the claim of discrimination,

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[183] The application of § 703(m) might not have made a difference in *Hicks* since the trial judge, sitting as factfinder, appeared convinced that no discrimination was involved, only personal animus. That is not certain, however, since the trial judge may have thought that race as well as personal animus were involved, but that race was not the determinative influence. If this case had been tried pursuant to § 703(m), liability would have been established in that situation.

[184] Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) and Rogers v. Mo. Pac. R.R., 352 U.S. 500, 508 n.17 (1957)) (emphasis in original).

[185] 534 U.S. 506, 511–12 (2002).

[186] FED R. CIV. P. 8(a).

plaintiff's complaint suffices if it includes a description of defendant's act that plaintiff claims is discriminatory plus dates and other information sufficient to put defendant on notice as to the nature of plaintiff's claim.[187] No theory of discrimination need be identified to satisfy the requirements of notice pleading.[188] Defendant can respond either with a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a motion for a more definite statement, or an answer denying that it discriminated. Under the easily satisfied notice pleading requirements of Rule 8 of the *Federal Rules of Civil Procedure*, it is presumably difficult to establish grounds for dismissing any complaint that identifies some conduct of the defendant that the plaintiff claims is discriminatory. Perforce, most defendants have to answer.[189]

Discovery follows the pleadings. The plaintiff will try to find any and all evidence that is probative of discrimination. Correspondingly, the defendant will try to find evidence to undermine the plaintiff's evidence and to prove that the challenged conduct was not discriminatory.[190]

The first time in the litigation process for a real challenge to the plaintiff's case follows discovery when the defendant moves for summary judgment.[191]

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[187] *Swierkiewicz* means that *McDonnell Douglas* is not, in the sense that Rule 12(b)(6) uses it, a claim upon which relief can be granted independent of a general claim of employment discrimination. As long as the plaintiff pleads the factual basis underpinning her claim of discrimination, it would be inappropriate for a court to grant a motion to dismiss for failing to make a claim upon which relief can be granted. Even if the plaintiff does plead, for example, facts supporting a "barebones" showing of the elements of a *McDonnell Douglas* case, a court should not dismiss as long as those facts provide adequate notice to the defendant of the basis for her claim. The plaintiff need not point out what the defendant may have claimed was the nondiscriminatory basis for the action nor does the plaintiff need to point to evidence that would support a finding that the defendant's asserted reason is unworthy of credence.

[188] There may be some close cases about what needs to be pled under notice pleading. In *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53–55 (2003), the Court held that the plaintiff, who brought an individual disparate treatment claim under the Americans with Disabilities Act, could not transform the case into a disparate impact case by challenging the nondiscriminatory reason defendant asserted as having disparate impact on individuals with disabilities. Presumably, to challenge the policy the employer relied on to refuse to hire plaintiff as disparate impact discrimination, he would have had to claim in his initial complaint that this employment practice or policy existed and that it had a disparate impact. That would have then timely satisfied the notice pleading requirements established in *Swierkiewicz*.

[189] If the defendant makes the Rule 12(b)(6) motion and the motion is denied, the defendant must then answer the complaint.

[190] Since it is the defendant's conduct that is at issue, presumably it has most of the information putting that conduct into context. Thus, the thrust of the defendant's discovery is to uncover so-called "after-acquired" evidence justifying the plaintiff's discharge in order to pretermit remedies as of the date of discovery. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362–63 (1995).

[191] *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560 (2001).

To defeat that motion, the plaintiff must point to evidence she will introduce that, if accepted by the factfinder, would support the ultimate issue in the case—i.e., the challenged employment decision resulted from defendant's intentional discrimination.[192] Thus, the evidence that the plaintiff assembles must be compared to the claims of discrimination it supports. Using § 703(m)'s "a motivating factor" level of showing, a preponderance of the evidence must support a reasonable factfinder in drawing the inference of discrimination, that is, discrimination played a role, no matter how small, in the decision.

The evidence can be used to support the inference of discrimination based on a number of theories. First, "smoking gun" evidence—evidence that the employer made a statement that can be viewed as an admission against interest that it discriminated—is obviously relevant and probative of discrimination, even if such evidence no longer needs to be labeled "direct" evidence of discrimination in order to trigger the application of § 703(m). As the Court recognized in *Reeves*, racist, sexist, or ageist comments by the employer that do not constitute admissions that it discriminated against the plaintiff, are, nevertheless, probative of the issue of the employer's intent to discriminate.[193]

Second, as described by the Court in *Teamsters v. United States*, evidence of unequal treatment supports drawing an inference of discrimination: "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[194] Evidence that Costa was not treated equally with her male coworkers was the main thrust of her case in *Desert Palace*.[195]

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[192] Rule 56(b) of the *Federal Rules of Civil Procedure* provides for summary judgment following discovery. For critiques of how district courts have made decisions on motions for summary judgment, see Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 753 (1995) (arguing that courts have applied summary judgment law too formalistically to individual discrimination cases that has "doomed otherwise valid discrimination claims"); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993).

[193] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135 (2000). So-called "stray comments" are circumstantial evidence of discrimination. *See supra* note 83.

[194] 431 U.S. 324, 335 n.15 (1977). *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 276 (1976), involved a claim of unequal treatment by white employees discharged for theft who claimed a similarly situated African American had not been discharged.

[195] Costa v. Desert Palace, Inc., 299 F.3d 838, 859–60 (9th Cir. 2002).

Third, evidence that the plaintiff was subjected to stereotyping, like the evidence accepted in *Price Waterhouse*, is also relevant to the question of whether the defendant intended to discriminate against the plaintiff.[196]

Fourth, evidence that the employer failed to follow its own policies is another kind of evidence that is relevant to proving intent to discriminate. Thus in *Carter v. Three Springs Residential Treatment*, the Eleventh Circuit held that it is evidence of discrimination in a failure to promote case when "Carter proved that Three Springs had a policy of posting job vacancies, not adhered to in this case."[197]

Fifth, the whole range of evidence that the Court described in *McDonnell Douglas* as relevant to the issue of pretext is probative of discrimination. This is because this evidence of pretext comes into the trial during the plaintiff's case in chief and is not really focused on surrebutting the defendant's asserted nondiscriminatory reason.[198] The wide range of potentially probative evidence was described in *McDonnell Douglas* as follows:

> [E]vidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.[199]

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196 Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).

197 132 F.3d 635, 644 (11th Cir. 1998).

198 While the *McDonnell Douglas* method is described as a three-step process, the trial of discrimination cases follows the general two-step process of civil litigation. Further, the first two steps, the plaintiff's prima facie case and the defendant's rebuttal, are, as the Court said in *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989), "not onerous." Thus, the true focus on the case comes down to the pretext stage, where, as the Court indicated in *Burdine*, the question of pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

199 McDonnell Douglas Corp. v. Green, 411 U.S. at 792, 804–05. (1973). As Professor Tristin K. Green noted: "The *McDonnell Douglas* framework as explained by the Supreme Court never eliminated a plaintiff's option to prove disparate treatment through circumstantial evidence without attacking the defendant's proffered reason." Green, *supra* note 161, at 997. Further, "the Court's rationale behind the *McDonnell Douglas* framework neither requires, nor implies, that the falsity-of-proferred [pretext] method of proof is the sole method of proof within the framework." *Id.* at 999.

As *Desert Palace* showed, the treatment of Costa by the employer before the altercation that brought about her discharge made her case much stronger. It gave the record a richness of context surrounding her discharge, strengthening the inference that discrimination was at play in her discharge. The fact that she was the first and only woman working in the defendant's warehouse provided contextual support for a finding that discrimination motivated her discharge.[200]

More broadly, "bottom line" statistical evidence of whether the employer's employment policies and practices result in a diverse workforce is useful in judging the motivation of the employer in any particular employment decision. Such evidence is certainly not conclusive: an employer with "good stats" may have discriminated in a particular case,[201] and an employer with "bad stats" cannot be presumed to have discriminated in a particular case. But the context established by the employer's workforce statistics is relevant to and probative of the issue of the intent of the employer when a particular employment decision is challenged. Simply, an employer with "bad stats" is less believable than an employer with good ones, all else being equal.[202]

Finally, the *McDonnell Douglas* approach—evidence establishing a prima facie case by excluding the most common nondiscriminatory reasons that might explain the employer's action—also obviously supports drawing the inference that the action was motivated by discrimination. Further, if the defendant has asserted a nondiscriminatory reason for its action, the plaintiff can support her case against a motion for summary judgment by pointing to evidence that would justify a finding that the employer's reason was not the true basis for its decision.

Under the approach adopted in § 703(m), all of these different types of evidence can help form the basis for a reasonable factfinder to draw the inference of discrimination under the "a motivating factor" standard for

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200 Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1685 (1998) (discussing the reaction of incumbent workers to trailblazers such as Costa).

201 *See* Furnco Constr. Co. v. Waters, 438 U.S. 566, 580 (1978) ("Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.").

202 In *Patterson*, 491 U.S. at 187–88, the Court held that the lower court erred in limiting the scope of evidence plaintiff could introduce to prove pretext to evidence that would specifically rebut the nondiscriminatory reason asserted by the employer. The description of the scope of that evidence was not as comprehensive as the one set forth in *McDonnell Douglas*. The grounds for the partial dissent of Justice Brennan (Stevens did not join) was that evidence of the general policy and practices of the employer concerning the employment of African Americans, especially statistical evidence, was relevant to and probative of discrimination. *Id.* at 217.

establishing liability. Looking at the litigation of individual discrimination cases from the viewpoint of a court determining a motion for summary judgment, the correct approach under § 703(m) closely resembles the approach used in general litigation.[203] Basically, that approach is to review the evidence and draw all inferences in favor of the plaintiff, the nonmoving party.[204] Thus, if there is sufficient evidence in an individual discrimination case that would support a reasonable jury's decision to draw an inference of discrimination, then defendant's motion should be denied.

Suppose that instead of the rich evidentiary records such as those in *Reeves* or *Desert Palace*, all that a plaintiff has is the "barebones" evidence sufficient to support a prima facie case under *McDonnell Douglas* but no more. *Burdine* described the consequences of proof of a prima facie case:

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[205]

From this statement, it appears that if the plaintiff points to evidence that would support a reasonable jury's conclusion that the most common nondiscriminatory reasons for the adverse action plaintiff challenges do not apply, then the defendant's summary judgment motion should be denied.

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[203] Rule 56(b) of the *Federal Rules of Civil Procedure* governs motions for summary judgment while Rule 50 governs motions for judgment as a matter of law. The motion for summary judgment occurs before trial while the motion for judgment as a matter of law can occur during or after trial. The supervisory function of the court, however, is essentially the same in both: to guarantee that factfinders are limited to deciding questions of material fact on all the elements necessary to establish liability if the motion is filed by the defendant or to establish an affirmative defense if the motion is filed by the plaintiff.

As to motions for judgment as a matter of law, *Reeves* described how this should work. Starting by looking at all the evidence in the record, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . . [A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000).

[204] *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas, *A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 671–72 (1998). When faced with these motions, plaintiff has to point to evidence that she will introduce sufficient to support a jury finding for her on all the issues on which she carries the burden of persuasion. *See* Matushita Elecs. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 585–86 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); *see also* Davis, *supra* note 6, at 861; Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2237 (1995); McGinley, *supra* note 192, at 203.

[205] Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

If *McDonnell Douglas* retains any meaning as setting a "determinative influence" level of showing to establish liability, the situation of a plaintiff with only a "barebones" prima facie case and no more would be the one situation in which the plaintiff might have to resort to *McDonnell Douglas* instead of relying on § 703(m)'s "a motivating factor" test. But a footnote accompanying that text in *Burdine* puts that interpretation in doubt by suggesting that evidence of the prima facie case alone is not a sufficient basis for a reasonable jury to draw the inference of discrimination:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.[206]

The thrust of this passage is that establishing a prima facie case does not necessarily mean that the plaintiff has produced enough evidence that a reasonable jury could find intent to discriminate. A minimal *McDonnell Douglas* prima facie case only establishes a rebuttable presumption of discrimination but does not support a reasonable jury drawing the inference of intent to discriminate. Thus, a plaintiff with only a prima facie case would lose in the defendant's motion for summary judgment if the defendant's motion points to evidence that it introduces a nondiscriminatory reason.[207] In that situation, the presumption has its desired effect of "smoking out" the defendant's alleged nondiscriminatory reason; once it performs that function, the presumption drops from the case.[208] Yet, what if defendants move for summary judgment even while refusing to come forward with a reason? If defendants could win summary judgment without pointing to evidence as to their alleged nondiscriminatory reason, they would have a strong incentive to stand mute, which would be at odds with the "smoke out" rationale of the *Burdine* presumption.

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[206] *Id.* at 254 n.7 (internal citations omitted).

[207] The plaintiff, however, can almost always defeat the defendant's motion for summary judgment if she is able to point to evidence she will introduce to prove that the reason defendant has asserted is unworthy of credence. *Reeves*, 530 U.S. at 142–43.

[208] Bringing defendant's alleged nondiscriminatory reason into play, however, transforms the case into a "mixed-motive" case with the effect of taking it out of situation where the *McDonnell Douglas* "determinative influence" standard applies and into the "a motivating factor" realm of § 703(m).

Therefore, if *McDonnell Douglas* has any continuing significance, it is when the plaintiff has only proof of a "barebones" prima facie case eliminating the most common nondiscriminatory reasons for the defendant's action and the defendant does not point to evidence of a nondiscriminatory reason for its action. The plaintiff should be able to go to trial even if that prima facie case is all that she has, assuming the defendant refuses to assert a nondiscriminatory reason to defeat the prima facie effect of plaintiff's showing. This is necessary to push the defendant to assert a nondiscriminatory reason for its action—the "smoke out" function described in *Burdine*. If the plaintiff is not allowed to go to trial, then *McDonnell Douglas* has lost all meaning beyond the force of its process of elimination argument to the factfinder.

At the close of the plaintiff's case in chief, the defendant theoretically faces a choice: stand pat by attacking the plaintiff's proof of her prima facie case or put in additional evidence of the nondiscriminatory reason for its decision.[209] If the defendant stands pat and the judge determines that there are material questions of fact regarding the plaintiff's prima facie case—if *Burdine* is to be believed—then the defendant loses, if the jury believes the plaintiff's proof of her elemental prima facie case, because there is no nondiscriminatory explanation asserted by the defendant to explain its action. Given that proof of a prima facie case is not onerous,[210] the factfinder, relying on the preponderance of evidence test, is likely to find for the plaintiff. The plaintiff, therefore, is entitled to a verdict in this extremely attenuated situation by establishing her prima facie case without the necessity of proving that defendant acted with an intent to discriminate.[211] Only an exceptional, risk-preferring defendant would take the chance that the jury would not believe the plaintiff's evidence of a prima facie case. Thus, it is only in the extraordinary situation that the plaintiff has only a "barebones" prima facie case and the defendant refuses to assert a nondiscriminatory reason that the *McDonnell Douglas* "determinative influence" standard will apply. But, in that rare case, the only question presented to the jury is whether plaintiff has proved her prima facie case.

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[209] Given discovery, prior motions for summary judgment and motions for judgment as a matter of law, as well as various pretrial procedures, this seems more of an analytical than a practical question.

[210] Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989). Indeed, this is a situation in which the plaintiff might be successful seeking a judgment as a matter of law wherein a reasonable jury would have to believe the plaintiff's prima facie case.

[211] Since the defendant has failed to introduce evidence of a nondiscriminatory reason for its conduct, that is never at issue.

Faced with the high risk of standing mute,[212] defendants will almost always introduce evidence of a nondiscriminatory reason to explain their action.[213] As suggested during the oral argument in *Desert Palace*, once the defendant introduces evidence of a nondiscriminatory reason the case ceases to be a single-motive case subject to the *McDonnell Douglas* "determinative influence" standard because, at that stage, it becomes at least potentially a mixed-motive case governed by § 703(m), and must be treated accordingly.

At the close of the defendant's case, and assuming that motions for judgment as a matter of law are denied, the case is ready to go to the jury[214] using the § 703(m) instruction approved in *Desert Palace*—the "a motivating factor" test.[215] If the defendant asks for and the judge determines there is sufficient evidence in the record that a reasonable jury could find the same-decision defense, then the § 706(g)(2)(B) instruction is given.[216]

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[212] Part of what makes standing pat risky is that the jury is likely to expect the employer to have a nondiscriminatory explanation for its action. In *Old Chief v. United States*, 519 U.S. 172, 188 (1997), a criminal case, the Court indicated that jury expectations "about what proper proof should be" influences the scope of relevancy:

> [T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about.

[213] Denny Chin and Jodi Golinsky indicate that, as of the date of their article, no reported case involved a failure of a defendant to come forward with a nondiscriminatory reason for its action. Chin & Golinsky, *supra* note 204, at 665. The only situation when a defendant might try this gambit is when it is convinced that the jury will not find that the plaintiff's prima facie case has been established. *Id.*

[214] If a jury is waived and the judge is the factfinder, the judge finds the facts and applies the law pursuant to *Desert Palace*.

[215] The instruction was: "[T]he plaintiff has the burden of proving . . . by a preponderance of the evidence that she 'suffered adverse work conditions' and that her sex was a motivating factor in any such work conditions imposed upon her." Desert Palace, Inc. v. Costa, 539 U.S. 90, 96 (2003) (quoting Costa v. Desert Palace, Inc., 299 F.3d 838, 858 (9th Cir. 2002)).

[216] This jury instruction is also an example from *Desert Palace*:

> If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly, even if the plaintiff's gender had played no role in the employment decision.

Id.

One potential problem with merging *McDonnell Douglas* into a uniform structure based on § 703(m) is that historically *Price Waterhouse* "mixed-motive" cases have been treated as somewhat of a "third rail" issue by defendants as well as plaintiffs. Given that the vast majority of individual discrimination cases have been treated as *McDonnell Douglas* cases, both defendants and plaintiffs may be reluctant to use the mixed-motive analysis because they share the feeling that the known devil of *McDonnell Douglas* is better than the unknown devil of § 703(m). Further, defendants do not relish the prospect of ever carrying the burden of persuasion on any issue in a discrimination case. But plaintiffs fear the same-decision defense will tempt the jury to "split the baby," finding liability under § 703(m)'s "a motivating factor" standard, but then finding that the defendant proved its same-decision defense—thereby depriving plaintiff of the most important remedies. Plaintiffs also do not want to give defendants that second bite at the apple under the § 706(g)(2)(B) same-decision defense. Since only a small subset of individual discrimination cases were ever tried under the old *Price Waterhouse* approach, it may be that the parties will just have to come to grips with a new world of individual discrimination law through experience with the new system. Since *Desert Palace* is framed in a way to give an alternative to the plaintiff to ask for a § 703(m) "a motivating factor" instruction, plaintiffs presumably will have the ability to continue to seek a *McDonnell Douglas* "determinative influence" instruction. The Court in *Desert Palace* described its holding as putting the issue in the hands of the plaintiff: "*In order to obtain an instruction under [§ 703(m)], a plaintiff* need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice."[217]

Thus, *Desert Palace* does not appear to foreclose the use of the classic *McDonnell Douglas* approach if the plaintiff asks for instructions that require her to prove that discrimination was the determinative influence in the employer's decision. That would impose a higher threshold on the plaintiff to establish liability than the "a motivating factor" standard in § 703(m) but it would also avoid the possibility of sending the same-decision defense to the jury. Though that does not seem the best strategic choice in general,[218] it may

[217] *Id.* at 102 (emphasis added).

[218] If the plaintiff is convinced that her case will be compelling to the factfinder, she may take the chance of asking for the higher "determinative influence" standard to apply in order to foreclose the defendant's ability to limit remedies pursuant to the same-decision defense in § 706(g)(2)(B).

be that *McDonnell Douglas* can survive beyond the very small area where it analytically still applies. But that seems to require the concurrence of the defendant[219]—since it would appear that a defendant can respond to the plaintiff's request to have the case treated as a *McDonnell Douglas* "single-motive" case by arguing that the case should be analyzed as a mixed-motive case because the defendant has introduced evidence of a nondiscriminatory reason for its action. Defendants may have an incentive to do just that in order to get the benefit of the same-decision defense.[220]

In sum, litigating individual discrimination cases using § 703(m) is feasible for all Title VII individual discrimination cases. Under the approach adopted by the Supreme Court in its individual discrimination cases decided since 1996, the lower courts should decide defendants' motions for summary judgment or for judgment as a matter of law with the expectation that plaintiffs will win more under the new system than the dual method system that reigned before *Desert Palace.* It may take some time, however, to discover how effective this new system is.

The prior, dual system certainly was a difficult one for plaintiffs. Professor Michael Selmi has shown that at the pretrial stage, 98% of employment discrimination cases were decided for defendants compared, for example, with 66% of insurance cases.[221] At trial, plaintiffs had a slightly lower success rate in employment discrimination cases than in insurance cases.[222] Professor David Benjamin Oppenheimer reinforces Professor Selmi's study.[223] Looking

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[219] Because the *Desert Palace* Court appeared to give to the plaintiff the authority to ask for an instruction under § 703(h) when she has introduced sufficient evidence to support a reasonable jury drawing the inference that race or gender was "a motivating factor" in defendant's action, even if other factors were also involved, it follows that the defendant would be able to ask for an instruction under §§ 703(m) and 706(g)(2)(B) when it claims a nondiscriminatory reason for the action and that, even if discrimination was "a motivating factor," it would have taken the same action even if it had not discriminated.

[220] Presumably, if the defendant shares the estimate made by the plaintiff that the jury would likely find for the plaintiff under the *McDonnell Douglas* "determinative influence" standard, the defendant loses little by exposing itself to liability under the "a motivating factor" standard, while potentially gaining a lot with the chance to limit plaintiff's remedies pursuant to the same-decision defense.

[221] Selmi, *supra* note 191, at 560 (claiming that, based on success rates, trial courts are much more hostile to employment discrimination cases than insurance and personal injury cases).

[222] *Id.* There is, however, a significant difference in outcomes in trials depending on whether the case is tried to a judge or to a jury: "Plaintiffs [in employment discrimination cases] are . . . half as successful when their cases are tried before a judge than a jury, and success rates are more than 50 percent below the rate of other claims." *Id.* at 560–61.

[223] David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516–17 (2003).

at California employment cases, he finds employment discrimination cases very hard to win. Not only are plaintiffs' success rates somewhat higher, looking at common law discharge cases (59%) compared with statutory employment discrimination cases (50%), but when sexual harassment cases were excluded from the study, the plaintiffs' success in statutory cases dropped significantly. "[T]he data demonstrate that discrimination cases are hardest to win when brought by non whites (and particularly black women) alleging race discrimination, women alleging sex discrimination (except for sexual harassment), and women over forty alleging age discrimination."[224] Plaintiffs do no better on appeal, whether they won or lost at trial. Professors Theodore Eisenberg and Stewart Schwab have published data showing that "employment discrimination plaintiffs do dramatically worse than defendants on appeal" which is one indicium of how hard it has been for plaintiffs to win discrimination cases.[225]

When an employment discrimination defendant wins at trial and the case is reviewed on appeal, only 5.8% of those judgments are reversed. By contrast, when an employment discrimination plaintiff wins at trial and the case is reviewed on appeal, 43.61% of those judgments are reversed. The 43.61% reversal rate of plaintiff trial victories is greater in employment discrimination cases than in any other category of cases except "other civil rights cases." The 5.8% reversal rate of defendant trial victories is smaller in employment discrimination cases than any other category of cases except prisoner habeas corpus trials.[226]

One explanation for the dismal success rate for plaintiffs in discrimination cases might be that there is little discrimination and so the cases are generally correctly decided. That argument is undercut, however, by evidence that discrimination continues to plague the American workplace. Professors Alfred W. Blumrosen and Ruth G. Blumrosen have undertaken a major study, using the information employers are required to submit to the EEOC in the annual EEO-1 Form.[227] In the longitudinal survey from 1975 to 1999, the good news

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[224] *Id.*

[225] Theodore Eisenberg & Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* 1 (July 16, 2001), *at* http://www.findjustice.com/ms/pdf/double-standard.pdf.

[226] *Id.* (internal citations omitted).

[227] Alfred W. Blumrosen & Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999*, at 1 (2002), *at* http://law.newark.rutgers.edu/blumrosen-eeo.html.

was that women and minority men had made significant employment gains.[228] The bad news was that considerable discrimination persists:

> For 1999, 75,793—or 37 percent [of the 160,000 establishments studied]—discriminated against Minorities in at least one occupational category . . . . For 1999, 60,425—or 29 percent—of establishments discriminated against Women in at least one occupational category . . . . A "hard core" of 22,269 [of about 160,000] establishments appear to have discriminated over a nine year period against Minorities, and 13,173 establishments appear to have done so against Women. This "hard core" is responsible for roughly half of the intentional discrimination we have identified.[229]

Assuming that the lower courts fully implement *Reeves* and *Desert Palace*, the approach the courts would then be taking toward individual discrimination cases would more closely approximate the approach taken toward general civil litigation. Presumably, the results of that new approach would also come more closely to resemble the outcomes in civil litigation generally. That means that many fewer motions for summary judgment would be won by defendants, more cases would go to trial, and fewer motions for judgment as a matter of law would be made in favor of defendants in discrimination cases.[230]

Those are large assumptions. It is also possible that judges will continue to decide individual discrimination cases at the pretrial and trial stages for defendants.[231] Using the new approach, can they reach the same result pattern

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[228] *Id.* at 26.

[229] *Id.* at 74. "Hard core" discriminators were defined as employers:

> [S]o far below average in an occupation that there is only one in one hundred chances that the result occurred by accident (2.5 standard deviations) [versus the 2 standard deviations used to determine systemic disparate treatment in *Hazelwood School District v. United States*, 433 U.S. 299, 311 n.17 (1977)] in 1999 and in either 1998 or 1997, and in at least one year between 1991 and 1996, and was not above average between 1991 and 1999.

Id. at 95.

[230] All of this means that the settlement value of individual discrimination cases should also rise. Increasing the economic value of these cases may cause more attorneys to represent plaintiffs in discrimination cases. Reducing the proportion of pro se cases would solve one of the complaints judges have about the discrimination cases on their dockets.

[231] *See* Selmi, *supra* note 191, at 555 (arguing that the federal judiciary is not sympathetic to plaintiffs in employment discrimination cases). Since *Desert Palace* made the law more plaintiff-friendly, only time will tell how educable federal judges are in implementing the new law of discrimination. "It would be very optimistic to assume that all judges are educable." Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUMAN RTS. L. REV. 575, 599 n.132 (2003).

of results as under the prior system?[232] At the summary judgment stage as well as at the motion for judgment as a matter of law stage, judges following *Reeves* will be required to review the evidence drawing every reasonable inference in favor of the plaintiff with the substantive law being set by § 703(m), which now presumptively governs all individual disparate treatment cases. Parsing the language of § 703(m), the term "demonstrates" is itself defined in § 701(m) to mean "meets the burdens of production and persuasion." Given the interpretation in *Desert Palace* that "demonstrates" does not carry with it any special, heightened evidentiary standards, it is unlikely that judges will find much purchase to resist the impact of *Desert Palace* there.

Perhaps more likely for the development of a restrictive application of § 703(m) will be found in interpreting what constitutes "a motivating factor." Since the term is new to Title VII in the 1991 amendments and since few courts had applied it to cases because of the "direct" evidence threshold now rejected in *Desert Palace*, there are fewer restraints to the development of a restrictive interpretation than with the term "demonstrates." There is, however, legislative history that supports the interpretation that discrimination was "a motivating factor" if it played any role at all in the employer's decision. Thus, the House Report on the bill destined to become the 1991 Civil Rights Act describes the meaning of the term a "contributing factor," which was ultimately replaced, in the enacted bill, with the language "a motivating factor."

> [I]n providing liability for discrimination that is a "*contributing factor*," the Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for *any discrimination that is actually shown to play a role* in a contested employment decision.[233]

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[232] Given the decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002), it is unlikely that judges will be in a position to increase the proportion of defendants' motions to dismiss plaintiffs' complaints for failing to state claims upon which relief can be granted.

[233] H.R. REP. NO. 102-40, Part 1, at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (second emphasis added). The change from the language "contributing factor" that ultimately became "motivating factor" when the Act was passed was not intended to suggest any change in concept. In the House Report accompanying the bill as finally passed by Congress, the change is described as follows: "The substitute's new language changes the grounds upon which an individual may bring suit against a company for discriminatory intent from that intent being 'a contributing' factor to a 'motivating' factor. *This change is cosmetic and will not materially change the courts' findings.*" 137 CONG. REC. H3944–45 (daily ed. June 5, 1991) (emphasis added) (inserted explanation by Rep. Stenholm).

Divining any difference in results depending on the levels of showing less than but-for is difficult, but surely the "a motivating factor" standard is much easier to satisfy than is but-for. Given the sharp difference that Justices White and O'Connor saw between "a motivating part" proposed by the plurality in *Price Waterhouse* and their preferred language of "a substantial factor," it is clear that "a motivating factor" is less difficult for plaintiffs than would be "a substantial factor" and "a substantial factor" is, if Justice O'Connor is to be believed in *Price Waterhouse*, much easier to establish than but-for. Presumably, careful review of the facts of many cases over time might reveal that judges, resistant to a more plaintiff-friendly interpretation of Title VII, were heightening what "a motivating factor" means. Nevertheless, they would fail to interpret it correctly if the showing approached the "a substantial factor" level, much less the but-for level.

The final new term added in § 703(m) is "employment practice." It is also used in § 703(k), the provision the 1991 Act added to Title VII to codify the disparate impact theory of liability. It may well be that courts, looking for ways to restrict the scope of § 703(m), may develop restrictive interpretations of what constitutes an "employment practice." This would be consistent with how some courts have construed the "terms and conditions" of employment in § 703(a).[234] The better reading of the term "employment practice" is that it is intended to keep Title VII's focus on employment versus nonemployment matters.[235] Over time it will be interesting to see if the lower courts develop a narrow gloss on "employment practice" that limits the full operation of

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[234] *E.g.*, Russell v. Principi, 257 F.3d 815, 819 (D.C. Cir. 2001) ("[T]he logic of an action that is 'adverse in an absolute sense' fits poorly with employment decisions involving bonuses . . . . A performance evaluation can drop below an average, but a bonus cannot be negative."); Davis v. Town of Lake Park, 245 F.3d 1232, 1242–43 (11th Cir. 2001) ("A negative evaluation that otherwise would not be actionable will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result."); Bruno v. City of Crown Point, 950 F.2d 355 (7th Cir. 1991) (evidence of asking only women candidates about family issues was not sufficient to support finding of intentional discrimination). Rebecca Hanner White provides an effective critique of this line of cases:

> Congress's use of the phrase "compensation, terms, conditions, or privileges" emphasizes the employment-related nature of the prohibited discrimination. The phrase is better read as making clear that an employer who discriminates against an employee in a non-job-related context would not run afoul of Title VII, rather than as sheltering employment discrimination that does not significantly disadvantage an employee.

Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151 (1998); *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 98, 102 (2002) (arguing that changes in employer structure will make it more difficult to show adverse action in employment decisions).

[235] *See* White, *supra* note 234, at 1151.

§ 703(m), just as some have done in limiting the scope of protection afforded by § 703(a) with narrow interpretations of "terms and conditions" of employment in that section of the statute.

No doubt the largest risk to the development of the full plaintiff-friendly role of § 703(m) is that, in deciding motions for summary judgment and judgment as a matter of law, judges will simply fail to view the evidence in the light most favorable to the nonmoving party—the plaintiff—and will fail to draw every reasonable inference in favor of the nonmoving party based on that evidence. While this would contravene the lesson the Supreme Court gave in *Reeves*, the exercise of that power by lower courts is hard for the Supreme Court to review.[236]

CONCLUSION

Since 1996, the Supreme Court has decided four individual discrimination cases. All were unanimous and all were favorable to the interests of a fuller protection of the rights of the individual to be protected from discrimination. These decisions now can be seen as being in sharp contrast to those that came before. Especially in light of *Reeves* and *Desert Palace*, the new direction appears to be toward an approach that focuses on the evidence in the record and the reasonable inferences that can be drawn based on that evidence. In other words, individual discrimination law is increasingly resembling the approach taken by courts in general civil litigation.[237]

The process of elimination method of argumentation as to what constitutes discrimination that is at the core of *McDonnell Douglas* is entirely consistent with this new approach. As a method of analysis separate from § 703(m), the *McDonnell Douglas* "determinative influence" standard applies only in those rare situations when a plaintiff has a "barebones" prima facie case and nothing more and defendant decides not to assert a nondiscriminatory reason to rebut the prima facie case. In that extremely rare situation, *Hazen Paper*'s "determinative influence" level of showing applies. Otherwise, unless both plaintiff and defendant agree that *McDonnell Douglas* applies, the "a motivating factor" test established in § 703(m) applies to all individual

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[236] *See* Zimmer, *Leading by Example*, *supra* note 72, at 188–89; Zimmer, *Slicing & Dicing*, *supra* note 72, at 577–78.

[237] For the ramifications of *Desert Palace* on "reverse" discrimination cases, see Charles A. Sullivan, Reversing Title VII: "Reverse Discrimination" Jurisprudence (unpublished manuscript on file with author).

disparate treatment cases brought pursuant to Title VII.[238] But for that very small subset of cases in which the *McDonnell Douglas* analysis applies, the defendant will be liable if race, color, religion, sex, or national origin was "a motivating factor" for the action the plaintiff attacks. If an impermissible factor was a motivating factor, the defendant has the opportunity provided by § 706(g)(2)(B) to prove as an affirmative defense to full remedies that it would have made the same decision even if it had not considered the impermissible factor.

[238] The issues connected with the possible application of *Desert Palace* to Title VII retaliation cases as well as ADEA and 42 U.S.C. § 1981 cases are beyond the scope of this paper.