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Status Rules: Doctrine as Discrimination in a Post-Hicks Environment

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I. INTRODUCTION

In his momentous essay The Path of the Law, Oliver Wendell Holmes observed that "[t]he law is the witness and the external deposit" of the moral life of a nation. Holmes argued that no matter whether an individual believes that the law emanates from a sovereign or from the legislature, there is a constant inquiry into the rationale and principles laid down by the judge who interprets the law. According to Holmes, this search for reason reflects a fallacy that suggests "that the only force at work in the development of the law is logic." The vitality of Holmes' observation strikes with particular force upon examination of recent developments in judicial application...
of antidiscrimination laws. One such application is the United States Supreme Court's decision in *St. Mary's Honor Center v. Hicks.*

In *Hicks,* the Court held that a plaintiff must prove intentional discrimination to be entitled to judgment in a Title VII disparate treatment employment discrimination lawsuit. A plaintiff must affirmatively show that the employer was motivated by the plaintiff's race, religion, color, sex, or national origin as proscribed by Title VII of the Civil Rights Act of 1964 in making the challenged employment decision. The *Hicks* decision attracted significant attention from civil rights activists and women's groups and has generated a large body of scholarship on the merits, or otherwise, of the decision. The bulk of this reaction was negative.

5. See id. at 514. Under the Court's analysis, there are two ways a plaintiff could obtain a judgment. First, as a matter of law and pursuant to the Federal Rules of Civil Procedure 50(a)(1) or 50(b), a court must award judgment to the plaintiff if a rational person would find that the evidence presented constitutes a prima facie case, and the defendant failed to meet its burden of production by not introducing evidence "which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse employment decision." Id. at 509. Second, a plaintiff is entitled to judgment if the defense fails to sustain its burden, and the factfinder determines that the prima facie case is supported by a preponderance of the evidence. See id. at 510 n.3. "It is not enough, in other words, to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.
7. See *Hicks,* 509 U.S. at 510-11.
8. See, e.g., *Management, Civil Rights Attorneys Differ on Effect of Hicks Decision,* 1993 DAILY LAB. REP. (BNA) No. 126, at C-1 (July 2, 1993) (reporting that civil rights attorneys interpret the *Hicks* decision as increasing a plaintiff's difficulty of prevailing in a discrimination action); Joan Biakupic, *High Court Ends Session on Note of Conservatism,* INDIANAPOLIS STAR, July 4, 1993, at B8 (contending that the majority's rewrite of longstanding interpretations of federal laws barring job discrimination pleased businesses but angered civil rights activists); *Overburdened: The Supreme Court Has Made It Too Difficult to Prove Bias: The Congress Must Act,* NEWSDAY, July 1, 1993, at 54 (claiming that the outrageous decision calls for the immediate attention of Clinton and Congress to rescue truth and justice); David G. Savage, *Justice's Rule Fired Workers Must Prove Bias,* L.A. TIMES, June 26, 1993, at A1 (quoting the director of the Women's Rights Project for the American Civil Liberties Union as stating that "this is going to make it next to impossible for discrimination complainants to win").
The Hicks decision is understood as having altered the procedural process of Title VII race discrimination cases in favor of employers.10 Because plaintiffs are not entitled to a judgment even if they prove that the reason proffered by the employer for the adverse employment decision is merely a pretext for discrimination, commentators have interpreted Hicks as endorsing the "pretext-plus" rule.11 Regardless of how the Hicks decision is understood, the Supreme Court's imprimatur legitimized the pretext-plus rule while also making it the law of the land.

In a narrowly legal sense, the Supreme Court's decision in Hicks, based on the precedents of McDonnell Douglas Corp. v. Green12 and Texas Department of Community Affairs v. Burdine,13 is appropriate because the plaintiff ultimately bears the burden of proving intentional discrimination.14 However, the Hicks decision has a broader substantive effect of sacrificing the struggle for a discrimination-free work environment on the altar of procedure. Some scholars rationalized Hicks as a decision that reaffirms the potency of the employment-at-will doctrine in the United States.15 Some argue that Hicks was correctly decided because the procedural rules of burden shifting as applied by the Court do not unfairly assume the presence of discrimination.16 Others argue that McDonnell Douglas and Burdine never established a framework that mandated judgment for a plain-

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10. See Corbett, supra note 9, at 351-52 (arguing that the Court's claim of a lack of authority to impose liability on an employer absent positive proof of discrimination is, in reality, an affirmation of the majority's preference for employment-at-will).


14. See id. at 253. In McDonnell Douglas and Burdine, the Court developed a procedural model for framing the factual issues and allocating the burdens of proof in a Title VII disparate treatment lawsuit to enable the plaintiff to prove her case with circumstantial evidence. See id. The Burdine Court stressed that the plaintiff maintains the burden of persuasion throughout the lawsuit and must be given a fair opportunity to prove discrimination. See id. The plaintiff's successful prima facie case creates a rebuttable presumption that the employer intentionally discriminated. See id. After establishing a prima facie case, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory reason for its adverse employment decision. See id. Thereafter, the plaintiff has the opportunity to demonstrate that the employer's articulated reason is pretextual by proving that the reason was not true or not the real reason. See id. at 256.

15. See, e.g., Corbett, supra note 9, at 330 (arguing that the Supreme Court has refused to displace the employment-at-will doctrine to the extent necessary to effectuate the objectives of antidiscrimination laws and that employment-at-will has "won so many battles before the Supreme Court that the war may almost be over").

16. See Smith, supra note 9, at 304.
tiff once pretext has been proven. According to this argument, the Hicks decision is doctrinally correct, and the problem lies with the precedents on which the decision rests. Meanwhile, other scholars criticize the Hicks decision for the procedural burdens imposed on plaintiffs and the resulting adverse consequences.

I argue that Hicks is doctrinally correct but suggest that a more important development than the reaffirmation of the employment-at-will doctrine was taking place in the Court. While a practical impact of the decision is to limit the use of inferences to prove discrimination, Hicks reflects the subtle, but increasingly palpable, societal conviction that race is no longer the problem that it was at the time of Title VII's enactment. In other words, a partial impact of Hicks is that a plaintiff in a Title VII race discrimination action must now overcome an unspoken presumption of a race-neutral workplace by proving that there is a causal link between race and the adverse employment decision. Seen in this light, the implications of the Hicks decision go far beyond the workplace to reflect deep-seated perceptions and deliberate skepticism about the pervasiveness of race-based decision making in the workplace. Superficially neutral evidence rules, as applied by the Court, leave the goal of equal treatment to the workings of a litigation structure that is based on an assumption that equality is the norm in the American workplace. In addition, the Hicks decision falsely assumes that the phenomenon of discrimination can be determined through application of a defined set of either evidentiary or procedural rules, or both. Not only is the framework endorsed in Hicks inadequate to address or reflect the nature of discrimination and the various ways that discriminatory animus may be expressed, it also undermines the integrity of decision

17. See Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229, 2269 (1995) (arguing that the McDonnell Douglas-Burdine proof structure was flawed because the prima facie case standard was inadequate in a substantial category of cases).
18. See id.
20. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 534-35 (1993) (Souter, J., dissenting). Justice Souter noted that the majority opinion essentially mandates direct evidence to satisfy a framework predicated on the absence of direct evidence and that "[t]he majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent." Id.
making because it artificially constrains factfinding. This vitiates the viability and legitimacy of the legal process as a means of evaluating and ascertaining the truth (or otherwise) of a discrimination claim. Although procedure is generally invaluable in the search for truth through the legal system, the procedure affirmed by the *Hicks* decision detracts from, if not completely undermines, the ends for which it exists, namely truth and justice for all.

As critical as the above issues are, however, the *Hicks* message is far more portentous. *Hicks* and its progenitors reflect the success of a flawed egalitarian ideal, despite liberal egalitarianism's efforts to transform American society into one in which an individual's status is not the primary determinant of his or her destiny. Although ideas of an egalitarian society partially informed this nation's political

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21. See Malamud, *supra* note 17, at 2236-37. Malamud astutely observes that "to accord legal significance to the plaintiff's satisfaction of the 'requirements' of the prima facie case 'stage' and the pretext 'stage' of McDonnell Douglas-Burdine is to engage in an act of misplaced concreteness. The world of practice under McDonnell Douglas-Burdine remains a disorderly one, in which the assignment of categories of facts to 'stages' of the case is unstable." *Id.* at 2237.

22. The exclusion of African Americans from the principles enunciated in the Declaration of Independence, and enshrined in the Constitution, was manifested in the infamous *Dred Scott* decision where the Supreme Court held that blacks could not sue in U.S. courts and that Congress could not prohibit slavery in the Territories. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432-54 (1856) (*Dred Scott*). The *Dred Scott* decision explicitly formalized the social reality that, although free, former slaves and their descendants were not deemed equal in the eyes of society and, ultimately, in the eyes of the law. In the decades that followed *Dred Scott*, the struggle for equality dominated the American landscape, beginning with the Civil War, the enactment of the Civil War amendments, the civil rights movement, and culminating in the Civil Rights Act of 1964. These victories, while sweet and certainly hard won, nonetheless have fallen short of the goal of ensuring that equality is the reality of American society and the American workplace. The egalitarian ideals of the Constitution have ostensibly been extended to minorities throughout the nation, but the realization of equality as the norm in life remains a distant goal. See James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 How. L.J. 633, 659 (1996) (arguing that the Constitution relegated African Americans to a subordinate status because of unanswered questions dating back to *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *Plessy v. Ferguson*, 13 U.S. 537 (1896), and *The Civil Rights Cases*, 109 U.S. 3 (1883), and which result in a modern badge of slavery); Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 8, 10-14 (1992) (affirming claims that the Declaration of Independence and the Constitution were defective from their inceptions, allowed racial injustice to exist under the rule of law they created, and resulted in the perversion of egalitarian ideals); see also Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (noting that while antidiscrimination laws are largely an attempt to secure equality for African Americans, "the desire to help blacks is qualified" because the laws do not specify any particular race or color and because the law requires only that employers refrain from using race as a basis for decision making). Fiss argues that the use of race as a criterion for decision making would only impair productivity, both for the individual businessman as well as for society at large. See *id*. Fiss concludes, however, that the two qualifications "make the conferral of benefits on blacks particularly palatable, ethically and politically, to the political majority." *Id.*
birth,\(^23\) the pattern of resource allocation was, and continues to be, heavily influenced by the status rules that supported the flawed egalitarian model. Although more subtle in their operation today, these rules informed the early political, social, and economic structure of American society and remain a part of our national fabric, just as they were over two centuries ago.

This Article, applying Henry Sumner Maine’s status to contract theory\(^24\) and using the Hicks decision as its context, examines the formal re-emergence of status. Maine argued that in progressive societies, law reflects free will as manifested in the relationships that define rights and duties between individuals as well as between individuals and society.\(^25\) Thus, relationships in these progressive societies are increasingly governed by contract (free will) and not status (relationships determined by what caste into which an individual was born).

Status is a term of social standing relative to the larger community.\(^26\) It defines the rights, duties, capacities, and incapacities that determine a person’s membership in a given class.\(^27\) Status establishes a legal personal relationship, neither temporary in nature nor terminable at the mere will of the parties.\(^28\) This Article argues that status has re-emerged as a primary determinant of access to economic resources. In this sense, status is preserved through certain legal standards, including those that have been used to explain or

\(^23\) Equality of natural rights, but not social and political rights, informed this nation’s political birth. For example, although President Lincoln disagreed with the Dred Scott decision, he did not go so far as to recognize procedural and substantive equality for all:

I think the authors of that notable instrument [Declaration of Independence] intended to include all men, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in certain inalienable rights, among which are life, liberty, and the pursuit of happiness. This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.


\(^24\) See Henry Sumner Maine, Ancient Law 164-65 (1861).

\(^25\) See id.


\(^27\) See id.

\(^28\) See id.
justify the Hicks decision. As employed in Hicks and other cases, these standards help preserve the role of status as an indicator for resource allocation.

Part II of this Article discusses the Hicks decision in light of the employment-at-will doctrine. It concludes that Hicks may be rationalized as a reflection of the importance of the at-will doctrine, but posits that upon closer examination, Hicks may have undermined the strength of the at-will doctrine by requiring an employer to produce a reason for firing an employee. Part III critiques the central role of the intent requirement in discrimination cases. It discusses the nature of discrimination and the need to develop a legal standard that makes feasible the task of proving that an adverse decision was the result of discrimination. Part IV examines the evidentiary concerns at issue in Hicks. It focuses on the role and effect of presumptions and shows how alternative approaches, derived from other areas of law, will serve Title VII's purposes far better than the framework provided in Hicks. These approaches are also likely to minimize the effect of status on an individual's potential for economic and professional success. Finally, Part V concludes that although the progeny of Hicks conform to the legal doctrine established therein, both Hicks and its progeny are undiscerning of the underlying premise that allows discrimination to prosper in an employment situation, that is, the presumption that all employees are treated equal.

II. ANTECEDENTS: STATUS, CONTRACT, AND HICKS AS AN EMPLOYMENT-AT-WILL DECISION

In Hicks, the plaintiff Melvin Hicks, a black man and a former shift commander at a halfway house, brought suit against his employer alleging that the employer took adverse employment actions against him because of his race in violation of Title VII. Mr. Hicks had maintained a satisfactory work record until January 1984 when John Powell, a white man, became his supervisor. Beginning on March 3, 1984, and lasting through June 7, 1984, the day he was fired, Mr. Hicks was cited for various incidents involving violations of workplace rules. In his place, the employer hired a white male.

29. See infra notes 217-21 and accompanying text for a clarification of the term "presumption." The conflicted use and application of the word "presumption" by the Supreme Court contributes significantly to the difficulty encountered by plaintiffs in proving discrimination. A proper use of the terminology employed when dealing with evidentiary standards and rules will greatly ease the confusion that current usage has engendered.
31. See id.
32. See id.
33. See id.
34. See id. at 506.
The United States District Court for the Eastern District of Missouri found that the plaintiff established a prima facie case of racial discrimination by a preponderance of the evidence. The plaintiff was a member of a protected class; he had performed his job satisfactorily; he was terminated, and the employer replaced him with a white male. The court also found that the defendant/employer rebutted the presumption of discrimination by proffering two non-discriminatory reasons for the adverse decisions and that these nondiscriminatory reasons were pretextual. Nevertheless, the district court held that the plaintiff failed to prove that the adverse actions were racially motivated and entered judgment for the employer. The district court conceded that Mr. Powell was determined to terminate Mr. Hicks, but the court believed that Mr. Powell's reason may have been motivated by personal animosity rather than discrimination.

The Eighth Circuit Court of Appeals reversed the district court's ruling and held that the plaintiff was entitled to judgment as a matter of law once he proved that the proffered reasons for the adverse decision were pretextual. The circuit court found that the district court erred in entertaining the possibility that personal animosity was the reason behind the termination when the defendants never actually stated such a reason or offered evidence to support it.

In a five-to-four decision, the Supreme Court reversed the Eighth Circuit's decision and held that a plaintiff in a Title VII action must show that the adverse decision was motivated by intentional discrimination based on race. The Court agreed with the district court that the burden of persuasion requires a plaintiff to show that the challenged employment decision was racially rather than personally motivated. The Court conceded that the employer's proffered non-discriminatory reasons were pretextual and that the prima facie case

36. See id. at 1249-50.
37. See id. at 1250 (finding that the defendant employer successfully demonstrated that the plaintiff had committed sufficiently severe internal policy violations to warrant his dismissal). The defendant asserted that on one occasion, Mr. Hicks failed to supervise his subordinates who then abandoned their posts. This failure of Hicks to supervise his subordinates "left St. Mary's vulnerable to escape or knavery by the inmates." Id. The defendant also asserted that Hicks's violations were sufficient in number and frequency to justify his termination. See id.
38. See id. at 1251 (finding that the supervisor provoked the confrontation between the plaintiff and his supervisor and that the plaintiff was either singled out for harsh discipline or was the only employee disciplined at all).
39. See id. at 1252.
40. See id. at 1251-52.
41. See Hicks v. St Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992).
42. See id.
44. See id.
might have been sufficient to rule in favor of the plaintiff. However, the Court concluded that nothing *compelled* such a ruling. According to the Court, the presumption of discrimination “drops out of the picture” once the burden of production has been met by the defendant. At this stage, the issue becomes whether the plaintiff proved that the defendant discriminated against him because of his race.

A. The At-Will Rule and Its Boundaries

An easy, almost instinctive, reaction to *Hicks* is to justify the decision in light of the core principle of American employment law, namely the employment-at-will doctrine. The at-will doctrine states that an employer may hire or fire an employee for *any* reason: good reason, bad reason, or no reason at all. Absent contractual provisions that substantively limit the employer's prerogative to terminate an employee for any or no cause, an employer is generally not required to provide an explanation for its decision to terminate an employee at any point during the employment relationship.

45. See id. at 511.

46. Id. at 510-11.

47. See id. at 511.

48. For an early formulation of the at-will doctrine, see HORACE G. WOOD, ON THE LAW OF MASTER AND SERVANT (1877). The first reported case applying the at-will doctrine is *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507 (Tenn. 1884), overruled on other grounds by *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). In *Payne*, an agent of the defendant, Western & Atlantic Railroad, ordered its employees not to trade with the plaintiff, who owned a store near the railroad's depot. See id. at 509-10. The order included a threat of discharge for any employee who continued to trade with the plaintiff. See id. at 511. Although the plaintiff sued in tort, see id. at 510-11, the court resolved the conflict using principles of contract law:

If the employees are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employee[s] an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employee[s]' action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie even to the employee[s]; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law ....

Id. at 517. The court further stated that while actions such as the defendant's may be morally wrong,

the law can adopt and maintain no such standards for judging human conduct; and men must be left, without interference to buy and sell where they please, and to discharge or retain employee[s] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.

Id. at 518.


though the legitimacy of the at-will doctrine as an expression of American law has faced some challenge, the rule nonetheless continues to thrive as a cardinal principle of employment relations.

Over the years, courts have developed several ways to limit the power of arbitrary and capricious termination embodied in the employment-at-will doctrine. The most important of these limitations is the public policy exception. This exception, stated generally, provides relief for an employee who is terminated for performing an act that public policy would encourage or for refusing to perform an act that public policy would discourage. For example, the exception extends to impose liability in a wide range of contexts where an employee is discharged for disclosing illegal activities of an employer, exercising a statutory right, such as filing a worker's compensation claim, or refusing to violate a penal statute. The scope of the public policy exception varies considerably from jurisdiction to jurisdiction, and courts have been active in prescribing the contours of the exception as it applies to state policy. There is no doubt that at the
federal level a clear public policy exists against discrimination. This policy is embodied in Title VII and other federal antidiscrimination statutes. Most states have incorporated this federal policy in state statutes, modeled on Title VII, to prohibit discrimination on a variety of grounds. Under the public policy exception to the at-will doctrine, however, there is no uniform pattern for treating discrimination claims. While some courts have permitted plaintiffs to bring discrimination claims under the state public policy exception, others have not.

Contract theory has also engendered some limitations on an employer's ability to terminate an employee arbitrarily. Courts in several jurisdictions have held that employee manuals create an implied contract of employment. Oral assurances of job security, combined with other factors, such as consistently high job evaluations, promotions, and longevity on the job have been held to create a quasi-contract, thereby limiting the at-will doctrine. Traditional torts,
such as interference with contractual relations, have also been used to impose liability on an employer who wrongfully discharges an employee.64

In addition to the contract and tort law limitations on the employment-at-will doctrine, Title VII prohibits an employer from making adverse employment decisions regarding an employee's compensation, terms, conditions, or privileges of employment because of the employee's race, color, religion, sex, or national origin.65 Title VII's proscriptions, like the common law tort or contract causes of action, may be viewed broadly as exceptions to the employment-at-will doctrine. The relative strength of these exceptions is determined ultimately by federal courts, which are responsible for interpreting the scope of Title VII, and state courts, which evaluate the propriety of contract and tort-based causes of action. Undoubtedly, the common law causes of action are easier to curtail by state courts than are Title VII causes of action by federal courts.66 However, as Hicks demonstrates, the application of procedural rules of burden shifting may engender the same results at the federal level as a narrowly construed common law cause of action in terms of a plaintiff's success in wrongful discharge cases. Thus, despite its limitations, the at-will doctrine continues to thrive as the dominant rule of law whether its articulation is explicit, through the application of common law, or implicit, through the procedural rules applied under Title VII.67 In tort-based causes of action, plaintiffs are certain of success only in the most egregious fact patterns.68 In contract cases, plaintiffs are

66. This is because common law causes of action may be narrowly construed where the issue is discrimination. Judges, who want to keep discrimination cases from funneling through tort or contract law, have more leeway to limit or restrict cases brought under these theories.
67. See Corbett, supra note 9, at 351-52 (arguing that the at-will doctrine implicitly survives through the Court's interpretation in Hicks). Some scholars have advocated a single just-cause rule to replace the various exceptions to the at-will doctrine. See, e.g., Donald C. Robinson, The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA), 57 MONT. L. REV. 375, 380 (1996) ("Public employees may have a constitutionally protected property interest in continued employment if there is some contract, rule, regulation, or law which infers a specified term of employment or a 'just cause' requirement for discipline or termination."). But see Todd H. Girshon, Wrongful Discharge Reform in the United States: International and Domestic Perspectives on the Model Employment Termination Act, 6 EMORY INT'L L. REV. 635, 704 (1992) ("To the extent that just cause imposes an unrealistically rigorous standard of review, applied liberally to most employees through relatively short qualifying periods, as in the Canadian Federal sector, the statutory right could arguably translate into an institutionalization of mediocre performance.").
68. See Nicolle R. Lipper, Sexual Harassment in the Workplace: A Comparative Study of Great Britain and the United States, 13 COMP. LAB. L.J. 293, 300 (1992) (explaining that many tort-based causes of action require the plaintiff to prove physical harm or that the harassing conduct was extreme and outrageous).
assured of success only where enough elements of a quasi-contract relationship will withstand the test of specificity required under contract rules.\textsuperscript{69}

While plaintiffs employing the recognized exceptions to the rule have enjoyed some success, the limits imposed by tort and contract are easily manipulated by an employer who ultimately retains control over the circumstances that lead to termination, particularly in the area of contract.\textsuperscript{70} For example, assuming the facts of \textit{Hicks} to be true and that the plaintiff had an employment contract stating that termination would be only for just cause, the outcome of the case still would have favored the defendant. The plaintiff's conduct of threatening his supervisor is, under most circumstances, a sufficient reason to justify discharge. This would be true even though the trier of fact found that the defendant manufactured the circumstances leading to the altercation to get the plaintiff to react in the threatening manner.\textsuperscript{71}

\textbf{B. The At-Will Rule in the Age of Modernity}

The employment-at-will doctrine has remained intact despite various legislative and judicial attempts to dilute its potency. The underpinnings of the rule appeal overtly to the principle of freedom

\begin{footnotesize}
\textsuperscript{69} See, \textit{e.g.}, Walker v. Modern Realty, Inc., 675 F.2d 1002, 1003 (8th Cir. 1982) (concluding that language used in a letter agreeing to employ the plaintiff was sufficiently clear to form an enforceable contract); Pine River State Bank v. Metille, 333 N.W. 2d 622, 633 (Minn. 1983) (holding that provisions of an employee handbook limiting the employer's ability to terminate its employees were contractually binding and that the employee was wrongfully terminated contrary to those provisions). Because some courts have rejected the view that an obligation to discharge an employee in good faith should be implied in an at-will employment contract, only extreme situations have warranted a public policy exception. For example, in \textit{Pugh v. See's Candies, Inc.}, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981), an employee who was terminated after 32 years of employment prevailed in a wrongful discharge claim because the employer breached an implied promise not to act arbitrarily. The court found that an enforceable promise arose from the duration of employment, the promotions the employee received, the lack of criticism, and the employer's policies. See id.

\textsuperscript{70} See, \textit{e.g.}, Woolley v. Hoffmann-La Roche, Inc 491 A.2d 1257, 1270-71 (N.J. 1985), \textit{modified on other grounds} by Woolley v. Hoffmann-La Roche, Inc., 499 A.2d 515 (N.J. 1985) (holding that where an employer distributes an employee handbook specifying the reasons for and procedures by which an employee may be terminated, the employer may avoid the resultant contractual significance of those provisions by including a prominent statement in the handbook to the effect that employment remains at will).

\textsuperscript{71} In \textit{St. Mary's Honor Center v. Hicks}, 509 U.S. 502 (1993), the plaintiff was fired after his supervisor manufactured an altercation that provoked the plaintiff to threaten him. See \textit{id.} at 508; \textit{cf.} Gaglidari v. Denny's Restaurants, Inc., 815 P.2d 1362, 1368 (Wash. 1991) (finding that an employee handbook created an employment contract, but that if the employee violated the provision prohibiting fighting on company premises, immediate dismissal was justified). The \textit{Hicks} Court found for the defendant/employer even though the behavior in question was an attempt to protect the employer's interests. See \textit{Hicks}, 509 U.S. at 524.
\end{footnotesize}
of contract, which is founded upon cherished ideals of equality and individual will. In addition, the definition of property, which was expanded in the late nineteenth century to include freedom of contract, unwittingly solidified the status of those who could not legally or easily own property at this point in history. This result was, in some ways, foreseen by those who contributed to the Progressive critique of the laissez-faire principle of economy—a principle supported by the conviction that a free market system would best distribute resources in society. As Roscoe Pound pointed out in his prominent article Liberty of Contract, the freedom of contract concept presumes equal rights between potential market actors, specifically employers and employees. In Pound's time, this concept was, as Pound insisted, clearly out of touch with social realities.

The Progressive critique was justified in *Lochner v. New York* in which the Supreme Court held that a maximum-hours law for bakers was an unconstitutional interference with freedom of contract, even though bakers clearly could not bargain effectively with their more powerful employers. The *Lochner* decision was surprising because this "constitutionalization of freedom of contract . . . came after two decades of astonishing change in the structure of the American economy that had resulted in the creation of giant corporations capable of exercising enormously disproportionate market power." True "freedom of contract" could simply not be realized any more in the new money economy than it had existed in the feudal economy.

72. See Feinman, supra note 51, at 118; see also Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 89 (N.Y. 1983) (declining to recognize the tort of wrongful discharge and holding that such a "significant change in [the] law is best left to the Legislature"). The court opined:

Those jurisdictions that have modified the traditional at-will rule appear to have been motivated by conclusions that the freedom of contract underpinnings of the rule have become outdated, that individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely, and that the rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal. Whether these conclusions are supportable or whether for other compelling reasons employers should, as a matter of policy, be held liable to at-will employees discharged in circumstances for which no liability has existed at common law, are issues better left to resolution at the hands of the Legislature.

Id. at 89.

73. PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 131 (1980).

74. See LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 184-94 (1965).


76. See id. at 482-87.

77. 198 U.S. 45 (1905).

78. See id. at 64.

In 1872 the infamous *Slaughter-House Cases* marked the beginning of a battle for an expansive definition of property. The battle reflected the breadth of the economic transformation taking place during this era in American society. In essence, the transition from a landed economy to an industrial economy marked a shift in sources of capital accumulation and created new forms of property that required the protection of the law. Indeed, the Supreme Court had long conceded that the law recognized a property interest in certain things "in the effort to meet the many new demands for justice incident to a rapidly changing civilization . . . ." The judicial instinct of the courts, then and now, is to view incursions on the employment-at-will doctrine as infringements on the employer's property rights. The exceptions to the rule are thus applied as benevolent acts of equity, to be used only in those circumstances where conscience cannot easily turn a blind eye. Roscoe Pound described the antecedents of this "judicial currency:"

> [O]ur constitutional models and our bills of rights were drawn in the period in which the natural law school of jurists was at its zenith, and the growing period of American law coincided with the high tide of individualistic ethics and economics. Hence, his school course in political economy and his office reading of Blackstone taught the nineteenth century judge the same things as fundamentals. He became persuaded that they were the basis of the juridical order, and, as often happens, the individualist conception of justice reached its complete logical development after the doctrine itself had lost its vitality. Social justice, the last conception to develop, had already begun to affect not merely legal thought but legislation and judicial decision, while the courts were working out the last extreme deductions from the older conception. . . . As a result of our legal history, we exaggerate the importance of property and of contract, as an incident thereof. . . . The absolute certainty which is one of our legal ideals, an ideal responsible for much that is irritatingly mechanical in our legal system, is demanded chiefly to protect property.

Unequal bargaining power between property owners and non-property owners was, and continues to be, inextricably linked to status. Freedom of contract emphasized the exercise of individual will. Yet, women, blacks, and other groups could not exercise their "will" in relation to a wide variety of subjects, such as owning prop-

80. 83 U.S. (16 Wall.) 36 (1872).
83. Pound, supra note 75, at 460-61.
erty or access to education or other "goods" available in the marketplace of the broader economy. Through the accretion of case law and, later, statutes, this situation ostensibly changed. However, as Morris Cohen pointed out in 1927, the American money economy, though consciously developed in reaction to the British feudal economy, in fact, substantially replicates it.\textsuperscript{84} In \textit{Adkins v. Children's Hospital},\textsuperscript{85} the Supreme Court held that a federal statute authorizing an administrative board to set minimum wages for adult women in the District of Columbia was unconstitutional.\textsuperscript{86} In his analysis of the case, Cohen compared the modern money economy with "medievalism" and "feudalism" where status governed social relations based on property ownership. Cohen observed of the modern economy:

> The state, which has an undisputed right to prohibit contracts against public morals or public policy, is here declared to have no right to prohibit contracts under which many receive wages less than the minimum of subsistence, so that if they are not the objects of humiliating public or private charity, they become centres of the physical and moral evils that result from systematic underfeeding and degraded standards of life. Let me repeat I do not wish here to argue the merits or demerits of the minimum wage decision. Much less am I concerned with any quixotic attempt to urge England to go back to medievalism. But the two events together show in strong relief how recent and in the main exceptional is the extreme position of the \textit{laissez faire} doctrine, which according to the insinuation of Justice Holmes, has led the Supreme Court to read Herbert Spencer's extreme individualism into the 14\textsuperscript{th} amendment, and according to others, has enacted Cain's motto, "Am I my brother's keeper" as the supreme law of industry. Dean Pound has shown that in making a property right out of the freedom to contract, the Supreme Court has stretched the meaning of the term property to include what it has never before signified in the law or jurisprudence of any civilized country. But whether this extension is justified or not, it certainly means the passing of a certain domain of sovereignty from the state to the private employer of labor, who now has the absolute right to discharge . . . . \textsuperscript{87}

Cohen concluded that the expanded definition of property removes any question as to the "character of property as [a] sovereign power . . . in a commercial economy" and that "[t]he extent of the power over the life of others . . . is not fully appreciated by those who think of the law as merely protecting men in their possession."\textsuperscript{88}

\textsuperscript{84} See Cohen, supra note 81, at 9-11.
\textsuperscript{85} 261 U.S. 525 (1923).
\textsuperscript{86} See id. at 559, 562. The purpose of the invalidated law was "to protect women and minors . . . from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living." Id. at 541-42.
\textsuperscript{87} Cohen, supra note 81, at 10-11.
\textsuperscript{88} Id. at 12-13.
The underpinnings of the employment-at-will doctrine mirror the status regime that defined the employment relationship throughout the nineteenth century. The at-will doctrine is not so much a reflection of the absence of contract as it is a reflection of property and therefore status. Historically, laws regulating the employment relationship were determined by the status of workers as slaves, apprentices, married women, or free white men.89 With the dawn of the Industrial Age, contracts replaced status as the source of regulation of the employment relationship.90 However, this substitution of contract for status as a source of rules for the employment relationship was a substitution in form only. The reality of modern employment relations is that the terms of an employment contract serve an employee's interests only to the extent that the employee has a status that enables negotiation of an employment contract that balances the interests of the employer and the employee.91 An employee's status affects whether hiring will occur. It helps define the formation stage, as well as the terms and conditions of employment. In an age when most formal barriers have been abolished, status explains in part why minority groups continue to find subtle, but powerful, barriers to advancement in the workplace.92

For the vast number of modern employees, the prospects of a contract that assures just-cause protection are dependent upon the peculiar characteristics of that employee, such as education and skill, and the specialized nature of the job. Understandably, contract negotiation as a mediating force between an employer and an employee is often unavailable or ineffective for those groups of people who, for

89. See generally Pound, supra note 75 (arguing that, absent protective legislation, employees cannot bargain on equal footing with employers).
90. See Nathan Isaacs, The Standardizing of Contracts, 27 Yale L.J. 34, 34 (1917) ("[T]he movement of progressive societies has hitherto been a movement from status to contract." (quoting Sir Henry Maine, Ancient Law 165 (1861))). Isaacs further noted that in Anglo-American society, the same is true despite scholarly assertions to the contrary. Observing that the difference between status and contract is "not one of kind, but one of degree," Isaacs prophetically concludes that the "twentieth century is witnessing a reaction back to status." Id. at 40.
91. For example, CEO's of large corporations, highly skilled individuals, and persons employed in upper management positions, all have more leverage to negotiate the terms of their employment contracts. The vast majority of American workers are either employed at will or have employment contracts that are not necessarily the product of consensual negotiation. See Joann S. Lublin, Pay for No Performances, WALL ST. J., Apr. 9, 1998, at R1.
92. See Theresa M. Beiner, Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?, 37 B.C. L. Rev. 643, 645 (1996) (discussing the invisible advantages not typically enjoyed by minorities in the workplace, such as lunch with a supervisor or playing golf with the boss). See generally Stephanie M. Wildman, Privilege in the Workplace: The Missing Element in Antidiscrimination Law, 4 Tex. J. Women & L. 171 (1995) (arguing that antidiscrimination law fails to address the effects of cultural values that assign privilege to maleness).
varied reasons, are not in a position to wield negotiating power.\textsuperscript{93} For example, in instances where the law implies a contract, the employer still holds the sovereign prerogative to change the terms of the contract.\textsuperscript{94}

Like her feudal counterparts, an at-will employee’s economic fate is determined by her at-will status—a status that may be altered only by the property holder/employer. Consequently, as legal realists pointed out long ago, the emphasis on the viability of a contract to create mutually beneficial, consensual employment relationships is misplaced, and its potential to equalize bargaining positions is exaggerated.\textsuperscript{95} A contract, on its own, cannot protect individual employees from the rule of custom that allows arbitrary findings, \textit{unless the employer allows this protection}.\textsuperscript{96} The existence of employer prerogative under the employment-at-will doctrine is merely a function of the employer’s status as a property holder. Like the business judgment rule, the employment-at-will doctrine serves to insulate employers from questions regarding how they choose to run their business. This reflects a reverent deference to what courts deem an employer’s privilege—to take any action that would further the business interest of the corporation.\textsuperscript{97} Thus, early in the growth of the employment-at-will doctrine, freedom of contract ideals created, and property rights reified, a buffer around the doctrine. In deference to the employer’s “property” right to exercise business judgment, and in the absence of

\textsuperscript{93} See American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921) (“A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers [an] opportunity to deal on equality with their employer.”). Certain classes of employees, such as low-wage unskilled workers, low-level management employees, regardless of race or sex considerations, are particularly affected by disparities in bargaining power. Consequently, unionization and collective bargaining agreements typically implement a “for cause” standard for discharge. See Lawrence E. Blades, \textit{Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power}, 67 \textit{COLUM. L. REV.} 1404, 1413 (1967).

\textsuperscript{94} The classic example of this is in the area of contracts arising from employment manuals and employee handbooks. Courts have generally held that an employer may avoid the contract implications of an employment manual by placing a conspicuous disclaimer in the manual. See, e.g., Dell v. Montgomery Ward & Co., 811 F.2d 970, 972-74 (6th Cir. 1987); Robinson v. Christopher Greater Area Rural Health Planning Corp., 566 N.E.2d 768, 772 (Ill. App. Ct. 1978) (stating that a clear disclaimer negates any promise made in an employee handbook or personnel policy). Additionally, employers typically reserve the right to add, delete, or otherwise change the provisions of the manual. See Woolley v. Hoffmann-LaRoche, Inc., 491 A.2d 1257, 1270-71 (N.J. 1985) \textit{modified on other grounds by} Woolley v. Hoffman-LaRoche, Inc., 499 A.2d 515 (N.J. 1985).

\textsuperscript{95} See Pound, supra note 75, at 454.

\textsuperscript{96} A contract does not affect an employee’s at-will status unless it specifically states a term of employment or states that discharge will occur only for just cause. Many employers require their workers to sign a document entitled “Employment Contract,” yet the workers remain at-will employees. Because the employer typically sets the terms of the contract, the employer also controls the status of the employee as at-will or not.

\textsuperscript{97} See, e.g., Kumpf v. Steinhaus, 779 F.2d 1323, 1325-26 (7th Cir. 1985) (stating that the employment-at-will doctrine reinforces an employer’s privilege to manage its corporate affairs).
a contract that expressly limits this right, courts continue to apply limitations to the rule cautiously.

C. Lessons from Hicks for the At-Will Rule

Despite the dominance of the at-will doctrine and its historical antecedents, it remains difficult to rationalize Hicks fully as an at-will decision. In Hicks, the court of appeals ruled in favor of the plaintiff because the plaintiff succeeded in proving that the defendant's articulated reasons for the adverse employment decision were pretextual. Consequently, the defendant had not met its burden of articulating a legitimate, nondiscriminatory reason for the adverse action. The defendant was "in no better position than if [it] had remained silent, offering no rebuttal to an established inference that [it] had unlawfully discriminated against [the] plaintiff on the basis of his race." Justice Scalia, writing for the majority, disagreed with the appellate court's reasoning. The Supreme Court held that the mere proffering of a nondiscriminatory reason, regardless of its persuasiveness, was sufficient to meet the burden of production, and thus the defendants had in fact "placed themselves in a 'better position than if they had remained silent.'" The Court further noted that in the determination of whether a defendant has met its burden of production, no credibility assessment takes place. By producing a nondiscriminatory reason, whether credible or not, the defendant rebuts the legal presumption of intentional discrimination.

One might argue that the Court's interpretation and application of evidentiary rules intrudes upon an employer's business judgment by requiring the employer to produce a reason for its adverse decision. This is especially so considering that the at-will doctrine does not require an employer to have any reason at all. By splitting the analysis into a two-tier inquiry, "burden-of-production determination" and "credibility-assessment," the Hicks decision preserves the essence of the at-will doctrine's sanction of no cause or bad cause discharge. However, by taking the additional step of stating that the credibility of what the employer produces is irrelevant to whether or not the burden of production is met, the Court implicitly undermines the strength of the at-will doctrine. If an employer has a bad reason, or any reason other than discrimination for the adverse decision, then the truth of his reason would be protected under the at-will doctrine. In fact, there is a reason to lie at the burden of production.

99. See id.
100. Id.
102. See id.
103. See id.
stage if discrimination motivated the adverse decision. There may be other reasons to lie at the pretext stage, but the potency of the employment-at-will doctrine is that it protects any reason other than a discriminatory one. Forcing the employer to articulate the true reason would reinforce the rule and protect the employer. However, the true reason may also reveal unconscious racism. The Hicks decision could have preserved the at-will doctrine without reducing the burden of production to a level where patently false assertions would suffice. Indeed, if the Hicks Court had insisted on truthful, even if morally reprehensible, reasons at the burden of production stage, then the employment-at-will doctrine would have been better served.

The Hicks decision represents a significant and recurrent theme in American legal tradition—a reification of property rights as an absolute doctrine leading to the preservation of status. This theme is rooted in an instinctive affinity for the economic theory of the late nineteenth century, a theory that emphasized freedom of contract. In short, the employment-at-will doctrine reflects "the law's development of a fundamental principle of economy." 104

III. IT'S ALL IN THE EVIDENCE, OR ISN'T IT?: THE NATURE OF DISCRIMINATION AND THE MATERIALITY OF THE INTENT REQUIREMENT

You have heard that it was said to those of old, 'You shall not commit adultery.' But I say to you that whoever looks at a woman to lust for her has already committed adultery with her in his heart. 105

For as he thinks in his heart, so is he. 106

The intent requirement as a measurement of liability has a long legal history. Evaluation of intent, broadly speaking, is a means of making a value judgment about the exercise of individual will under a given set of circumstances. In each area of law where intent is required, liability ideally corresponds with intent as one way of effectuating the law's broader purpose as an instrument of social order. Despite the fundamental role that intent plays within our legal system, there is no precise definition of what it means, nor are there guidelines on how to establish its presence. In tort law, intent at one

104. Feinman, supra note 51, at 118. Feinman points out two ways that the employment-at-will doctrine facilitated the development of an advanced capitalist economy: (1) the employment-at-will doctrine maintained the distinction between owners and non-owners of capital, thereby allowing owners of capital (employers) to exercise control over their enterprises; and (2) the employment-at-will doctrine facilitated discharge of employees when turbulent markets or technological changes necessitated a reduced labor force, or even in situations where the employer deemed discharge necessary. See id. at 132-33. Feinman describes these two elements as "essential elements of traditionalist capitalist systems." Id. at 134.

105. Matthew 5:27, 28 (New King James).

level is an organizing concept, distinguishing two major categories of
torts: negligence and intentional torts.\textsuperscript{107} In criminal law, intent is a
general requirement as to the state of mind of an individual for the
purpose of determining criminal culpability and levels of culpabil-
ity.\textsuperscript{108} While intent is a significant feature in both of these areas of
law, there is no uniform definition of "intent," nor is there any inter-
nal consistency as to what constitutes intent for the different kinds of
torts or crimes that the law recognizes. For example, while every
crime requires some mental element, the Model Penal Code recog-
nizes four different kinds of culpability for the purposes of estab-
lishing criminal liability.\textsuperscript{109} The definition of a crime usually incorpo-
rates a specific level of culpability necessary to establish the requi-
site mental element.\textsuperscript{110} Grades of crimes and corresponding levels of
culpability, or intent, reflect societal views as to the appropriate
punishment for a particular state of mind.\textsuperscript{111}

In torts, intent generally refers to a state of mind regarding an act
or omission with a purpose or desire to bring about given conse-
quences or a belief or knowledge that given consequences are sub-
stantially certain to result from the act.\textsuperscript{112} This state of mind must

\textsuperscript{107} See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 8, at

\textsuperscript{108} One example of this is the distinction between general intent and specific intent,
where the latter refers to a special mental element beyond that generally required in refer-
ence to the physical act of the crime committed. Common law larceny requires the mental
state required for taking and carrying away the property of another, in addition to the ex-
tra element of the intent to steal. In a similar vein, common law burglary requires a men-
tal state manifested in breaking and entering into the dwelling place of another and the
additional element of intent to commit a felony therein. See generally Wayne R. LaFave &
Austin W. Scott, Jr., Criminal Law § 3.5, at 224 (2d ed. 1986) (distinguishing intent
from knowledge and discussing the various "kinds" of intent and the various things intent
is used to denote).

\textsuperscript{109} See Model Penal Code § 2.02(2)(a)-(d) (1985). Under the Code, "a person is not
guilty of an offense unless he acted purposely, knowingly, recklessly or negligently." Id. at
§ 2.02(1).

\textsuperscript{110} See generally id. § 2.02(1), (3) (regarding the general requirements of culpability).

\textsuperscript{111} Thus, under the Model Penal Code, where a statute provides that distinctions be-
 tween grades or degrees of an offense depend on the mental state of the offender, the Code
posits that the grade or degree of the conviction should "be the lowest for which the deter-
morative kind of culpability is established with respect to any material element of the of-
in section 10 indicates that the drafters saw a correlation between the defendant's state of
mind and the value of the defendant's conduct. According to the Code, where the grade of
an offense depends on the level of culpability, "a person's culpability should be determined
by the lowest level of culpability he exhibits with respect to a material element. The of-
fenses for which the Model Code accepts a departure from this general approach are com-
paratively few." Model Penal Code § 2.02(10) commentary at 252 (1985).

\textsuperscript{112} See Keeton et al., supra note 107, § 8, at 34; see also Restatement (Second) of
Torts § 8A (1965) ("The word 'intent' is used throughout the Restatement . . . to denote
that the actor desires to cause the consequences of his act, or that he believes that the con-
sequences are substantially certain to result from it.").
exist at the time the act or omission occurs. As in criminal law, a defendant's liability in tort ideally reflects a value judgment as to the results or consequences of the actor's particular state of mind.

The defendant's liability is least where the conduct is merely inadvertent, greater for acts in disregard of consequences increasingly likely to follow, greater still for intentionally invading the rights of another under a mistaken belief of committing no wrong, and greatest of all where the motive is a malevolent desire to do harm.

Also similar to criminal law, intent is defined specifically for different kinds of torts.
The question of how to establish and what would suffice as proof of intent is peculiarly problematic in the area of discrimination. In tort law and criminal law, the effects of the act generally serve as evidence of intent.\textsuperscript{116} For intent to be present in tort, the defendant must desire the act, whether the determination of that desire is an objective or subjective evaluation.\textsuperscript{117} However, the difficulty with using an awareness test in assessing discrimination cases is that discrimination may exist and be manifested without the defendant's conscious knowledge.

A. Discrimination as a Function of Status

Discrimination can be a passive moral state that exists in the heart without any conscious awareness of its existence or of how or when it may manifest in specific acts, speech, or decisions.\textsuperscript{118} For example, the comment, "I see why they used blacks as slaves—they are so strong," made by a friend while I was lifting a suitcase may not indicate intent in the conscious sense. However, there is certainly a manifestation of discrimination if I am later asked to lift the heaviest of several cases because "I am the strongest." In \textit{Slack v. Havens},\textsuperscript{119} comments such as "colored people are hired to clean because they clean better" were held to be evidence of discriminatory intent.\textsuperscript{120} If the defendant sincerely believed that "colored people" are gifted cleaners, is the defendant guilty of discrimination? More significantly, is the defendant liable for discrimination? One could surely argue that a sincere belief does not provide the intent basis on which liability rests, even though discrimination is present.

Discrimination may be consciously or unconsciously intended; it may be well-intentioned or motivated by malice.\textsuperscript{121} In the example

\textsuperscript{116} See Re\textit{statement (Second) of Torts} § 8A (1965); Model Penal Code § 2.02(2)(a)-(d) (1985).
\textsuperscript{117} Re\textit{statement (Second) of Torts} § 8A (1965).
\textsuperscript{118} See, e.g., Robert Caton, \textit{What is a Racist?}, \textit{Newsday}, Apr. 21, 1996, at A44 (commenting that people are not necessarily deemed racists because they believe one race is better than the other, but they are deemed racists because of their social views); Richard Powelson, \textit{Are Officers on Duty After Shifts End}, \textit{Knoxville News-Sentinel}, Mar. 17, 1996, at F2 (noting that the U.S. Department of Justice has concluded that it is not illegal for FBI agents to tell racist jokes while on camping trips). These commentaries testify to the fact that intent as a measure of liability for discrimination cannot possibly account for the various ways in which discrimination exists. Jokes, after all, are not intended to mean anything.
\textsuperscript{119} 522 F.2d 1091 (9th Cir. 1975).
\textsuperscript{120} Id. at 1093, 1095.
\textsuperscript{121} See generally Charles R. Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 Stan. L. Rev. 317, 324 (1987) (explaining unconscious racism in terms of Freudian and cognitive psychology). Lawrence points out that "according to Freud, the mind protects itself by denying the emotionally-based ideas and
above, the comment as to the physical ability of black people is based on a stereotype about race. There is no doubt in my mind that my friend did not intend to offend me, but she nevertheless made a judgment about my ability based on nothing more than my race. The assignment of tasks based on her belief would be useful as evidence of discrimination only because she had verbally expressed herself earlier, and so the causal element required by law could have been established. Assume she assigned tasks with this in mind but made no comment, or made a comment but no act reflecting her conviction—discrimination, albeit unintended, still exists. Yet, under the framework for proving discrimination, the case in the last two scenarios would have been difficult, if not impossible, to establish.

Generally, our system of law and order does not care what an individual's state of heart is, yet it requires that a particular state of heart exists before finding liability for discriminatory action, as though discrimination can be turned on and off at will. Examples of such comments are numerous\textsuperscript{122} and are used as direct evidence of discrimination under Title VII.\textsuperscript{123} Such evidence serves as a passport for those cases where indications of race-consciousness on the part of the employer make it impossible for a court to dismiss claims of discrimination easily.\textsuperscript{124} But without evidence of such expressions, in a world where the only two possible occupations are to lift suitcases or to supervise the lifting of suitcases, I would be better "qualified" to lift suitcases because I am "stronger." More likely than not, my children will also be presumed better qualified to lift suitcases. In a

\begin{quote}
beliefs that conflict with what an individual has intellectually learned is good and right." Id. at 322. He explains that, according to cognitive theory, people attain some of their most strongly held beliefs through the observation and experience of culture, unaware that they are absorbing these lessons. See id. at 323.
\end{quote}

\textsuperscript{122} See Boutros v. Canton Reg'l Transit Auth., 997 F.2d 198, 201 (6th Cir. 1993) (statements calling plaintiff a "camel jockey" and "rug peddler"); see also Lawrence, supra note 121, at 339-44 (discussing examples of unconscious racism in everyday life); The Nation, TIME, Oct. 16, 1964, at 31, 36 ("You have to remember that Americans can't do that kind of work. It's too hard. Mexicans are really good at that. They are built low to the ground, you see, so it's easier for them to stoop." (quoting former U.S. Senator George Murphy speaking of crop harvesting)); Murray Chass, Campanis Is Out; Racial Remarks Cited by Dodgers, N.Y. TIMES, Apr. 9, 1987, at B13 (quoting Al Campanis, vice-president of the Los Angeles Dodgers, who explained that there were no black executives in major league baseball because "they may not have some of the necessities to be, let's say, a field manager or general manager").

\textsuperscript{123} See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (finding that suggestions that the plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" may constitute direct evidence of sex-biased decision making); Slack v. Havens, 522 F.2d 1091, 1095 (9th Cir. 1975) (holding that such comments as "colored people are hired to clean because they clean better" and "colored people should stay in their places" are evidence of discriminatory intent).

\textsuperscript{124} But see Jackson v. Harvard Univ., 721 F. Supp. 1397, 1431 (D. Mass. 1989) (dismissing decision makers' stereotyped comments that "women were not successful in the [Harvard Business School] classroom" as not probative of sex discrimination).
similar fashion, family relations or caste systems under feudalism dictated what occupations the next generation could or would undertake. This is because in a society distinguished by property ownership, status begets status. Consequently, in this world of lifters versus supervisors, the decisionmaker is the "owner" of the factory, and in my children's generation, the owner's son is more likely to be the new "owner."

Status not only serves to determine which job a person is likely to hold, it also helps to determine the value that is placed on that job. Value is often a reflection of one's status as black or white, woman or man. This phenomenon is observed more patently in the area of sex discrimination. Thus, wages for occupations historically dominated by women have risen with the increase in the number of men in these occupations. Another example is the phenomenon of the glass ceiling that constrains women's advancement in corporate America with no obvious malice or discrimination to blame. On the other hand, in the area of race discrimination, the emphasis is on the value of the individual occupying the position. This value is the repository for discrimination even where the job is ostensibly a successful one. In this situation, the impact of discrimination is not immediate and often not felt until there is an opportunity for advancement to the highest ranks, where job value and personal value converge. Intent,

125. Although men and women may in some instances perform the same duties, there still remains a gap between men's and women's wages. As recently as 1992, women in America earned only 0.71 for every dollar earned by men. See The Fair Pay Act of 1994: Hearings on H.R. 4803 Before the Joint Subcomm. of House Educ. and Post Office and Civil Serv. Comm., 103d Cong. 53 (1994) (statement of Michele Leber, Treasurer, National Comm. on Pay Equity). Status also plays a role in equality of promotion in male-dominated vocations, such as law and accounting. See, e.g., Price Waterhouse, 490 U.S. 228, 251 (1989) (finding that sex stereotyping may have played a part in evaluating a female accountant's partnership candidacy); Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (holding that partnership decisions are subject to Title VII).

126. This is reflected in wage disparities, where men earn more than women in the same occupation. See Marion Crain, Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech, 82 Geo. L.J. 1903, 1913-14 (1994) (stating that even within female-dominated occupations, men tend to earn more than women). "Both nursing and bookkeeping are predominantly female occupations, with 93 percent female employment. Male nurses earn an average of 10 percent more than female nurses, and male bookkeepers earn an average of 16 percent more than women bookkeepers." Id. at 1914.


128. See generally Derrick A. Bell, Who's Afraid of Critical Race Theory?, 1995 U. ILL. L. REV. 893 (1995) (discussing the argument that blacks are intellectually inferior to whites as found in RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994)). Bell concludes that these arguments enable white Americans to blame the social status of African Americans on inherent low intelligence while avoiding the real cause of inequality—oppressive racism and open hostility toward any form of black success. See id. at 894.
as a requirement for finding that discrimination exists, cannot even begin to unravel the complex forces at play in a world like this.

B. Comparative Application of the Intent Requirement

The Reconstruction Civil Rights Acts were enacted to enforce the antidiscrimination principle of the Thirteenth and Fourteenth Amendments.129 These statutes, in particular 42 U.S.C. § 1981, provide important historical and legal reinforcement for the equal protection principle in the workplace. Although the statute remained dormant for a significant period of time, they were revived during the civil rights movement and together with Title VII, serve as important avenues of redress for a variety of discrimination claims. The constitutional roots of all the Civil Rights Acts should have strengthened the application of the equality principle. However, modern equal protection jurisprudence focuses on intent as a primary element of a claim under the Fourteenth Amendment. With the Hicks decision, proof of discrimination under Title VII has clearly modeled the Supreme Court’s conservative treatment of discrimination claims.

1. Intent in Equal Protection Cases

While there are important differences between the requirements of intent in criminal law and torts, the element of mental awareness—or consciousness of action and/or result—is a critical part of assessing the degree of liability despite its varying permutations for specific crimes and torts. In disparate treatment and equal protection cases, however, intent, in the purposeful sense, plays a significant role in determining whether or not discrimination has in fact taken place. Thus, unlike tort or criminal law where different degrees or kinds of intent are used to measure the extent of liability, the presence or absence of intent in discrimination cases is what determines the existence of liability.

In Washington v. Davis,130 the Supreme Court distinguished judicial scrutiny of alleged violations of the Equal Protection Clause from scrutiny of alleged Title VII violations. In Davis, the plaintiffs challenged the validity of a qualifying test administered to applicants for positions in the District of Columbia police force on the grounds that the test had a disproportionately adverse impact on black applicants.131 The district court rejected the allegation that the test in question was written in a way that favored white applicants.132 The court held that the test was “reasonably and directly related to the

131. See id. at 232-33.
requirements of the police recruit training program and that it [was] neither so designed nor operate[d] to discriminate against otherwise qualified blacks."\textsuperscript{133}

The court of appeals reversed the district court's decision\textsuperscript{134} and held that the critical fact was that four times more black applicants failed the test than did white applicants.\textsuperscript{135} According to the court of appeals, the absence of discriminatory intent in the administration or design of the test was irrelevant.\textsuperscript{136} The disproportionate impact of the test created an inference of a constitutional violation, which could be rebutted only with evidence that the test was an adequate measure of job performance as well as an indicator of probable success.\textsuperscript{137} The court concluded that the employer had failed to meet its burden of persuasion and thus ruled in favor of the black applicants.\textsuperscript{138}

The Supreme Court reversed, holding that disproportionate impact alone is insufficient to maintain a constitutional violation.\textsuperscript{139} The Court distinguished the rigorous evidentiary persuasions required of a defendant in Title VII cases and declined to extend the same level of judicial scrutiny to equal protection cases.\textsuperscript{140} According to the Court, "the basic equal protection principle[s] [require] that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."\textsuperscript{141} Thus, under equal protection analysis, intent to discriminate is always a requirement for culpability and liability. As distinct from tort law, intent under this framework is "purpose intent," requiring that the defendant wished or purposely desired the discrimination, as opposed to "knowledge intent," that is, knowing that discrimination is certain to occur. Similarly, in Personnel Administrator v. Feeney,\textsuperscript{142} the Supreme Court upheld a lifetime preference to military veterans for state civil service positions in Massachusetts, even though the preference disproportionately advantaged males. The Court held that discriminatory purpose:

implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of ac-

\textsuperscript{133} Id.
\textsuperscript{134} See Davis v. Washington, 512 F.2d 956, 958 (D.C. Cir. 1975).
\textsuperscript{135} See id. at 960.
\textsuperscript{136} See id.
\textsuperscript{137} See id. at 961-63.
\textsuperscript{138} See id. at 965.
\textsuperscript{140} See id. at 247-48.
\textsuperscript{141} Id. at 240.
\textsuperscript{142} 442 U.S. 256 (1979).
tion at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group.\textsuperscript{143}

2. Intent in Employment Law Cases

Under Title VII, a discrimination claim may proceed under two theories: disparate treatment and disparate impact.\textsuperscript{144} Similar to \textit{Washington v. Davis},\textsuperscript{145} disparate impact cases deal with facially neutral employment practices that have a disproportionately adverse impact on a protected group. The disparate impact theory was first recognized in \textit{Griggs v. Duke Power Co.},\textsuperscript{146} and was later codified in the Civil Rights Act of 1991.\textsuperscript{147} The \textit{Griggs} court recognized two elements vital to Title VII's viability as an instrument for fostering equality. First, prospects for equal opportunity are directly linked to the ability of courts to apply antidiscrimination laws in a manner that recognizes the scars of racism reflected by the effects of past racism on present opportunities.\textsuperscript{148} Second, discrimination may be unintended and even unconscious but, nevertheless, real.\textsuperscript{149} The unprecedented \textit{Griggs} holding made it possible for the most insidious forms of racism to be challenged before a court of law. Indeed, given the impossibility of reducing racism to one single attitude, process, or state of mind, it is not farfetched to say that the disparate impact theory may now be a more valuable tool in the struggle for a discrimination-free work environment than the disparate treatment theory. This is because the disparate impact theory permits a finding of discrimination regardless of intent.\textsuperscript{150}

Unlike disparate impact, disparate treatment claims focus on patently unequal terms of employment between a member of a protected group and another individual who is typically not a member of a traditionally protected group. Disparate treatment requires that a plaintiff prove that the unequal treatment is the product of an intent to discriminate. Intent to discriminate is often proven by circumstan-

\textsuperscript{143} \textit{Id.} at 279. \textit{See also} Village of Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265-66 (1977) (holding that the racially discriminatory impact of a village's denial of a rezoning application was insufficient to prove an Equal Protection violation).


\textsuperscript{145} 426 U.S. 229 (1976).

\textsuperscript{146} 401 U.S. 424 (1971).


\textsuperscript{148} \textit{See} Griggs, 401 U.S. at 431.

\textsuperscript{149} \textit{See id.} at 432-35.

\textsuperscript{150} \textit{See id.}
tial evidence, as direct evidence of discrimination is rarely available.\footnote{151} The seminal case establishing the disparate treatment framework for an action brought pursuant to an alleged Title VII violation is *McDonnell Douglas Corp. v. Green*,\footnote{152} in which the Supreme Court clarified "the standards governing the disposition of an action challenging employment discrimination . . . ."\footnote{153} Under the framework, to establish a prima facie case or, more accurately, a rebuttable presumption of discrimination,\footnote{154} a plaintiff must prove several elements: (1) the plaintiff belongs to a protected class; (2) the plaintiff applied and was qualified for the job; (3) the plaintiff was rejected despite his/her qualifications; and (4) after the rejection, the position remained open and the employer continued to seek applicants from persons of complainants' qualifications, or the employer filled the position with a person who was not a member of a protected class.\footnote{155}

In the cases following *McDonnell Douglas*, the Supreme Court further clarified some of the foregoing elements of the prima facie case. For example, in *McDonald v. Santa Fe Trail Transportation Co.*,\footnote{156} the Court held that the provisions of Title VII offer protection to all individuals from disparate treatment because of their race and not only to members of historically recognized minority groups.\footnote{157} The *McDonald* Court described the first element of the prima facie case as typical of the most common sort of case.\footnote{158} Thus, the first element of the *McDonnell Douglas* framework is susceptible to the vagaries of a particular fact pattern. For example, a white male could ostensibly make out a prima facie case where whiteness equals the proven characteristic that was discriminated against, even though white males are not traditionally considered a minority group.

\footnote{151} Recently, secret tape recordings exposed the racist corporate culture of Texaco. Corporate executives allegedly belittled black employees and plotted the destruction of evidence in the race case. See *Judge OKs Texaco Bias Settlement*, FLORIDA TODAY, Mar. 27, 1997, at 12C. The court approved a \$176 million dollar settlement, the largest settlement of its kind in U.S. history. The case reveals the rarity of direct evidence and the blatant invidiousness of discrimination in this corporation.

\footnote{152} 411 U.S. 792 (1973).

\footnote{153} Id. at 798.

\footnote{154} The Supreme Court refers to this as the "prima facie" case. However, in the context of the Court's opinion, the first step is actually a presumption because the required elements are simply basic facts of the rebuttable presumption of the presumed fact of discrimination.

\footnote{155} See *McDonnell Douglas*, 411 U.S. at 802.

\footnote{156} 427 U.S. 273 (1976).

\footnote{157} See id. at 278-79 (holding that white plaintiffs stated a claim under Title VII where they alleged that the defendant employer discriminated against them on the basis of their race when the employer discharged them for misappropriating cargo and retained a black employee who was charged with the same offense).

\footnote{158} See id. at 279 n.6.
In *Texas Department of Community Affairs v. Burdine*,159 the Supreme Court focused on the role of the evidentiary standards in a Title VII action. The Court reiterated the basic allocation of evidentiary burdens.160 First, the plaintiff shoulders the burden of proving a prima facie case of discrimination.161 If the plaintiff is successful, the burden shifts to the defendant who must offer a legitimate, nondiscriminatory reason for the adverse employment decision.162 If the defendant carries this burden, the plaintiff then is afforded an opportunity to prove that the reasons offered by the defendant were merely a pretext for discrimination.163

The Court proceeded to elaborate on the nature of the burden-shifting requirements:

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff . . . . The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.164

C. The Doctrinal Consistency of *Hicks*

Commentators on the *Hicks* decision have disagreed about the Supreme Court's use of previous Title VII decisions. The interpretation of the *Hicks* decision is torn between those who read it as redefining the scheme set out in *McDonnell Douglas* and *Burdine*165 and those who read the decision as merely refining *McDonnell Douglas* and *Burdine*.166 While one may oppose the practical and substantive repercussions of *Hicks*, a careful study of *McDonnell Douglas* and *Burdine* reveals that *Hicks* properly applied the standards set in *Burdine*. The *Burdine* Court did not hold that judgment for the plaintiff follows as a matter of law once the plaintiff demonstrates pretext. Rather, the Court insisted that "[t]he plaintiff retains the burden of persuasion . . . . This burden now merges with the ultimate

160. See id. at 252-53.
161. See id.
162. See id.
163. See id.
164. Id. (citing *McDonnell Douglas* and Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2, 29 (Stevens, J., dissenting) (1978)). Again, the Court's language is misleading because preponderance of the evidence is a standard of persuasion.
165. See Corbett, supra note 9; Smith, supra note 9.
166. See Malamud, supra note 17.
burden of persuading the court that she has been the victim of intentional discrimination.\textsuperscript{167}

Because the burden of persuasion never shifts, the plaintiff in a Title VII action must ultimately persuade the trier of fact that the employer discriminated against the employee. Before courts reach this ultimate question, however, the defendant must carry the burden of producing evidence that will rebut the presumption of discrimination.\textsuperscript{168} The plaintiff, then, has the burden of persuading the trier of fact that the defendant's proffered reasons were pretextual—that a genuine issue of fact exists as to whether discrimination was actually the motivation for the employer's adverse action.\textsuperscript{169} The plaintiff does this by persuading the court that the employer's explanation is invalid and that a discriminatory reason more likely motivated the employer.\textsuperscript{170} This could lead to an inference that the plaintiff has satisfied her burden once pretext is shown. However, the Hicks Court does not explicitly hold this way in favor of the plaintiff. Rather, the plaintiff bears the ultimate burden of persuasion that the proffered reason was a pretext and that, therefore, the employer's adverse decision was the product of discrimination.\textsuperscript{171}

In International Brotherhood of Teamsters v. United States,\textsuperscript{172} the Supreme Court described the McDonnell Douglas scheme as one that permits a presumption of discrimination to be made once the most common reasons for an adverse employment decision are eliminated.\textsuperscript{173} By interpreting the standard for rebuttal as imposing only a burden of production, the Hicks decision thwarts the purpose for the presumption while also invalidating the substantive goal of this procedural framework. While an employer may lie about the reason for the adverse employment decision, an employee must still prove intent to discriminate. If an employer lies about the reason for the adverse employment decision in meeting its burden of production, why should the court believe the truth of the evidence offered about intent to discriminate? If an unsupported lie satisfies the burden of production, then the employer has no reason or incentive to investigate, confront, and deal with the presence of discriminatory attitudes that may lead to discriminatory behavior in the workplace. If a plaintiff

\textsuperscript{167} Burdine, 450 U.S. at 256. It is certainly plausible to read Burdine as mandating judgment for the plaintiff, particularly because the Court explains that the plaintiff may "succeed" in satisfying this burden. See id.

\textsuperscript{168} See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993). Having the burden of production, the defendant must present admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action. See id.

\textsuperscript{169} See id. at 507-08.

\textsuperscript{170} See id.

\textsuperscript{171} See id.

\textsuperscript{172} 431 U.S. 324 (1977).

\textsuperscript{173} See id. at 358 n.44.
proves the falsity of the employer's proffered reason, along with the other elements of a viable discrimination claim, the defendant employer, at the very least, should be required to bear the ultimate burden of persuasion of its proffered reason. Any other rule simply overlooks the possibility that discrimination may have been the real reason. In other words, the question of whether discrimination actually exists is not the same as whether the defendant intended, desired, or had the conscious purpose of discriminating. Indeed, the question of whether the defendant had such an intention, desire, or conscious purpose is virtually irrelevant to the determination of whether it actually discriminated.

D. Doctrine as Discrimination

Another striking facet of the intent requirement in disparate treatment cases is the way in which it undercuts a fundamental goal of Title VII—to preclude decisions based on stereotypes. A stereotype serves as a proxy for truth and reduces the cost of information gathering. When an employer makes a decision based upon a stereotype, this decision, while clearly discriminatory, is not necessarily the product of a conscious awareness or desire for a particular outcome. Instead, a stereotype may be an honest conviction about a characterization. Stereotyping is one obvious example of a state of mind that may not satisfy the intent test required but, nonetheless, has been held to constitute a violation of Title VII. Unintended dis-


175. See Mary Stevenson, Women's Wages and Job Segregation, in Labor Market Segmentation 243, 251 (Richard C. Edwards et al. eds., 1975) (suggesting that strong prejudice based upon perceptions of ability as a function of a person's sex leads employers to believe that women are not worth hiring because they would be inefficient workers); see also Lloyd, supra note 127, at 14 (explaining wage differences between individuals and groups from a human capital approach based on differences in productivity). Variables such as education and, particularly, experience are used as stand-ins for productivity. See id. Because women have not been in the labor force as long as men, the human capital they accumulate tends to differ from that of men. Thus, employers are generally willing to pay women less on the assumption that they are less productive than men. See generally Nadine Taub, Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination, 21 B.C. L. Rev. 345 (1980) (arguing for an expanded concept of discrimination in order to dismantle attitudinal barriers that foster and protect inequality in the workplace). Taub presents social science data to demonstrate why and how sex segregation continues to dominate employment relations in spite of Title VII and argues that decision making based on stereotypes should be recognized as discrimination per se. See id.

176. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); see also 29 C.F.R. § 1604.2(a)(1)(ii) (pointing out that refusal to hire an individual based on a stereotyped characterization of the sexes will not be recognized as satisfying the bona fide occupational qualification exception).
crimination can be the product of stereotyping.\textsuperscript{177} If an individual employer chooses not to expend the resources and efforts to gather information about an employee but, instead, relies on a stereotype, a plaintiff should be able to prevail in a Title VII action without having to prove that the defendant had the intent or conscious purpose to discriminate.

Finally, the \textit{Hicks} decision reflects the absence of any sense of communal accountability or responsibility for racism. In criminal law, inferring intent poses no substantial public concern nor raises any outcry because crime has historically been thought of as an offense against the community. The possibility that anyone could be murdered or robbed is something with which most people can identify. This, coupled with the fact that the gravest effects of discrimination are invisible, explains society's easy acceptance of the use of circumstantial evidence as proof of culpability in criminal cases but, increasingly, not in discrimination cases.\textsuperscript{178} Intent in criminal law reflects more than a causal element of the crime: it is an explicit attempt to evidence the wrong while also justifiably imposing sanction. Thus, where intent is not established, one may not be guilty of the crime charged but may still be guilty of a lesser crime.\textsuperscript{179}

When an employer makes an adverse decision based on a stereotype, positive or negative, the more appropriate test of discrimination is volition rather than intent. As in other areas of law, the absence or presence of intent may be a factor in determining the degree of liability, but certainly not the existence of discrimination. Volition, as a measure of discrimination, has as its underlying premise the idea that an act is either a product of the heart or mind, or both. It would allow discrimination in its infinite varieties and manifestations to be addressed without the confining and unrealistic boundaries of a narrowly defined intent requirement.\textsuperscript{180} Volition in this regard would reflect three Judeo-Christian principles for evaluating responsibility for an offense: (1) "For out of the abundance of the heart, the mouth speaks;"\textsuperscript{181} (2) "But I say to you that whoever looks at a woman to

\begin{itemize}
\item \textsuperscript{180} In \textit{Slack v. Havena}, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. May 15, 1973), the trial court did just this when it found that Title VII requires only "that a defendant has meant to do what was done; that is, the act or practice must not be accidental." \textit{Id.}
\item \textsuperscript{181} Matthew 12:34 (New King James). Words or actions reflect a state of heart.
\end{itemize}
lust for her has already committed adultery with her in his heart;”\textsuperscript{182} and (3) “For as he thinks in his heart, so is he.”\textsuperscript{183}

These principles are not new ways of establishing liability. Indeed, the Model Penal Code incorporates a variation of this model in its structure for determining culpability.\textsuperscript{184} Such efforts to expand the basis for guilt seek to incorporate the various aspects of human behavior into a framework based on a specific vision of society. This approach to evaluating human behavior has also recently been the subject of republicanist scholarly attention.\textsuperscript{185} For example, in criminal law, one scholar argues that virtue, rather than intent, should be used as the measure of a person’s actions.\textsuperscript{186} Intent may reflect the role of law as an instrument for regulating human behavior, but virtue as a measure of the value of human conduct reflects the premise on which the law rests, namely our vision of society as a whole.\textsuperscript{187}

The nature of discrimination is such that doctrinal measures of liability, like intent, cannot alone determine the existence of discrimination.\textsuperscript{188} Like torts or criminal law, the legal framework for evalu-

\textsuperscript{182.} Matthew 5:28 (New King James). The requisite guilt for the offense exists as soon as an outcome is desired or conceived in the mind.

\textsuperscript{183.} Proverbs 23:7 (New King James). This refers to the conscious awareness or knowledge of what one is doing.

\textsuperscript{184.} See Saunders, supra note 179, at 474-75 (arguing that even without a causal relationship between mind and body, criminal liability may be imposed where there is volition). Professor Saunders uses the analogy of accessory liability and inchoate crimes to support his thesis that mind-body causation is not necessary for culpability under criminal law. See id. at 469-75.

\textsuperscript{185.} See generally MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996) (offering a civic republican interpretation of citizenship and self-government); Richard H. Fallon, Jr., What is Republicanism, and Is It Worth Reviving?, 102 HARv. L. REV. 1695 (1989) (discussing the revival of republicanism and the role it should take in modern government). Republicanism focuses on the “good society” and those things necessary to achieve the good society, such as participation in government, a virtuous citizenry, and the pursuit of the common good. See id. at 1697.

\textsuperscript{186.} See generally Kyron Huigens, Virtue and Inculpation, 108 HARV. L. REV. 1423 (1995) (arguing that a republican theory of criminal law explains the principles of blame and punishment in criminal justice).

\textsuperscript{187.} See id. at 1425 (“The law has a purpose, an end in view, which is to promote the greater good of humanity. The criminal law serves that end by promoting virtue; that is, by inquiring into the quality of practical judgment displayed by the accused in his actions.”).

\textsuperscript{188.} As one scholar explains:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision-maker’s beliefs, desires, and wishes.

\dots \textsuperscript{[A]} large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Lawrence, supra note 121, at 322. The requirement for intent has come under significant scholarly attack. Professor Lawrence notes within the specific context of Washington v. Davis, 426 U.S. 229 (1976), that the criticisms of the intent requirement focus primarily on two concerns. See id. at 319. First, the intent requirement places a heavy burden on the
ating discrimination claims must be malleable enough to ferret out discrimination in all its various manifestations. The test for proving discrimination, as set forth by the decision in Hicks, reflects, yet again, the inadequacy of legislative attempts to redress the incidence of discrimination. It is clear that legislation, no matter how strongly worded or well-intentioned, cannot correct or prevent discriminatory attitudes or reach all manifestations of discriminatory practices. Unfortunately, though, legislative failure in this area is further reinforced by procedural rules that reduce discrimination to a test for intent. Intent, as the paramount factor in determining liability, undermines the potential of the legal system’s ability to act as an avenue to correct discrimination.

IV. RES IPSA LOQUITUR AND PROOF OF DISCRIMINATION

In torts, the doctrine of res ipsa loquitur provides an alternative model for establishing legal responsibility for an act. Absent direct evidence, negligence may be inferred from circumstantial evidence. Circumstantial evidence requires that inferences be drawn from proven facts. An 1865 opinion explained the res ipsa loquitur doctrine as follows:

There must be reasonable evidence of negligence.
But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.\(^{189}\)

The framework for the application of res ipsa loquitur requires several elements: (1) the evidence must be of a kind that ordinarily does not occur without negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.\(^{190}\) An additional feature of res ipsa loquitur is that evidence of the true explanation must be more readily ac-

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190. See KEETON ET AL., supra note 107, § 39, at 244.
cessible to the defendant than to the plaintiff. Prosser argues that courts will look at the fourth element when they want to stretch the doctrine of res ipsa loquitur. The element is justifiable on policy grounds; it gives the doctrine of res ipsa loquitur some breadth and facilitates the search for truth. Res ipsa loquitur should simply be a way of proving circumstantial evidence. Some scholars argue, however, that res ipsa loquitur is not a method of proof but a way to allow a plaintiff to win without proving negligence, in other words, substituting non-proof as evidence. Still others view res ipsa loquitur as a way of treating as proved that which is not actually proved. In Buckelew v. Grossbard, the New Jersey Supreme Court stated that the doctrine of res ipsa loquitur is rooted in a “sound procedural policy of placing the duty of producing evidence on the party who has superior knowledge or opportunity for explanation of the causative circumstances.”

A. Res Ipsa Loquitur and Its Prospects for Title VII

The res ipsa loquitur procedural framework provides a viable alternative for Title VII cases. Where a plaintiff proves the prima facie case and demonstrates that the defendant's proffered reason is pretextual, these facts, in a sense, speak for themselves. In Hicks, what other reasonable inference could be drawn where all the non-minority officers were retained even though some had engaged in the same sort of behavior as the plaintiff, yet only the plaintiff, a black male, was terminated? Applying the relevant elements of the res ipsa loquitur framework, the inference of negligence requires that the defendant must be in control of whatever caused the harm. In employment cases, this element is clearly met. The process that leads to the employee's actual or constructive termination is squarely within the

191. See id. Controversy exists as to whether this fourth element is required. Prosser and Keeton say it is not a required element and neither the first nor second Restatement requires it. See id. § 39, at 255; William L. Prosser, Res Ipsa Loquitur in California, 37 CAL. L. REV. 183, 222 (1949) (arguing that acceptance of the disputed fourth element of res ipsa loquitur would make “sheer ... ignorance the most powerful weapon in the law”); William L. Prosser, Procedural Effect of Res Ipsa Loquitur, 20 MINN. L. REV. 241, 260 (1936) (“[N]o policy of the law ... favor[s] ... permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary.”).

192. See KEETON ET AL., supra note 107, § 39, at 255.

193. See, e.g., Charles E. Carpenter, The Doctrine of Res Ipsa Loquitur, 1 U. CHI. L. REV. 519, 523 (1933-34) (arguing that the fourth element is one of necessity providing a substitute for direct proof of negligence only where such proof is unavailable); Louis Jaffe, Res Ipsa Loquitur Vindicated, 1 BUFF. L. REV. 1, 7 (1951) (arguing that the usefulness of res ipsa loquitur is dependent on the fourth element).


196. Id. at 1157.
employer's control. It is on this premise that employers are, for example, held liable for the environment at the workplace, which is a principal focus of sexual harassment claims. The employer is usually the only one that has access to the evidence—the true reason—for why the plaintiff was terminated.

The procedural effect of res ipsa loquitur has been as troublesome in the practice of tort law as the Title VII McDonnell Douglas-Burdine framework has been in the practice of employment discrimination law. Interestingly, the Hicks majority's explanation of the McDonnell Douglas-Burdine procedural framework strongly echoes the res ipsa loquitur procedural framework. Under res ipsa loquitur, a jury may infer negligence, but this conclusion is not compelled. Most jurisdictions hold that the burden of persuasion remains on the plaintiff and does not shift to the defendant, and the burden of production exists only to the extent that if the defendant does nothing, the jury may rule against him. Despite the burden of persuasion requirement, however, cases exist where the inference of negligence is so clear from the facts that, in the absence of explanation, the plaintiff wins. In some jurisdictions courts sometimes apply what is essentially a strict liability test, requiring the defendant to produce evidence explaining the accident or face liability. This policy of imposing the burden of persuasion on the defendant has been explained as justifiable where the defendant owes some special responsibility to the plaintiff. In other words, policy considerations dictate where the burden of persuasion ultimately lies. In the final analysis, the strength of inferences, drawn from a set of facts, varies from case to case. This flexibility allows res ipsa loquitur to function effectively as a means for channeling responsibility and allocating burdens of proof in the torts context. The Hicks framework lacks this flexibility. If there is, in fact, a commitment to a discrimination-free work environment, courts must address the need to ascribe responsibility for discrimination. Again, a disturbing aspect of Hicks is what the decision suggests about society's unwillingness to assume collective responsibility for ensuring that race-based decision making, conscious or not, benevolent or invidious, is effectively combated by the legal process.

199. See KEETON ET AL., supra note 107, § 40, at 258.
200. See id.
201. See id.
202. See id. at 259; see also Anderson v. Somberg, 386 A.2d 413 (N.J. 1978).
203. See KEETON ET AL., supra note 107, § 40, at 259.
B. The Rules of Evidence and the Practice of Discrimination

We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe McDonnell Douglas represents. But nothing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.204

The impact of the Hicks decision does not lie in the allocations of the burdens of persuasion and production, but rather in the question of how to satisfy those burdens. The rules that determine what satisfies a burden of proof reflect policy decisions. Further, evidentiary rules demonstrate how the law's ultimate purpose of ascertaining the truth may best be accomplished through a defined process.205 Ultimately, what the specific allocations of McDonnell Douglas, Burdine, and Hicks reflect is that those who have been victims of discrimination, who have borne its stigma and its pain, must somehow explain to a neutral court why the result in question indicates the presence of discrimination. This is the starkest indication that the courts have yet to completely understand or believe that discrimination remains a part of our modern society.

The Court's application of the evidence rules in Hicks ensured that a certain result was not only appropriate but also inevitable. Some have argued that the pretext-plus rule is the only fair way to allocate evidentiary burdens in employment discrimination cases because it protects the business judgment of the defendant/employer and does not assume that the employer's action was motivated by discrimination.206 This reasoning is faulty for several reasons. First, several areas of equal employment opportunity law exist where courts have explicitly required that the defendant disprove that discrimination caused an adverse employment decision.207 In other words, regardless of the area of alleged discrimination and the corre-

205. See Peter M. Panken et al., Employees' New Burden of Proof in Employment Discrimination Cases: The Conservative Supreme Court Speaks, in ADVANCED EMPLOYMENT LAW & LITIGATION 73, 75 (ALI-ABA Course of Study, Nov. 30-Dec. 2, 1989).
206. See Smith, supra note 9, at 301-02.
sponding structural framework, the essential component of most discrimination laws has been to protect the beneficiaries of equal employment opportunity laws.

For example, under the Equal Pay Act (EPA), the burden of persuasion shifts to the defendant once the rebuttable presumption of discrimination has been raised. This is established by proving that workers of the opposite sex in the same establishment are receiving different rates of pay, based on sex, for equal work. The defendant may rebut the inference of discrimination by proving one of the four defenses to different pay scales between the sexes. Failure to meet this burden results in a loss for the defendant. In *Brennan*, the Court noted that this allocation of burdens "is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof."

Similarly, in disparate impact cases, once a plaintiff demonstrates that a facially neutral employment practice has a disproportionately adverse effect on members of a protected group, the Civil Rights Act of 1991 imposes the burden of persuasion on an employer to demon-

209. *See Brennan*, 417 U.S. at 195-96 (holding that the employer failed to meet its burden of proving that the difference in wages between male night employees and female day employees was motivated by a factor other than sex). In *Brennan*, the defendant and employer, Corning, introduced a night shift. *See id.* at 191. At the time, New York and Pennsylvania law prohibited women from working at night. *See id.* The male employees that were recruited to fill the new night shift inspectors' jobs demanded and received significantly higher wages than female inspectors working the day shifts. *See id.* Corning later eliminated all shift differentials, and after the law restricting night work for women was amended, Corning opened up night shift jobs to women with enough seniority to bid for the higher paying jobs as opportunities arose. *See id.* at 194. However, a new collective agreement that eliminated all future wage differentials preserved a higher wage base for the mostly male night shift inspectors hired under the old order. *See id.* The Secretary of Labor sought to enjoin Corning from continuing to operate under a pay scale that perpetuated the pay differentials between male and female inspectors working during the night shift and to collect back pay for past violations. *See id.* Corning argued on appeal that the Secretary had failed to prove an EPA violation because day shift work and night shift work are not performed under similar working conditions as required by the Act. *See id.* at 197. The Court looked at Corning's job evaluation plans and found that the plans did not treat the time of day worked as a working condition. *See id.* 202-03. In fact, the Court found that Corning's job evaluation plans treated the jobs equally. *See id.* Additionally, Corning's job evaluation manager testified that the company did not consider time of day worked to be a working condition. *See id.* at 203. The Court ultimately held that Corning failed to carry its burden of persuasion that the higher rate paid to male night shift workers was "in fact intended to serve as compensation for night work, [but] rather constituted an added payment based on sex." *Id.* at 204.
210. *See id.*
211. *See id.* Under the EPA, an employer may defend pay differentials for equal work on grounds of "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1) (1994).
212. *See Brennan*, 417 U.S. at 196.
213. *Id.* at 196-97.
strate the business necessity or job relatedness of the practice in question.\textsuperscript{214} Indeed, under the 1991 Act, the defendant employer bears both the burden of production and the burden of persuasion.\textsuperscript{215} Finally, in affirmative action cases under Title VII, the plaintiff challenging the affirmative action program bears the burden of proving that the program violates the provisions of Title VII.\textsuperscript{216} In all of these different areas, burdens of persuasion are allocated in a manner that protects the intended beneficiaries of the applicable legislation.

Absent direct evidence of discrimination, presumptions assume a central role as a procedural tool, either to allocate the burden of persuasion or the burden of production. This, in effect, was the focus of the Court's decision in 

\textit{Hicks}. The critical issue is to determine what effect a presumption should be given. A presumption, appropriately speaking, arises from a rule of law that creates a relationship between a basic fact and a presumed fact.\textsuperscript{217} The first step in the presumption process is the finding of the existence of a basic fact. This fact, in turn, implies the presumed fact, which consequently requires a legal finding of its existence. However, the party against whom the presumption operates may defeat the finding of the existence of the presumed fact by offering sufficient rebuttal evidence.\textsuperscript{218} For example, the basic fact that a child is born in wedlock gives rise to the presumed fact that the child is legitimate.\textsuperscript{219} Similarly, the basic fact that a letter is properly addressed, stamped, and put in the mail gives rise to the presumed fact that the addressee received the let-

\begin{itemize}
  \item An unlawful employment practice based on disparate impact is established under this chapter only if –
  \begin{itemize}
    \item (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.\ldots
  \end{itemize}
  \item \textit{Id.}
  \item \textsuperscript{215} See id. § 2000e-2(k) (1994); see also 137 CONG. REC. S15498 (daily ed. Oct. 30, 1991) (statement of Sen. Hatch) ("The employer must come forward and meet the burden not only of production \ldots but the burden of persuasion as well.").
  \item \textsuperscript{217} See Leo H. Whinery, 2 OKLAHOMA EVIDENCE: COMMENTARY ON THE LAW OF EVIDENCE § 9.03 (1994); see also EDMUND H. MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1963).
  \item \textsuperscript{218} See Whinery, supra note 217, § 9.04.
\end{itemize}
The term presumption is also used, as was the case in *Hicks*, as a rule of law to allocate the burden of producing evidence or of persuading the factfinder.\(^\text{221}\)

In the Title VII disparate treatment context, the fact that all other similarly situated employees were retained and that the only minority employee was discharged should give rise to a presumption of discrimination. Once the presumption is established, the party against whom the presumption operates has the opportunity to rebut the presumed fact. The nature of the rebuttal is determined by the particular effects of the rule that the court adopts. In *Hicks*, the Court applied the traditional Thayer-Wigmore approach\(^\text{222}\) incorporated in Rule 301 of the Federal Rules of Evidence,\(^\text{223}\) requiring the party against whom the presumption operates to produce evidence that shows no causal relationship between the basic fact of discharge and the presumed fact of discrimination.\(^\text{224}\) The Morgan-McCormick approach\(^\text{225}\) would treat this problem differently by not only requiring the party against whom the presumption operates to produce evidence, but also to bear the ultimate burden of persuasion that there was no causal relationship between the basic fact of discharge and the presumed fact of discrimination.\(^\text{226}\) Congress, however, rejected this theory in favor of the Thayer-Wigmore approach of shifting only the burden of producing evidence.\(^\text{227}\) Consequently, in *Hicks*, the mere assertion of a reason for the discharge was sufficient to rebut the presumption of discrimination, even though the party in whose favor the presumption operated had established that the asserted reason was pretextual or untruthful.\(^\text{228}\)

Despite the Supreme Court's rigid presentation of the *McDonnell Douglas-Burdine* framework, the rules of evidence regarding presumptions may be applied in such a way as to provide room for courts to consider underlying policies. Even where presumptions are


\(^\text{221}\) See generally St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

\(^\text{222}\) See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 314 (Boston, Little, Brown, and Co. 1898); WIGMORE, *supra* note 219, § 2491, at 305.

\(^\text{223}\) See FED. R. EVID. 301 (1975).


\(^\text{226}\) This approach to the effect of presumptions was adopted by the National Conference of Commissioners on Uniform State Laws in promulgating the Uniform Rules of Evidence in 1974. See UNIF. R. EVID. 301(a) (1974) "A presumption imposes on the party against whom it is directed the burden of proving that the non-existence of the presumed fact is more probable than its existence." *Id.*


\(^\text{228}\) See Hicks, 509 U.S. at 518.
used as a tool to allocate burdens of production and persuasion, the
general purposes underlying presumptions are identified as public
policy, probability, procedural convenience, or any combination of the
three. Some states even provide that a court may consider the
strength of the public policy underlying a presumption in determin-
ing how to allocate the burden of persuasion. For example, the pre-
sumption of legitimacy for all children born in wedlock is a reflection
of a strong public policy to protect children from the social stigmati-
ization that may arise from bastardy. Illustrating the procedural
convenience of presumptions, one author has explained:

[T]he familiar presumption that evidence that the vehicle de-
scribed in the complaint was illegally parked and the defendant
named in the complaint was the registered owner at the time of
the violation constitutes a presumption that the registered owner
was the person who parked the vehicle where the violation oc-
curred. Here, apart from any support the presumption gains from
public policy and probability, certainly from a procedural stand-
point the defendant has immediate and readier access to the evi-
dence with which to rebut the presumed fact of the presumption.

Similarly, in discrimination cases, the employer is in the best po-
sition to present evidence to rebut the presumption of discrimination.
Given the presumption that discrimination is a probable motive,
coupled with the procedural convenience of the presumption, no justi-
fiable or rational reason exists to allow an employer to simply assert
any reason, true or false, in satisfaction of the burden of production.
The result mocks any notion that there is a strong public policy
against discrimination. The proposed amendment to Rule 301 of the
Federal Rules of Evidence that reflected the Morgan-McCormick ap-
proach was justified on the ground that the underlying reasons for
creating presumptions did not justify giving a lesser effect to pre-
sumptions.

Notwithstanding Hicks, plaintiffs can still make beneficial uses of
inferences of discrimination in Title VII discrimination lawsuits. How-
ever, the Hicks decision will invariably curtail the extent to
which such inferences will be effective. Under Hicks, inferences are
sufficient to show intentional discrimination only when the trier of
fact disbelieves the reasons put forward by the defendant. However,
even this result is not guaranteed by Hicks because Hicks limits

229. See McCORMICK, supra note 219, § 343, at 580.
230. See, e.g., CAL. EVID. CODE §§ 603-606 (West 1997); FLA. STAT. §§ 90.301-303
(1997).
231. See McCORMICK, supra note 219, § 343, at 581-82.
232. WHINERY, supra note 217, § 9.01, at 153 (emphasis added).
233. See Advisory Committee Note, Rules of Evidence for the United States Courts and
the effect of presumptions to the mere Thayer-Wigmore approach of producing evidence. The importance of a fair, but realistic, process for evaluating discrimination claims is too important to be left teetering on the edge of a presumption that has been stripped of its value, especially where the evidence produced is proven to be false. The remaining question is whether an employer has truly met the burden of production when its proffered reason has been disproved by the plaintiff. Echoing Holmes's axiom that more than logic lies behind a legal decision, one article recently noted that "[t]he seemingly doctrinal rules that assign burdens of proof are not mere taxonomy; they conceal strong, normative policy decisions concerning who should shoulder evidentiary risks and, more broadly, the desirability of Title VII and the potential power it puts in the hands of workers."235

V. THE BROADER IMPLICATION OF HICKS: THE PRESUMPTION OF EQUAL TREATMENT

In *Liberty of Contract*, Roscoe Pound asked, "[W]hy do so many [courts] force upon legislation an academic theory of equality in the face of practical conditions of inequality? . . . Why is the legal conception of the relation of the employer and employee so at variance with the common knowledge of mankind?"236 Pound maintained that liberty of contract was "a chief article in the creed of those who sought to minimize the functions of the state, [and] that the most important of its functions was to enforce by law the obligations created by contract."237 Consequently, because liberty to contract was treated as a fundamental right, any attempt to encroach upon it, particularly in the employment context, was unsuccessful.238

The decisions following *Hicks* have not fulfilled the dire predictions of those who criticized the decision as sounding the death knell for disparate treatment plaintiffs. Instead, the majority rule regarding the procedural framework for disparate treatment after *Hicks* is that a plaintiff may survive summary judgment if the plaintiff produces enough evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not the true reasons for the adverse decision.239

For example, the Third Circuit has consistently interpreted *Hicks* as allowing, although not mandating, judgment for the plaintiff

235. *Developments*, supra note 9, at 1579.
236. Pound, supra note 75, at 454.
237. *Id.* at 456-57.
238. See *Lochner v. New York*, 198 U.S. 45 (1905); see also supra notes 77-79 and accompanying text.
where the defendant's reasons have been proven to be pretextual or have been rejected by the court as untrue.\footnote{240} In \textit{EEOC v. Ethan Allen, Inc.},\footnote{241} the Second Circuit held that once pretext is found, it "permits the ultimate inference of discrimination."\footnote{242} Similarly, the Sixth Circuit construed \textit{Hicks} as demonstrating:

that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury must draw, to a permissive one the jury may draw, provided that the jury finds the employer's explanation "unworthy" of belief.\footnote{243}

In addition, the Equal Employment Opportunity Commission (EEOC) issued guidelines for enforcement of the \textit{Hicks} decision.\footnote{244} According to the EEOC, "a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination.\footnote{245}

Clearly, the use of inferences in the post-\textit{Hicks} environment is still viable, and there appears to be no formal threat to a plaintiff's ability to make her case and avoid summary judgment once pretext is shown. However, the question of how to prove discrimination remains unresolved for cases in which a court holds that a reasonable factfinder could not find that the employer's articulated reason was a pretext for discrimination.\footnote{246} The unspoken presumption in the post-\textit{Hicks} environment is that there is equal treatment in the workplace and that defeat of the presumption requires direct or circumstantial evidence of conscious discrimination. In \textit{Personnel Administrator v. Feeney},\footnote{247} the Supreme Court cautioned:

\begin{quote}
[A]n inference is a working tool, not a synonym for proof. When . . . the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when . . . the statutory history and all of the available evi-
\end{quote}
Given the strong historical forces at play in the norms that undergird employment relations, *Hicks* will always raise the specter of how to prove discrimination. For example, although the Sixth Circuit in *Manzer v. Diamond Shamrock Chemical Co.* recognized that a jury which finds the employer's reasons unworthy of belief may find discrimination, the court stressed that the jury may not reject an employer's explanation unless there is a "sufficient basis in the evidence for doing so." According to the court, "To allow the jury simply to refuse to believe the employer's explanation would subtly, but inarguably, shift the burden of persuasion from the plaintiff to the defendant, which we must not permit." *Hicks* evidences a disturbing shift in the regulation of race relations away from an effort to facilitate and protect equal access and treatment in the employment context. The Court has moved to a position where those who have labored under the burden of unequal treatment now bear the burden of disproving a presumption of a race-neutral work force. The socio-economic philosophy of free market capitalism, reinforced by the strong impulse to protect property rights, serves to keep things in status quo. Until this system is discredited, or until the concept of equality for all is infused with procedural and substantive rights superceding the right to property, the rules of the workplace, in tandem with the free market, will preserve and serve status interests.

Most discrimination does not occur intentionally in the sense of invidious motivation. More often than not, discrimination is a state of heart and mind that manifests itself in conscious or unconscious assessments about attitudes toward, or decisions affecting, members of a particular group. Different adjectives may be used to describe various forms of discrimination such as ignorant discrimination, careless discrimination, or unconscious discrimination. Regardless of the terminology, however, all forms of discrimination are wrong. Although, as a society, we impose lesser sanctions on ignorant discrimination than we do on intentional discrimination, we cannot afford the cost of failing to provide a viable recourse for all forms of discrimination through the legal system. The cumulative effect of discrimination, intended or otherwise, is ultimately economic, although non-economic effects are just as devastating. Thus, it remains im-

248. Id. at 279 n.25.
249. 29 F.3d 1078 (6th Cir. 1994).
250. Id. at 1083.
251. Id.
252. See Krieger, supra note 176, at 1164.
253. See generally Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Ra-
important to determine what counts as discrimination, how to prove its existence, and to do so based on a policy that gives breadth and depth to the equality principle.

VI. CONCLUSION

The seeds of the Hicks decision were sown long ago in Burdine when the Supreme Court held that the defendant in a Title VII action need not persuade the trier of fact that it was motivated by the reasons offered to rebut the presumption of discrimination. The Title VII framework only requires that the defendant offer a reason, but not necessarily the true reason, for its actions and the adverse employment decision. Underlying the Hicks decision and its precedents is the familiar and often articulated conviction of courts and legislatures that employers make efficient decisions and that courts and legislatures should not interfere with those decisions. The Hicks decision reaffirms the dominance of the employer’s interests in the employment relationship and exemplifies longstanding judicial deference to the employer’s judgment in that relationship. One danger posed by Hicks is not the exacting evidentiary requirements that a plaintiff must meet, but rather the reality that the jury’s disbelief of the defendant’s articulated reasons will invariably be based on how the jury understands the phenomenon of racism. This position, particularly at this point in history, is untenable for the jury system that is increasingly scarred by vicissitudes of modern race relations. A more potent danger posed by Hicks is that judicial reluctance to interfere with the property rights of an employer, coupled with the lack of any exact measure for determining the existence of discrimination and the limited construction of the intent requirement, form a complex structure that ultimately serves the interest of status preservation.

254. This places minority groups, and particularly African Americans, in an ironic position. While their status as slaves historically precluded them from pursuing the benefits of social and economic mobility, the combined effects of unchecked discrimination and the at-will rule ensures that “the substance of [their lives remains] in another man’s hands.” FRANK TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).
While the focus on evidence or other legal structures may produce doctrinally correct results, such as the *Hicks* decision, this focus is misplaced when the result would be to shield discrimination from scrutiny. The allocation of the burdens of persuasion and production, and the determination of how and what satisfies each burden, may unwittingly serve as a proxy to facilitate discriminatory decisions rather than a means to ferret them out. This result is inimical both to the groups of people it operates against and to the broader vision of becoming a society where all people are recognized as created equal under God. It is important to see justice as a moral value vindicated through process and not as process or doctrine exalted over truth. It is, perhaps, this truth that will set us free from the vicious trap of status rules.