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## Proving Discrimination after Price Waterhouse and Wards Cove

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# PROVING DISCRIMINATION AFTER *PRICE WATERHOUSE AND WARDS COVE*: SEMANTICS AS SUBSTANCE\*

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## INTRODUCTION

Anyone involved in litigation under Title VII of the Civil Rights Act of 1964<sup>1</sup> or similar state statutes<sup>2</sup> may wonder what is entailed

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17a (1982) provides in relevant part:

- (a) It shall be an unlawful employment practice for an employer—
- (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  - (2) to limit, segregate, or classify his employees or applicants for employment in

in proving or disproving discrimination after the United States Supreme Court's October 1988 Term.<sup>3</sup> In fact, in the pending Civil Rights Act of 1990, Congress is considering reversing some of what the Supreme Court did during that Term.<sup>4</sup> One of the issues that the Supreme Court addressed during the 1988 Term involved allocating burdens of proof in two major types of Title VII claims, disparate-treatment and disparate-impact.<sup>5</sup> *Price Waterhouse v. Hopkins*,<sup>6</sup> dealt with a disparate-treatment claim, resulted in a plurality opinion, two concurrences and a dissent, and held that the defendant had the burden of proving that discrimination did not cause an adverse employment decision.<sup>7</sup> *Wards Cove Packing Co. v. Atonio*<sup>8</sup> dealt with a disparate-impact claim, resulted in a five-four decision, and held that the defendant only had the burden of producing evidence of, not the burden of proving, a business justification of practices causing a disparate-impact.<sup>9</sup> In so holding, *Wards Cove* brought to disparate-impact cases an allocation of proof that previously had been limited to early disparate-treatment cases.<sup>10</sup> The problem with

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any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

*Id.*

2. See, e.g., ILL. ANN. STAT. ch. 68, para. 1-102 (Smith-Hurd Supp. 1989); MINN. STAT. ANN. § 363.12 (West Supp. 1989); N.Y. CIVIL RIGHTS LAW § 40-c (McKinney Supp. 1989); see also Note, *The Application of the McDonnell Douglas Analysis to Mixed Motive Employment Discrimination Cases*, 12 HAMLINE L. REV. 173 (1989) (discussing Minnesota law).

3. See *infra* notes 210-65 and accompanying text (explaining uncertainty of Supreme Court's rulings in *Price Waterhouse* and *Wards Cove*).

4. See *infra* notes 346-59 and accompanying text (discussing legislation).

5. See *infra* notes 145-46 (distinguishing disparate-treatment claims under Title VII, which are those in which plaintiffs seek to prove that they were intentionally discriminated against because of their sex, race, religion, color, or national origin, from disparate-impact claims, which are those in which plaintiffs challenge employer's use of objective or subjective employment practices that disproportionately exclude from workforce Title VII protected applicants).

6. 109 S. Ct. 1775 (1989) (plurality opinion).

7. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786, 1787-88 (1989) (plurality opinion).

8. 109 S. Ct. 2115 (1989).

9. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989). The justices disagreed as to whether earlier Supreme Court opinions had required the defendant to prove not only a business justification but also a business necessity. Compare *id.* at 2126 (finding employer has burden of production, but employer need not establish that business necessity is "indispensable") with *id.* at 2132 (Stevens, J., dissenting) (countering that employer has burden of showing that requirements of business necessity are essential). See generally *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584-87 (1979) (holding that employer's refusal to hire persons undergoing methadone did not violate Civil Rights Act of 1964 absent further statistics on all employees); *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977) (stating test for prima facie discrimination case and explaining that defendant failed to refute evidence); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (listing business necessity as "touchstone" of employee's defense).

10. *Wards Cove*, 109 S. Ct. at 2125-26; see, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). See generally *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (differentiating between disparate-treatment and disparate-impact).

the *Wards Cove* analysis and holding is that disparate-impact cases are very different from disparate-treatment cases and should not be analyzed similarly.<sup>11</sup> The Civil Rights Act of 1990 would restore the proper burden of proof analysis to disparate-impact cases.<sup>12</sup>

Although the United States Supreme Court has been allocating proof between plaintiffs and defendants in disparate-treatment cases since 1973,<sup>13</sup> the dissent in *Price Waterhouse* stated that this area of the law is still "difficult for the bench and bar."<sup>14</sup> The dissent also stated that this latest disparate-treatment case is "certain to result in confusion."<sup>15</sup> The confusion may grow if disparate-treatment analysis remains applicable to disparate-impact cases.

Allocating proof is not difficult, however, if one understands the difference between an inference and a presumption. As this Article will demonstrate, a presumption is a mandatory conclusion drawn from certain facts. Its purpose is to let the party using it proceed with litigation. If it is a conclusion drawn from minimal facts, as is the presumption in the early disparate-treatment cases, it will disappear when the opposing party articulates any evidence to the contrary. Because the presumption is court-created, it does not shift the burden to the defendant to prove the contrary conclusion, but only to produce evidence of that conclusion. An inference, on the other hand, is a conclusion that logically can be drawn from the evidence.<sup>16</sup> If the evidence causes the fact finder to infer and thus believe the conclusion, the opposing party will then have to prove a defense.

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11. See *infra* notes 322 and accompanying text (examining burden of proof allocation in disparate impact cases).

12. See *infra* notes 346-59 and accompanying text (discussing legislative proposal).

13. See, e.g., *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-16 (1983) (holding that when plaintiff in Title VII case proves by preponderance of evidence prima facie case of employment discrimination, burden shifts to defendant to articulate non-discriminatory reasons for its actions); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981) (holding that appellate court erred by requiring defendant to prove by preponderance of evidence its non-discriminatory reasons for rejecting or terminating plaintiff); *Board of Trustees of Keane College v. Sweeney*, 439 U.S. 24, 24-25 (1978) (per curiam) (holding that to meet plaintiff's prima facie case of discrimination, defendant need only "articulate" legitimate, non-discriminatory reason for terminating employee and need not prove absence of discriminatory motive); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-80 (1978) (holding that plaintiff made prima facie showing of discrimination and defendant therefore must be allowed to introduce evidence bearing on its motive); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (setting forth basic allocation of burdens and order of presentation of proof in Title VII cases alleging discriminatory treatment).

14. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1806 (1989) (Kennedy, J., dissenting).

15. *Id.* (Kennedy, J., dissenting).

16. See *infra* text accompanying notes 55-78 (distinguishing inference from presumption).

For purposes of this Article, the term "inference" refers to a finding of fact based on direct evidence. When "presumption" is used, it refers to a judicially created or mandated conclusion of law.

As this Article will continue to demonstrate, the early disparate-treatment cases are presumption cases. *Price Waterhouse* and all disparate-impact cases, however, are inference cases. They involve the fact finder concluding from the evidence that forbidden conduct occurred. In *Price Waterhouse*, the defendant used a discriminatory reason as a motivating factor to make an employment decision. In disparate-impact cases, the employer uses a neutral employment practice that causes a disparate-impact on the workforce. Neither of those types of cases involves a presumption of discrimination drawn from the minimal evidence that someone applied for a job, was qualified, was rejected and the job remained open, which is what is involved in early disparate-treatment cases. Those early disparate-treatment cases correctly held that the defendant need only articulate but not prove a nondiscriminatory reason. The former cases are mixed-motive or disparate-impact cases in which the plaintiff has already proved plaintiff's case and the burden of proof should then shift to the defendant to prove a defense. In mixed-motive cases the defense is causation, that the discriminatory reason did not cause the adverse employment action. In disparate-impact cases the defense is business necessity, that the employment practice causing the disparate-impact is necessary to the employer's business.

Part I of this Article outlines the basic principles in allocating burdens of production and persuasion at various stages during litigation, distinguishes the burden of production from the burden of persuasion, and discusses the substantive significance of this distinction. Part I also examines the differing roles presumptions and inferences should play in allocating the burdens of production and persuasion. Part II discusses the allocation of burdens of production and persuasion in Title VII cases. Part II-A first explains the difference between disparate-treatment and disparate-impact cases. In Part II-B, this Article describes allocation of burdens of production and persuasion in disparate-treatment cases prior to *Price Waterhouse* and then discusses and clarifies the disagreements among the Justices in *Price Waterhouse*. Part II-B also explains how to distinguish between a presumption and an inference and suggests that if courts and litigants make this distinction, then they will be able to distinguish easily between the different types of disparate-treatment cases. This section demonstrates that a "mixed motive" case such as *Price Waterhouse* is not a presumptive case as are *McDonnell Douglas* and *Burdine*, but is an inferential case, and the *Price Waterhouse* decision is thus correct to shift the burden of proof to the defendant, although prior inferential disparate-treatment cases shifted only the burden of production. Part II-C discusses allocations of proof in the

disparate-impact cases. The section illustrates how *Wards Cove* erroneously brought presumption principles into disparate-impact cases and the problems those principles create because the cases contain no presumptions. Finally, Part II-C recommends legislation to restore basic burden of proof principles to disparate-impact cases.

## I. BASIC PRINCIPLES IN ALLOCATING BURDENS OF PROOF

Although the Supreme Court has decided a number of Title VII cases involving allocations of burdens of proof, only one of those cases refers to basic litigation principles.<sup>17</sup> Indeed, these cases generally use terms like burden of proof, burden of production, prima facie case, presumption, and inference, yet only one case defines any of the terms.<sup>18</sup> Therefore, this Article defines the terms and sets forth the legal principles to clarify current caselaw.<sup>19</sup>

### A. *Burden of Persuasion Distinguished from Burden of Production*

The phrase "burden of proof" is often used to refer to two concepts, burden of production and burden of persuasion.<sup>20</sup> The burden of proof is more frequently used to refer to the latter concept, which is also referred to as the risk of nonpersuasion.<sup>21</sup> As the names of the terms indicate, a burden of production is merely a burden that requires a party to produce evidence.<sup>22</sup> The burden of persuasion requires the party to prove to the fact finder the truth or existence of those facts for which the party has the burden.<sup>23</sup> To

17. See *supra* note 13 (listing cases); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 nn.7-10 (1981) (explaining evidentiary principles and definitions including definitions of prima facie, presumption, and inference).

18. *Burdine*, 450 U.S. at 254-55 nn.7-10 (defining terms). See generally Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1129-62 (1980) (discussing ambiguities in Supreme Court's use of litigation terms).

19. See Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 893 (1989) (suggesting distinction based on direct or indirect evidence); see also *Price Waterhouse*, 109 S. Ct. at 1812 (Kennedy, J., dissenting) (finding distinction between direct and indirect evidence "difficult"); see *infra* text accompanying notes 55-78 (demonstrating that proper distinction is between presumption and inference).

20. F. JAMES, JR. & G. HAZARD, JR., *CIVIL PROCEDURE*, § 7.5, at 313-14 (3d ed. 1985); see E. CLEARY, *MCCORMICK ON EVIDENCE*, § 336, at 947 (3d ed. 1984) [hereinafter *McCormick*] (discussing definition of "burden of proof"); 9 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW*, §§ 2485, 2487, at 283, 294 (J. Chadbourn rev. 1981); see also *FED. R. EVID.* 301 (distinguishing between burden of going forward or presumption and risk of nonperformance).

21. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.6, at 314; *MCCORMICK*, *supra* note 20, § 336 at 948; 9 J. WIGMORE, *supra* note 20, § 2486, at 287.

22. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.7, at 318 (defining burden of persuasion); *MCCORMICK*, *supra* note 20, § 336, at 947 (referring to burden of persuasion as "risk of nonpersuasion"); J. WIGMORE, *supra* note 20, § 2485, at 283 (noting that rule evolved out of conflict between judge and jury and that party must first satisfy judge through burden of production before matter goes to jury).

23. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.6, at 316-17 (requiring jury to find existence of fact more probable than not before holding for party with burden of persua-

avoid confusion, this Article will not use the ambiguous term of burden of proof and will specifically refer to burdens of production or persuasion.

### B. *Substantive Significance of Allocation of Proof*

As litigators know, the allocation of burdens of production and persuasion can determine the outcome of the case.<sup>24</sup> If the plaintiff has the burden of production and does not produce evidence, the plaintiff's suit will be dismissed.<sup>25</sup> If the defendant has that burden and does not produce evidence, either the court will enter a verdict for the plaintiff or the fact finder will be allowed to find in favor of the plaintiff on that particular issue so that the defendant risks an adverse verdict.<sup>26</sup>

The more stringent burden of persuasion similarly can affect the outcome of a case. If the evidence in a case is inconclusive, the party with the burden of persuasion will lose for failure to meet that burden.<sup>27</sup> This is true regardless of the level of proof required to meet the burden.<sup>28</sup> Therefore, the party without the burden of proof will win. Thus, although allocation of the burdens of production and persuasion is nominally procedural, it has significant, substantive impact. The allocation of the burdens between the parties can change the outcome of the case.

### C. *Numerous Factors Govern Allocation of Burden of Proof*

Law students are generally taught that the plaintiff must plead

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sion); 9 J. WIGMORE, *supra* note 20, § 2485, at 285-86 (noting burden requires party to convince fact-finder of truth).

24. F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.7, at 321 (explaining how primary consequence of rule is procedural and, when no evidence is available, party upon whom burden of production is placed can lose on issue and on entire case); *cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (describing responsibilities of party with burden of production).

25. See 9 J. WIGMORE, *supra* note 20, § 2487, at 293 (noting that judge will not give case to jury if proponent fails to meet burden of production).

26. See MCCORMICK, *supra* note 20, § 338, at 954-55; 9 J. WIGMORE, *supra* note 20, § 2487, at 298-99 (diagramming burdens on parties).

27. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.6, at 314; *see also* 9 J. WIGMORE, *supra* note 20, § 2485, at 285-86 (using metaphor of general business decision to explain burden of persuasion).

28. In most civil cases, the level of proof is a preponderance of the evidence standard, in some, a clear and convincing standard. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.6, at 316 (discussing preponderance of evidence requirement); MCCORMICK, *supra* note 20, § 338, at 956 (addressing preponderance standard); F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.6, at 317 (detailing clear and convincing evidence standard). Besides allocating burdens of proof, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1791-93 (1989) (plurality opinion), also held that the defendant's burden of proof is by the preponderance of the evidence standard, reversing the Court of Appeals which had required a clear and convincing standard. *Price Waterhouse*, 109 S. Ct. at 1793. This Article does not address the difference in levels of burdens of proof.

and prove the elements of plaintiff's prima facie case and that the defendant must plead and prove affirmative defenses. Thus, to determine the allocation of the burden of persuasion, one would think that all that is necessary is to determine the elements of plaintiff's prima facie case.<sup>29</sup> Commentators agree, however, that a formal rule stating that each party must prove the essential elements of its case only restates the problem and necessitates another rule to define "essential" elements.<sup>30</sup> Commentators also agree that a rule based on whether the elements are pled in the affirmative or negative is not helpful because statements can be phrased either affirmatively or negatively.<sup>31</sup> Similarly, when a cause of action is statutory or contractual, some rules for allocating burdens of proof distinguish between affirmative language and language of exception.<sup>32</sup> Because the language may not have been drafted with burden of persuasion allocation in mind, however, this allocation may produce arbitrary results.<sup>33</sup> Indeed, clear and specific legislative guidance as to burdens of persuasion is rare.<sup>34</sup> Hence, courts generally allocate the burdens.<sup>35</sup>

The treatise writers agree that no one principle governs how courts allocate burdens of persuasion and production.<sup>36</sup> The writers note that courts should consider issues of policy, convenience, fairness, and probability.<sup>37</sup> Policy issues include factors such as bur-

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29. See, e.g., McCORMICK, *supra* note 20, § 337, at 948; F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 322-23 (listing common principle as giving burden of persuasion to party with burden of pleading, although not in all cases); 9 J. WIGMORE, *supra* note 20, § 2486, at 288 (noting that party with affirmative allegation bears burden of production).

30. F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 322; McCORMICK, *supra* note 20, § 338, at 949; 9 J. WIGMORE, *supra* note 20, § 2486, at 288.

31. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 322; McCORMICK, *supra* note 20, § 337, at 949. For example, negligence, according to James and Hazard, may be termed "failure to exercise due care," and "[b]reach of a promise may be called nonfulfillment." F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 322.

32. See McCORMICK, *supra* note 20, § 337, at 951, 951 n.14. As McCormick illustrates, insurance contracts are an example. *Id.* Defendants in indemnity actions may carry the burden of proof on exception clauses, while general coverage burdens fall on plaintiff. *Id.*

33. See McCORMICK, *supra* note 20, § 337, at 951 (referring to language as merely formal choice).

34. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.9, at 144-45 (remarking as to uncommon occurrence of clear statutes).

35. See *infra* notes 36-54 and accompanying text (discussing factors considered in judicial allocation of burdens).

36. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.9, at 145 (stating that no universal rule governs burden allocation); McCORMICK, *supra* note 20, § 337, at 952 (providing same proposition); 9 J. WIGMORE, *supra* note 20, § 2486, at 288, 291, 292 (giving same proposition); see also F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 4.4, at 196 (stating that no universal rule determines what are affirmative defenses); *id.*, § 7.8, at 322 (listing several tests for allocation).

37. See McCORMICK, *supra* note 20, § 337, at 952; 9 J. WIGMORE, *supra* note 20, § 2486, at 291 (listing policy and fairness reasons); see also F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.9, at 145 (listing as consideration in allocating burdens primary elements of plaintiff's case).

dening the plaintiff because that person seeks to change the status quo or burdening the defendant when certain defenses are disfavored or unusual.<sup>38</sup> Included under convenience and fairness issues are factors such as who has knowledge and access to information and whether the burden follows the natural order of storytelling.<sup>39</sup> Authorities agree, however, that access to information should not be overrated as a reason for allocating burdens because fairness may override an issue of access to information.<sup>40</sup> Moreover, modern discovery rules give both sides greater access to information.<sup>41</sup> Finally, courts may consider the probability of a particular explanation based on common experience in allocating burdens.<sup>42</sup>

As with burdens of persuasion, no uniform rule exists to direct allocation of burdens of production.<sup>43</sup> Courts use the same factors that they consider in allocating burdens of persuasion, which ultimately rest on broad policy considerations.<sup>44</sup> Although the party with the burden of persuasion usually has the burden of production, situations arise which necessitate splitting the burdens.<sup>45</sup> If the plaintiff provides evidence sufficient to require the fact finder to rule for the plaintiff, then the burden of production may shift to the defendant.<sup>46</sup> In that case, the defendant may also have the burden of

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38. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 324-25 (noting that when law disfavors change, it places burden on claimant); McCORMICK, *supra* note 20, § 337, at 950 (noting policy disfavoring certain contentions).

39. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 324-25 (describing convenience and fairness issues in burden allocation); McCORMICK, *supra* note 20, § 337, at 950 (describing burden following logic of storytelling).

40. See, e.g., F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 324 (discussing balancing of fairness and information access); 9 J. WIGMORE, *supra* note 20, § 2486, at 290 (providing same proposition); McCORMICK, *supra* note 20, § 337, at 950 (listing instances in which access to information does not determine burden).

41. See FED. R. CIV. P. 26-37 advisory committee notes (1970) (noting that 1970 Amendments eliminate requirement of good cause pursuant to Rule 34(a) discovery of documents, and that Rule 26(b)(1) permits discovery even if documents are inadmissible at trial); McCORMICK, *supra* note 20, § 337, 950 n.11 (noting expanded discovery rules have reduced importance of access to information in allocating burdens).

42. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.8, at 324 (addressing courts' flexibility to allocate burdens according to common experience); McCORMICK, *supra* note 20, § 337, at 950 (providing same proposition).

43. 9 J. WIGMORE, *supra* note 20, § 2488, at 300. This lack of uniformity is typical also when parties attempt to allocate burdens of persuasion; see *supra* notes 36-42 and accompanying text (detailing lack of consistent allocation method).

44. McCORMICK, *supra* note 20, § 337, at 952 (examining allocations of burden of production); 9 J. WIGMORE, *supra* note 20, § 2488, at 299 (providing same proposition).

45. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 4.5, at 196-97 (citing *Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980) (placing burden of production in § 1983 case on defendant for affirmative defense, while plaintiff retained burden of persuasion for case)); McCORMICK, *supra* note 20, § 337, at 951 (stating that usual allocation places both burdens on one party).

46. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.7, at 320 (discussing directed verdict); 9 J. WIGMORE, *supra* note 20, § 2487, at 294 (noting that if proponent introduces sufficient evidence, judge can require opponent to proffer evidence).

persuasion.<sup>47</sup> In addition, as will be discussed later,<sup>48</sup> the court may use a rebuttable presumption to shift the burden of production or persuasion from the plaintiff to the defendant.<sup>49</sup> Because a presumption is a procedural device that shifts these burdens, it is created for the same reasons that courts allocate burdens.<sup>50</sup>

As no one rule exists, scholars note that allocation of burdens depends on the type of case presented.<sup>51</sup> In 1980, the United States Supreme Court resolved the issue whether an allegation of bad faith was part of plaintiff's case or whether good faith was an affirmative defense for the defendant under a section 1983 claim.<sup>52</sup> Holding that the defendant must plead good faith as an affirmative defense, the Court based its decision on the language and policies underlying section 1983, and the parties' access to knowledge.<sup>53</sup> This varied approach is consistent with the conclusions of the commentators that no one rule governs allocation of burdens.<sup>54</sup>

#### D. *Presumption Distinguished from Inference*

Many commentators distinguish the term presumption from the term inference.<sup>55</sup> Many cases, however, including United States Supreme Court Title VII cases, use the terms interchangeably;<sup>56</sup> Wigmore notes that the term presumption is often confused and

47. See *infra* text accompanying notes 128-34 (discussing operation of burden of persuasion after all evidence introduced).

48. See *infra* text accompanying notes 55-78 (defining and explaining operation of rebuttable presumption).

49. See 9 J. WIGMORE, *supra* note 20, § 2487, at 295 (detailing use of presumptions to shift burden to opponent).

50. *Id.* (differentiating between presumption as factual inference and as factor that shifts burden of presumption, and possibly, burden of persuasion); see McCormick, *supra* note 20, § 342, at 965 (explaining operation of presumptions).

51. See 9 J. WIGMORE, *supra* note 20, § 2486, at 292 (concluding that no one set of principles provides test).

52. *Gomez v. Toledo*, 446 U.S. 635 (1980); see 42 U.S.C. § 1983 (1988) (creating cause of action to recover damages for infringement of constitutional rights by someone acting under color of state law).

53. *Gomez*, 446 U.S. at 638-41 (deciding issue whether defendant was entitled to qualified immunity defense).

54. See *supra* note 36 and accompanying text (relating commentators' agreement on lack of uniform rule).

55. See, e.g., F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 342, at 965-66 (distinguishing terms); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, § 3.2, at 55-56 (2d ed. 1987) (differentiating between terms); McCORMICK, *supra* note 20, § 342, at 965-66. *But c.f.* 9 J. WIGMORE, *supra* note 20, § 2487, at 295 & n.4 (citing historical confusion between presumption and inference).

56. *Compare* *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1801 (1989) (stating "an inference arises") *with id.* at 1804 (O'Connor, J., concurring) (remarking "that fact finder is entitled to presume"); *compare* *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (explaining that plaintiff must plead factors that give rise to "inference") *with id.* at 254 n.7 (distinguishing between presumption and inference and stating that "presumption" is being applied).

must be distinguished from an inference.<sup>57</sup>

A presumption or a presumptive inference is a court-made device that says that if a party can prove certain explicitly delineated facts, the court will conclude that an additional fact exists.<sup>58</sup> Thus, a presumption is a legally mandated conclusion which follows from certain specific facts.<sup>59</sup> For example, if *A* is proved then *B* is presumed to be true. Once *B* is presumed to be true, and if the presumption is rebuttable, the opposing party must now produce evidence that *B* is not true, even though the party who produced evidence of *A* produced no evidence of *B*.<sup>60</sup> A presumption, therefore, is a procedural device that shifts the burden of production, and sometimes even persuasion, from the party normally having these burdens.<sup>61</sup>

Because a rebuttable presumption is a procedural device to shift the burden of production or persuasion and because many factors go into allocating these burdens, if a presumption can be used in a particular kind of case, a court can draw the presumptive conclusion even though the predicate facts, standing alone, could logically result in a number of different conclusions.<sup>62</sup> For example, the presumption that the Supreme Court created in Title VII disparate-

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57. 9 J. WIGMORE, *supra* note 20, § 2487, at 295. Unfortunately, Wigmore uses the term inference in the definition of presumption. A presumption, he says, is a rule of law by which a judge draws an inference of a specific fact from specific evidence. *Id.* Wigmore distinguishes a presumption from a "mass of evidence . . . made up of a variety of complicated data, differing in every new trial and not to be tested by any set formula." *Id.* Thus, he is really distinguishing inferences that are drawn as the result of legal presumptions from inferences that are findings of fact based on evidence. The two meanings of the word inference have differing procedural effects; therefore, they should not be confused. *See infra* text accompanying notes 112-27, 135-44 (discussing how presumption usually shifts only burden of production but inference can shift burden of persuasion).

58. *See* McCORMICK, *supra* note 20, § 342, at 965 (explaining operation of presumption and distinguishing it from factual inference); 9 J. WIGMORE, *supra* note 20, § 2490, at 302-03 (defining presumption as having effect of rule of law).

59. Wigmore gives the example of presuming death from a seven-year absence. 9 J. WIGMORE, *supra* note 20, § 2490, at 303; *see* G. LILLY, *supra* note 55, § 3.2, at 56, 58 (describing mandatory inference, distinguishing it from factual inference by its compulsory effect, and listing examples).

60. A presumption that can be rebutted by the opposing party is a rebuttable presumption. *See* G. LILLY, *supra* note 55, § 3.2, at 56 (discussing rebuttable presumption). By contrast, an irrebuttable, or conclusive, presumption cannot be rebutted and is therefore not a procedural device, but a substantive rule of law. G. LILLY, *supra* note 55, § 3.2, at 57; McCORMICK, *supra* note 20, § 344, at 981. For example, a child under seven is irrebuttably presumed incapable of committing a felony. McCORMICK, *supra* note 20, § 342, at 966. The presumptions referred to in this Article are rebuttable presumptions.

61. *See* McCORMICK, *supra* note 20, § 344, at 981 (discussing shift of burden of production); *id.* at §§ 342, 344 at 965, 981 (addressing argument that shift of burden of production is at minimum); *see also* G. LILLY, *supra* note 55, § 3.4, at 59-60 (stating burden of persuasion shifts under minority view); McCORMICK, *supra* note 20, § 344, at 981 (providing same proposition); *infra* note 64 (discussing majority and minority views).

62. *See* G. LILLY, *supra* note 55, § 3.2, at 55 (defining presumptive conclusion as whether basic facts support finding); *see also id.* § 3.2, at 56 (defining presumptive conclusion as "strong likelihood of existence of presumed conclusion"); *see also* FED. R. EVID. 301 (instructing as to evidence of presumption).

treatment cases is that the conclusion of intentional discrimination can be presumed from four facts; that the plaintiff was protected by Title VII, applied and was qualified for the job, was rejected, and the job remained open.<sup>63</sup> Obviously, other conclusions for why the plaintiff was rejected could be drawn from these facts.

Whether a presumption shifts the burden of persuasion or the burden of production depends on the jurisdiction and the case.<sup>64</sup> If the policy reasons for creating the presumption are strong and/or the basic facts underlying the presumption are probative of its conclusion, then the presumption might shift the burden of persuasion as well as the burden of production to the opposing party.<sup>65</sup> Usually, however, the presumption shifts only the burden of production.<sup>66</sup>

If the presumption shifts only the burden of production to the defendant, and if the defendant produces no evidence, then the plaintiff wins on that issue.<sup>67</sup> If the defendant does produce admissible evidence, then the presumption will disappear; this disappearance is sometimes referred to as a "bursting bubble presumption."<sup>68</sup> The plaintiff will then be left with the burden of persuasion, which had never shifted, and logical inferences, if any, left from facts used to create the presumption.<sup>69</sup> If the facts used to create the presumption are insufficient on their own to rebut the evidence that the defendant produced, then the plaintiff must either disprove the defendant's evidence or produce more evidence.

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63. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

64. There is a debate as to whether all presumptions should function in the same manner and if so, how. The debate is sometimes referred to by the names of the proponents of different theories. Thayer views all presumptions as "bursting bubbles," disappearing when the defendant produces evidence and then shifting only the burden of production. McCORMICK, *supra* note 20, § 344, at 974-75. Morgan views presumptions as shifting the burden of persuasion. G. LILLY, *supra* note 55, § 3.4, at 59-60. Federal Rule of Evidence 301 takes the Thayer approach. McCORMICK, *supra* note 20, § 344, at 981; see also G. LILLY, *supra* note 55, § 3.4, at 59-65 (discussing majority view that only burden of production shifts, not both burdens). Several states, however, have adopted the minority view that both burdens shift. See ME. R. EVID. § 301 (West 1989); WISC. STAT. § 903.01 (1987); CAL. EVID. CODE §§ 603-06 (West 1960 & Supp. 1990).

65. See McCORMICK, *supra* note 20, § 344, at 981-82 (commenting on potentially increased need to preserve presumption based upon social policy).

66. McCORMICK, *supra* note 20, § 342, at 965 (describing presumption as rule that at least shifts burden of production); see also FED. R. EVID. 301 (establishing burdens for federal courts).

67. See McCORMICK, *supra* note 20, § 344, at 973-74 (noting that jury will rule for plaintiff if jury finds that presumed facts exist).

68. See McCORMICK, *supra* note 20, § 344, at 974-75 (referring to Thayer's "bursting bubble" presumption theory).

69. See McCORMICK, *supra* note 20, § 344, at 974 (citing Thayer theory); 9 J. WIGMORE, *supra* note 20, § 2489, at 300 (presuming that burden of persuasion was originally on plaintiff); G. LILLY, *supra* note 55, § 3.4, at 65 (differentiating between presumption and inference); see also 9 J. WIGMORE, *supra* note 20, § 2491, at 304 (providing same proposition).

Without the presumption, plaintiff's evidence is no longer sufficient to survive a motion for a directed verdict.<sup>70</sup> By contrast, if the presumption shifts the burden of persuasion to the defendant, the defendant must not only produce evidence contrary to plaintiff's evidence, but also convince the fact finder of the persuasiveness of that evidence.<sup>71</sup>

A factual inference differs from a presumption or presumptive inference in that it is a conclusion that can be drawn logically from the evidence and could be the most likely conclusion to draw from the facts.<sup>72</sup> In the course of a trial, the fact finder may or may not believe the inferences. Thus, factual inferences are not compulsory conclusions.<sup>73</sup> Factual inferences can result in the fulfillment of a party's burden of persuasion. They do not, however, establish what constitutes that burden. If the fact finder believes that the inferred facts exist<sup>74</sup> and the court believes these facts are sufficient to meet the party's burden of persuasion, then the burden of persuasion is fulfilled. At that point, the inference shifts the burden of persuasion to the opposing party to prove an affirmative defense.<sup>75</sup>

Thus, courts create a presumption or presumptive inference from a specific fact pattern while a fact finder concludes a factual inference from facts specific to a party's case, which that party persuasively marshalls to convince the fact finder. A presumption exists absolutely, at least temporarily, because a court says it exists, but the

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70. See *infra* notes 80-134 and accompanying text (discussing use of presumption in context of trial).

71. See *McCORMICK*, *supra* note 20, § 336, at 947 (defining and distinguishing burdens of production and persuasion); 9 J. *Wigmore*, *supra* note 20, § 2489, at 301 (addressing burden of persuasion).

72. See *G. LILLY*, *supra* note 55, § 3.2, at 56-57 (distinguishing presumption from inference); *McCORMICK*, *supra* note 20, § 342, at 965 (defining rational inference as use of ordinary reasoning to determine one fact from prior fact). *Black's Law Dictionary* defines an inference as:

In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. . . . Inferences are deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

*BLACK'S LAW DICTIONARY* 700 (5th ed. 1979).

73. See *G. LILLY*, *supra* note 55, § 3.2, at 56 (distinguishing factual inferences from mandatory or compulsory presumptions).

74. See *G. LILLY*, *supra* note 55, § 3.3, at 56-57 (stating that question of weight is for jury); 9 J. *WIGMORE*, *supra* note 20, § 2491, at 304 (noting that weight of inferences is question for jury).

75. See *infra* notes 91-96 and accompanying text (describing affirmative defense). These decisions are not made one at a time. If the case is a jury case, the court will instruct the jury as to what to do if they believe certain evidence. For example, they will then need to consider a defendant's evidence. In a bench trial, the court will make these decisions as it determines what evidence is most credible.

mere introduction of evidence can cause the presumption to disappear.<sup>76</sup> On the other hand, a factual inference is a conclusion that will not disappear although it is a conclusion that a fact finder might find more or less likely depending on the strength of the underlying facts and the other evidence.<sup>77</sup> A presumption will usually shift only the burden of production.<sup>78</sup> An inference, if it is believed and if it fulfills the plaintiff's burden of persuasion, will shift the burden of persuasion to the defendant.

### *E. Burdens of Production and Persuasion Applied During Stages of Litigation*

Presumptions, inferences, and burdens of production and persuasion have different roles at different stages of the litigation.<sup>79</sup> To understand the allocation of proof, one must understand these stages.

#### *1. Complaint and motion to dismiss*

A case is begun when the plaintiff files a complaint.<sup>80</sup> The plaintiff generally has the burden of pleading what is sometimes referred to as a prima facie case<sup>81</sup> with respect to plaintiff's claim.<sup>82</sup> That is, plaintiff's complaint must state enough to survive a motion to dismiss for failure to state a claim.<sup>83</sup> One method a court can use to determine that a plaintiff has pleaded enough to state a claim is to

76. See G. LILLY, *supra* note 55, § 3.2, at 56 (relating effect of evidence or presumption); 9 J. WIGMORE, *supra* note 20, § 2491, at 305 (expanding upon existence of presumptions).

77. See G. LILLY, *supra* note 55, § 3.2, at 56 (addressing question of existence of inferred facts); 9 J. WIGMORE, *supra* note 20, § 2491, at 304 (leaving for jury to determine strength of evidence).

78. See *supra* notes 61 & 64 and accompanying text (stating rebuttable presumption usually transfers only burden of production).

79. See *infra* text accompanying notes 80-127 (discussing various stages of litigation).

80. FED. R. CIV. P. 3.

81. The term prima facie case can be confusing because it can refer to what plaintiff must plead to survive a motion to dismiss, what evidence plaintiff must produce to survive a directed verdict, or what evidence plaintiff must prove to win. See MCCORMICK, *supra* note 20, § 342, at 965; *id.* at 955 n.4 (explaining dual usage of term "prima facie"). Wigmore also states that prima facie has a dual definition. It can be equivalent to a presumption or it can mean producing enough evidence to go to the jury. 9 J. WIGMORE, *supra* note 20, § 2494, at 378-80; see BLACK'S LAW DICTIONARY, *supra* note 72, at 1071 (defining prima facie as evidence sufficient to overcome motion to dismiss).

82. See FED. R. CIV. P. 8(a)(2); Federal Rule of Civil Procedure 8(a)(2) provides that the complaint should contain "a short and plain statement of the claim showing that the pleader is entitled to relief" to avoid problems involving whether a plaintiff has to distinguish between facts and conclusions of law. *Id.*; see F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.11, at 151 (discussing complaint under federal rules). A complaint must also state the jurisdictional basis and the request for relief. FED. R. CIV. P. 8(a)(1) and (3).

83. FED. R. CIV. P. 12(b)(6) (describing motion to dismiss for failure to state a claim); see F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.9, at 143 (requiring plaintiff to make showing sufficient to press action forward).

give the plaintiff the benefit of a presumption.<sup>84</sup> For example, if a plaintiff pleads sufficient qualification for a job and the plaintiff's application is rejected although the job stayed open, a court could presume intentional discrimination.<sup>85</sup> A court determines whether plaintiff has pleaded a prima facie case or is entitled to a presumption based on the same factors that determine the allocation of burden of production and persuasion.<sup>86</sup> Those factors are case specific and involve issues of policy and convenience.<sup>87</sup>

## 2. *Discovery*

If the plaintiff's complaint can survive a motion to dismiss, the plaintiff, as well as the defendant, can proceed to discovery.<sup>88</sup> The plaintiff may need discovery to obtain proof of what the plaintiff believes in good faith he or she has pleaded.<sup>89</sup> If the complaint is dismissed, plaintiff cannot discover these facts. Thus, one purpose of a presumption at the pleading stage is to allow a plaintiff to proceed to discovery by stating a prima facie case from a set of facts likely to be known to the plaintiff.<sup>90</sup>

## 3. *Answer and affirmative defenses*

If the plaintiff's complaint can survive a motion to dismiss, the defendant will file an answer.<sup>91</sup> To dispute the plaintiff's claim, the defendant may deny the plaintiff's facts<sup>92</sup> or raise affirmative defenses.<sup>93</sup> An affirmative defense is a set of facts which, if believed, will defeat the plaintiff's recovery.<sup>94</sup> Generally, if an issue is labeled as an affirmative defense, then the procedural consequence is that the defendant has the burdens of production and persuasion on that issue.<sup>95</sup> The same factors that determine the allocation of burden of

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84. See G. LILLY, *supra* note 55, § 3.2, at 55-57 (describing presumptions); McCORMICK, *supra* note 20, § 343, at 968-69 (discussing reasons for allocating presumptions).

85. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

86. F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.9, at 148; see *id.* § 7.8, at 323 (explaining that factors used to allocate burden of pleading are same as used to allocate burden of proof).

87. See *supra* notes 30-54 and accompanying text (discussing factors).

88. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.11, at 153.

89. See *id.* (calling plaintiff's discovery "fishing expedition").

90. See McCORMICK, *supra* note 20, § 342, at 965 (describing effect of presumption on prima facie case).

91. FED. R. CIV. P. 8(b) (providing criteria for answer).

92. See FED. R. CIV. P. 8(b) (providing for denials).

93. See FED. R. CIV. P. 8(c) (providing for affirmative defenses). The defendant will also admit facts and identify those of which he or she has no knowledge. FED. R. CIV. P. 8(b).

94. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 4.5, at 195-98 (discussing affirmative defenses; explaining that affirmative defense is not denial but positive fact that lessens plaintiff's claim, compelling fact finder to balance competing claims).

95. *Id.*

proof determine the allocation of facts between plaintiff's prima facie case and defendant's affirmative defense.<sup>96</sup>

#### 4. *Motion for summary judgment, plaintiff's evidence, and motion for a directed verdict*

Assuming material facts in dispute preclude summary judgment, the case will proceed to trial for a fact finder to determine the facts and for a judge to apply the law.<sup>97</sup> At this stage plaintiff must produce evidence of plaintiff's prima facie case.<sup>98</sup> The plaintiff's evidence must be sufficient to survive the defendant's motion for a directed verdict at the close of plaintiff's case.<sup>99</sup>

One way that the plaintiff can survive a motion for a directed verdict is to produce evidence which, if believed, would allow or compel a verdict for the plaintiff, unless the defendant has an affirmative defense.<sup>100</sup> In some cases, as with a motion to dismiss, a plaintiff can survive a motion for a directed verdict by producing evidence that leads to a legally mandated presumption.<sup>101</sup> Again, the same factors which govern the allocation of proof determine what evidence the plaintiff must produce.<sup>102</sup>

#### 5. *Defendant's evidence and plaintiff's response*

If a plaintiff survives a motion for a directed verdict, the defend-

96. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 3.14, at 163; see also *supra* notes 30-54 and accompanying text (discussing factors that determine allocation of burden of persuasion).

97. FED. R. CIV. P. 56. A motion for summary judgment, arising after discovery, is granted when no material issues in dispute exist, and one party is entitled to a ruling as a matter of law. See *Wilson v. Myers*, 823 F.2d 253 (8th Cir. 1987); see also *Ozark Air Lines, Inc. v. Air Lines Pilots Ass'n, Int'l*, 577 F. Supp. 487, 489 (E.D. Mo. 1983), *aff'd*, 744 F.2d 1347 (8th Cir. 1984). In this instance, the judge will rule for one party, if, given the facts as true and construing them in the light most favorable to the non-movant, any disputed issues of fact remain. See *Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983); see also *Ramirez v. Burr*, 607 F. Supp. 170, 173 (S.D. Tex. 1984) (finding of unlikelihood that movant will prevail at trial is not adequate reason for summary judgment motion). See generally F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 5.19, at 271-77 (discussing summary judgment).

98. See *supra* notes 81-84 and accompanying text (discussing prima facie case).

99. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.7, at 319 (discussing plaintiff's evidence). Making out a prima facie case at this stage is also used to refer to shifting the burden of production. The two uses of prima facie cases create confusion. See *McCORMICK*, *supra* note 20, § 342, at 965 n.4 (noting ambiguity); 9 J. WIGMORE, *supra* note 20, § 2494, at 378-82 (discussing dual meanings of prima facie).

100. *McCORMICK*, *supra* note 20, § 342, at 965; see also *supra* notes 93-94 and accompanying text (concerning affirmative defenses).

101. See *McCORMICK*, *supra* note 20, § 342, at 965 (explaining effect of presumptions); *id.* § 344, at 973 (describing presumption as protection against directed verdict); see also *supra* notes 80-87 and accompanying text (discussing motion to dismiss).

102. See F. JAMES, JR. & G. HAZARD, JR., *supra* note 20, § 7.7, at 318-19 (noting parallel factors); see *supra* notes 29-54 and accompanying text (discussing factors considered in shifting burden of proof).

ant will put on his or her evidence.<sup>103</sup> The plaintiff may have survived the motion because of the strength of plaintiff's evidence or because of a presumption in plaintiff's favor.<sup>104</sup>

If the plaintiff survives the motion for directed verdict through the use of a presumption, the underlying facts without the presumptive, mandated conclusion may be inconclusive. For example, the fact that one applies for a job, is qualified and rejected and is protected by Title VII is not conclusive evidence of intentional discrimination by the employer.<sup>105</sup> The presumptive facts could also have independent probative value. For example, from evidence that a letter is correctly mailed in due course of business, a fact finder could either presume or infer that the letter was received.<sup>106</sup> When a plaintiff survives a motion for a directed verdict with this kind of presumption, it is similar to surviving the motion because of the strength of the evidence.<sup>107</sup> Defendant's evidence has different consequences for the plaintiff depending upon whether the plaintiff's case is based on a presumption with inconclusive facts or based on the strength of the evidence.<sup>108</sup> If the underlying facts are not probative of the presumptive conclusion, defendant's evidence will create another burden of production for the plaintiff.<sup>109</sup> If the underlying facts are independently probative, they might shift the burden of persuasion to the defendant.<sup>110</sup>

a. *Rebutting a presumption based on inconclusive facts—"bursting the bubble"*

According to the majority view of presumptions,<sup>111</sup> plaintiff's proffered facts, though forming a presumption, may be insufficient for the court to logically infer a conclusion following introduction of

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103. See F. JAMES, JR. & G. HAZARDS, JR., *supra* note 20, § 7.7, at 319 (describing that in general case opponent will then put on evidence); McCORMICK, *supra* note 20, § 342, at 965 (explaining process between parties for directed verdict).

104. See McCORMICK, *supra* note 20, § 342, at 965 (describing prima facie case and use of presumption).

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

106. See G. LILLY, *supra* note 55, § 3.4, at 65 (describing how effect of presumption remains though presumption technically disappears).

107. 9 J. WIGMORE, *supra* note 20, § 2487, at 298 (diagramming proceeding at trial).

108. See *infra* text accompanying notes 109-10 (describing differing burdens).

109. See *infra* text accompanying notes 112-27 (explaining effect of defendant's evidence on plaintiff's burdens).

110. See *infra* notes 111-27 and accompanying text (explaining how strength of plaintiff's evidence, if believed, can shift burden of persuasion to defendant to prove affirmative defense).

111. See *supra* note 64 (explaining majority and minority views of effect of presumptions on burden of production and persuasion).

defendant's rebuttal evidence.<sup>112</sup> For example, as mentioned previously, under Title VII proof of an individual applying for a job, being qualified and rejected, and the job remaining open is not conclusive of an employer's intentional discrimination if the employer then introduces evidence of a legitimate reason for rejecting the applicant.<sup>113</sup> In that instance, upon the defendant's motion, the court may enter a directed verdict against the plaintiff if the plaintiff fails to produce any additional evidence.<sup>114</sup> To avoid this, the plaintiff would need to proffer additional evidence in the form of either cross-examination or rebuttal evidence to discredit the defendant's evidence.<sup>115</sup> Indeed, without further evidence, the plaintiff cannot prove his or her case and is thus unable to shift the burden of proving affirmative defenses to the defendant.<sup>116</sup> Specifically, the plaintiff has only established a *prima facie* case because of judicial permission in the form of a presumption, not because of the evidence with respect to the defendant's wrongdoing.<sup>117</sup> The premise underlying the presumption is that absent an explanation from the defendant, the presumptive conclusion is a likely conclusion.<sup>118</sup> Consequently, defendant's rebuttal evidence of plaintiff's predicate facts would "burst" the premise upon which the presumption was based by providing a reason for the prior absence of an explanation.<sup>119</sup> Thus, a rebuttable presumption without independently probative underlying facts will shift only the burden of production to the defendant.<sup>120</sup> The plaintiff will win only if the defendant is silent.<sup>121</sup> Otherwise, because plaintiff retains the burden of proof, if rebuttal evidence is introduced, plaintiff will need to produce more evidence or disprove defendant's evidence to reestablish the *prima facie* case.<sup>122</sup>

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112. McCORMICK, *supra* note 20, § 344, at 975-76 (discussing effect of defendant's evidence on plaintiff's presumption).

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

114. See McCORMICK, *supra* note 20, § 344, at 975 (assuming that legislature or court, as matter of policy has not shifted burden of proof to defendant despite inconclusiveness of underlying facts).

115. See *supra* notes 67-71 and accompanying text (describing shifts in burden of production); 9 J. WIGMORE, *supra* note 20, § 2487, at 299 (noting shifting burden on plaintiff).

116. 9 J. WIGMORE, *supra* note 20, § 2487, at 299.

117. See *id.* at 295 (explaining presumption).

118. See McCORMICK, *supra* note 20, § 338, at 955 (discussing effect of silence).

119. See G. LILLY, *supra* note 55, § 3.4, at 59 (discussing Thayer or majority view); McCORMICK, *supra* note 20, § 344, at 975 (explaining "bursting bubble" theory).

120. See 9 J. WIGMORE, *supra* note 20, § 2487, at 298 (diagramming process).

121. See G. LILLY, *supra* note 55, § 3.2, at 56 (stating that trier must accept presumed fact unless rebutted by contravening evidence); McCORMICK, *supra* note 20, § 338, at 955 (comparing silence of different points of litigation).

122. See 9 J. WIGMORE, *supra* note 20, § 2487, at 298-99 (diagramming process of shifting burdens and placement of directed verdicts).

According to the minority view, a presumption should shift both the burdens of production and persuasion to the defendant. The primary reason given for this view is that the policies underlying the cause of action favor less stringent burdens on the plaintiff.<sup>123</sup>

*b. Counteracting an inferential finding of fact in favor of the plaintiff*

If the plaintiff's motion for a directed verdict did not survive as the result of a presumption based on inconclusive facts, then the evidence on its own, after the presumption bursts or without ever having triggered a presumption, may cause a fact finder to find that the plaintiff has met his or her burden of persuasion.<sup>124</sup> The fact finder would have both the plaintiff's evidence and the defendant's evidence and the plaintiff would have the burden of persuasion. This burden could be met if the fact finder finds credible direct evidence of defendant's liability or logically infers defendant's liability from persuasive circumstantial evidence<sup>125</sup> and disbelieves the evidence defendant presented to deny plaintiff's evidence.<sup>126</sup> If the fact finder believed the plaintiff's inferences despite the defendant's evidence, then the defendant would have the burden of proving affirmative defenses.<sup>127</sup> Thus, the burden of persuasion on the plaintiff's case would have been met on the basis of the evidence presented and any believed inferences therefrom, not on the basis of the presumption. The burden of proof would then shift to the defendant to prove affirmative defenses.

*6. Fact finding*

After both sides rest, the fact finder will weigh the evidence, and only at this point will the court apply the burdens of persuasion.<sup>128</sup> Thus, only at this point will it become apparent whether the defendant has any burden of persuasion.<sup>129</sup> First, the fact finder would need to determine that the plaintiff's evidence satisfied the plaintiff's burden of persuasion.<sup>130</sup> If it did, then the fact finder would

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123. See *supra* note 64 (explaining minority view).

124. See McCORMICK, *supra* note 20, § 338, at 955 (explaining that plaintiff could win directed verdict on strength of evidence).

125. See McCORMICK, *supra* note 20, § 338, at 952-54 (discussing use of direct and circumstantial evidence and noting that more than "a scintilla" of evidence needed to convince fact finder).

126. 9 J. WIGMORE, *supra* note 20, § 2487, at 298 (diagramming process by which defendant must shift burden of production back to plaintiff or risk losing on weight of evidence).

127. See *supra* notes 91-96 and accompanying text (discussing affirmative defenses).

128. See McCORMICK, *supra* note 20, § 336, at 947 (stating that burdens of persuasion are important only after all evidence is introduced).

129. See 9 J. WIGMORE, *supra* note 20, § 2488, at 298-99 (diagramming process and noting areas for jury determination and point at which jury receives instructions).

130. See *id.* (explaining process by which evidence shifts burdens and that, after both sides

consider whether the defendant had met the burden of proving affirmative defenses.<sup>131</sup> At this stage, if the fact finder believed the plaintiff's evidence and not the defendant's, then the plaintiff would win.<sup>132</sup> If not, then the defendant would win.<sup>133</sup> If a doubt remained, then the party without the burden of persuasion would win.<sup>134</sup>

#### F. *Significance of Presumption and Inference on Burdens of Proof*

The difference between an inference and a presumption, or a presumptive inference and a factual inference, is significant in allocating burdens of proof. A presumption will not shift the burden of persuasion unless it does so for policy reasons or because it is exceedingly probative.<sup>135</sup> Generally, it will shift only the burden of production, but the burden of persuasion will remain with the plaintiff.<sup>136</sup>

When plaintiff establishes an inference based on the evidence to the satisfaction of the fact finder, then the burden of persuasion will shift to the defendant if, with the inference, the plaintiff has proved that which is allocated to the plaintiff's burden.<sup>137</sup> The burden shifting result of an inference is different from that of a presumption because an inference is a conclusion that the fact finder determines from the evidence.<sup>138</sup> The defendant's evidence will not burst or destroy the inference but is weighed against the inference to ascer-

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have avoided directed verdict, burden of persuasion remains on plaintiff and is for jury to decide).

131. See *supra* text accompanying notes 91-96 (discussing affirmative defenses).

132. 9 J. WIGMORE, *supra* note 20, § 2488, at 299 (explaining plaintiff's responsibility to produce evidence that will satisfy fact finder and cause plaintiff to prevail).

133. *Id.* (stating that opponent will prevail if plaintiff fails to come forward with adequate evidence).

134. See *supra* notes 24-28 and accompanying text (discussing significance of burden of proof). See generally F. JAMES, JR. AND G. HAZARD, JR., *supra* note 20, § 7.6, at 314-16 (discussing importance of burden allocation); McCORMICK, *supra* note 20, § 338, at 954-55 (defining and discussing burdens).

135. See *supra* notes 58-78 and accompanying text (defining presumption and burden of proof); G. LILLY, *supra* note 55, § 3.2, at 56 (discussing shift of burden of production); see also McCORMICK, *supra* note 20, § 344, at 973-74 (defining presumption).

136. See *supra* notes 114-21 and accompanying text (explaining that rebuttable presumptions concerning probative underlying facts shifts burden of production, not burden of proof); 9 J. WIGMORE, *supra* note 20, § 2487, at 295-99 (explaining and diagramming process of burden shifting).

137. See *supra* notes 72-73 and accompanying text (defining inference and discussing shifting of burden); G. LILLY, *supra* note 55, § 3.2, at 56 (discussing import and treatment of references).

138. See *supra* notes 55-78 and accompanying text (describing differences between inference and presumption); J. WIGMORE, *supra* note 20, § 2487, at 295-99 (defining presumption and distinguishing from inference); see also G. LILLY, *supra* note 55, § 3.4, at 59-60 (discussing shifts of burdens under minority and majority views).

tain which is more credible.<sup>139</sup> The stronger the underlying facts and circumstantial evidence, the stronger the inference.<sup>140</sup> Thus, an inference produces evidence for the fact finder to choose to believe, not a judicially created conclusion.

The early Title VII disparate-treatment allocation of proof cases are presumptive inference cases,<sup>141</sup> while the later ones and all of the disparate-impact cases are factual inference cases.<sup>142</sup> Thus, the former cases should involve shifting only the burden of production, and the latter cases should involve shifting the burden of persuasion. One recent case, *Price Waterhouse v. Hopkins*,<sup>143</sup> a disparate-treatment inferential case, did shift the burden correctly, whereas *Wards Cove Packing Co. v. Atonio*,<sup>144</sup> a disparate-impact case, did not.

## II. BURDEN OF PRODUCTION AND PROOF ALLOCATION IN TITLE VII CASES

### A. *Disparate-Treatment Cases Distinguished from Disparate-Impact Cases*

Disparate-treatment cases under Title VII are those in which plaintiffs seek to prove that they were intentionally discriminated against (treated disparately) because of their sex, race, religion, color, or national origin.<sup>145</sup> These cases differ from those labeled as disparate-impact cases. Disparate-impact cases involve challenges to the use of objective or subjective employment practices that disproportionately cause the exclusion from the employer's work force of applicants, or likely applicants, protected by Title VII.<sup>146</sup>

139. See *supra* notes 120-27 and accompanying text (discussing differing effects of evidence on inference); McCORMICK, *supra* note 20, § 338, at 952-54 (describing burden shifting and evidence needed to prevail); 9 J. WIGMORE, *supra* note 20, § 2487, at 248 (diagramming process of burden shifting).

140. See *supra* notes 128-34 and accompanying text (discussing effect of facts on outcome); 9 J. WIGMORE, *supra* note 20, § 2488, at 298-99 (explaining effect of facts on burden shifting and jury determination).

141. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (resolving Title VII dispute through use of prima facie case presumption); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (using presumption to prove whether discrimination was "more likely than not" to have occurred); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (using, but not defining, presumptive inferences); see also *infra* notes 159-87 and accompanying text (characterizing early cases as presumptive inference cases).

142. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1791 (1989) (affirming trial court's finding that plaintiff's inferences drawn from stereotyping proved discrimination); see also *infra* notes 274-77 and accompanying text (discussing different burden between early and later cases).

143. 109 S. Ct. 1775 (1989).

144. 109 S. Ct. 2115 (1989).

145. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 §§ 701-718, 42 U.S.C. §§ 2000e-1 to 2000e-17a (1983); see *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (distinguishing use of disparate-treatment model from disparate-impact model).

146. *Id.*; see *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2784-87 (1988) (discussing application of disparate-impact theory to subjective employment practices). To prevail in

B. *Allocation of Proof in Disparate-Treatment Cases*

1. *Disparate-treatment cases prior to 1989*

a. *The holdings*

Courts in disparate-treatment cases have always required that the plaintiff prove that the employer engaged in intentional discrimination.<sup>147</sup> The mechanics of proving discrimination have been the subject of much litigation.<sup>148</sup> In 1973, the United States Supreme Court first addressed proof requirements in a disparate-treatment case.<sup>149</sup> In *McDonnell Douglas*, a unanimous Court held that to establish a prima facie case under Title VII, a plaintiff must show membership in a racial minority, application and qualification for a job, rejection, and continuing availability of the job.<sup>150</sup> The Court noted that those four showings may vary.<sup>151</sup> For example, the plaintiff could be a woman challenging a failure to promote, rather than to hire, as was the case in *Texas Department of Community Affairs v. Burdine*.<sup>152</sup>

The Court's decision in *McDonnell Douglas* failed to clarify whether the defendant had to articulate or prove a legitimate, nondiscriminatory reason for the adverse employment action and thus failed to clarify how the burdens of production and persuasion were to be

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a disparate-impact case, plaintiffs need not show intentional discrimination. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661-62 (1987).

147. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff's initial burden is to prove a prima facie case by a preponderance of the evidence. *Id.* at 253. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the decision. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The plaintiff, however, always bears the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated" against plaintiff. *Id.*

148. See *infra* notes 191-94 and accompanying text (discussing conflicting decisions in circuit courts).

149. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The plaintiff alleged that he was denied employment because of his involvement in civil rights activities and because of his race and color. The defendant employer denied that race was a consideration and instead argued that plaintiff's involvement in criminal conduct was its reason for not rehiring the plaintiff.

150. *Id.* at 802.

151. *Id.* at 802 n.13; see *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978) (stating that *McDonnell Douglas* formulation of prima facie claim not intended to be inflexible rule); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (observing that *McDonnell Douglas* decision's importance is not in specifying discrete elements of proof required, but in recognition of general principle that plaintiff has initial burden of providing evidence sufficient to create inference of discrimination).

152. 450 U.S. 248, 254 n.6 (1981) (resulting in lack of serious contention that Burdine failed to prove a prima facie case). As an employee in the Public Service Careers (PSC) Division, Burdine applied for the Project Director position when her supervisor resigned. Her application was rejected but she was assigned additional duties. The position remained vacant for six months, at which time a male from another division was hired as Project Director, Burdine and two other employees were fired, and a second male hired as the only other professional employee in the PSC Division.

allocated.<sup>153</sup> Lower courts were confused regarding whether the burden of production or persuasion shifted to the defendant after plaintiff established a prima facie case.<sup>154</sup> Unfortunately, a subsequent Supreme Court decision used the words “articulate” and “prove” interchangeably, leading to more litigation.<sup>155</sup> The *Burdine* decision clarified this issue, holding that after the plaintiff establishes the prima facie case with the four *McDonnell Douglas* factors, the defendant must articulate, but need not prove, a legitimate, non-discriminatory reason for the adverse employment action.<sup>156</sup> If the defendant articulates a reason, then, in order to prevail, the plaintiff must prove that the employer’s stated reason is a pretext to hide intentional discrimination.<sup>157</sup> In the context of this four step prima facie case, the Court in *Burdine* held that the burden of persuasion remains with the plaintiff to prove intentional discrimination.<sup>158</sup>

b. *The McDonnell Douglas and Burdine-type cases are presumption cases*

Although the *McDonnell Douglas* and *Burdine* type cases use the terms presumption and inference interchangeably,<sup>159</sup> those cases are in fact presumptive cases. As described above, the conclusion of those cases, that only the burden of production shifts to the defend-

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153. Oddly enough, although the Court in *McDonnell Douglas* noted that the “critical issue” involved the “allocation of proof,” *McDonnell Douglas*, 411 U.S. at 800, and noted that the opinions of the lower courts “attempted with a notable lack of harmony, to state the applicable rules,” *id.* at 801, the Court did not cite authorities on allocation of proof. *Id.* at 802-03. Nor did the Court define what it meant by prima facie case or set forth any applicable rules. *Id.* Instead, the Court in *McDonnell Douglas* first spoke of plaintiff’s “initial burden” and the defendant’s burden then “to articulate some legitimate, nondiscriminatory reason for the rejection,” *id.* at 802, but later spoke of the defendant as having discharged its “burden of proof.” *Id.* at 803 (emphasis added).

154. See *Williams v. Bell*, 587 F.2d 1240, 1245-46 n.45 (D.C. Cir. 1978) (stating that under *McDonnell Douglas* onus is on employer to establish events justifying employment action); *Harper v. Trans World Airlines*, 525 F.2d 409, 411 (8th Cir. 1975) (noting that *McDonnell Douglas* standard shifts burden to defendant to present acceptable, legitimate business reasons for discriminatory practice after plaintiff establishes prima facie case).

155. Compare *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (stating that employer’s burden lies in “proving” decision based on legitimate consideration) with *id.* at 578 (stating that employer need only “articulate” legitimate, nondiscriminatory reason for decision). See generally *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (holding that employer need only provide nondiscriminatory reason for action, not show nondiscriminatory intent).

156. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

157. *Id.* at 256.

158. *Id.* at 253 (citing 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2489 (Chadbourne rev. 1981)). The citation from WIGMORE is from a section on bursting presumptions. See 9 J. WIGMORE, *supra* note 20, § 2489 (stating burden of persuasion never shifts); see also *supra* notes 114-20 and accompanying text (explaining bursting presumptions); G. LILLY, *supra* note 55, § 3.2, at 56 (discussing distinction between presumption and inference).

159. See *supra* notes 147-58 and accompanying text (discussing two cases).

ant, is consistent with basic litigation principles.<sup>160</sup> The four facts that the cases hold establish a prima facie case—that the plaintiff is a member of a protected group, was qualified for and applied for a job, was rejected, and the position remained open or could have been filled by the plaintiff—<sup>161</sup>without more, are not sufficient evidence from which a fact finder could logically infer discrimination. The presumption is not sufficient, therefore, to shift the burden of persuasion to the defendant because, even if the plaintiff can prove these four pleaded facts, the plaintiff will not have proved intentional discrimination.<sup>162</sup> Rather, the defendant's burden becomes one of articulating, but not proving, an explanation of the adverse employment action.<sup>163</sup> This explanation will burst the presumption because it is no more than a court-created conclusion.<sup>164</sup> With the presumption gone, the plaintiff retains the initial burden of persuasion and must still prove intentional discrimination, which will entail proving that the defendant's articulated reason was a pretext to hide intentional discrimination.<sup>165</sup>

*Furnco Construction Corporation v. Waters*<sup>166</sup> attempted to explain why only the burden of production shifted, but confused the explanation by using the terms "presumption" and "inference" interchangeably. *Furnco* distinguished the *McDonnell Douglas* prima facie showing from an ultimate finding of fact concerning the discriminatory refusal to hire.<sup>167</sup> The Court stated that the former raises an

160. See *supra* notes 17-28 and accompanying text (discussing basic principles in allocating burdens of proof).

161. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

162. *Burdine*, 450 U.S. at 255 n.8. As discussed previously in the text, establishing a prima facie case occurs at three different stages in litigation with differing allocations of burdens. It can refer to sufficient pleading to survive a motion to dismiss, sufficient evidence produced to survive a motion for directed verdict, or sufficient evidence proved to shift the burden of persuasion to the defendant. See *supra* notes 80-93, 97-102 and accompanying text. Generally, when plaintiff pleads and produces evidence of the prima facie case, only the burden of pleading and production, not persuasion, is shifted to defendant. If the plaintiff proves the prima facie case, however, typically the burden of persuasion then shifts to the defendant. See *supra* notes 80-110. Although *McDonnell Douglas* stated that the plaintiff "proved a prima facie case," *McDonnell Douglas*, 411 U.S. at 802 (emphasis added), the procedural posture of the case involved the court of appeals' reversal of the district court's dismissal of the Title VII 703(a)(1) claim. *Id.* at 797. Presumably, therefore, the Court was referring to a pleaded, not proven, prima facie case. A pleaded prima facie case would not shift the burden of persuasion to the defendant. See *Burdine*, 450 U.S. at 253-56.

163. *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802.

164. See *supra* notes 114-20 and accompanying text (discussing "bursting bubble" theory of discrimination).

165. *Burdine*, 450 U.S. at 256 (stating that plaintiff meets burden directly by persuading court discriminatory reason more likely to have motivated employer or indirectly by showing employer's explanation is not credible).

166. 438 U.S. 567 (1978).

167. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). *Furnco* allowed its job superintendent to hire bricklayers he knew to be experienced and did not require him to hire

inference of discrimination only because it presumes the acts, if not otherwise explained, are more likely than not based on impermissible factors.<sup>168</sup> The Court presumed intentional discrimination, not because the plaintiff pleaded evidence negating the employer's legitimate reasons for an adverse employment action, and not because the presumption was the most probable conclusion, but because the Court shifted the burden of production to the defendant to articulate a legitimate reason.<sup>169</sup> Thus, the Court presumed from minimal facts that the plaintiff pleaded intentional discrimination.<sup>170</sup> The Court did not factually infer intentional discrimination based on plaintiff's pleadings alone.<sup>171</sup>

*Burdine* was the first of the cases resolving Title VII burden of proof issues to cite evidence treatises or define what was meant by prima facie case.<sup>172</sup> *Burdine* noted that a prima facie case may describe either the plaintiff's establishment of a "legally mandatory rebuttable presumption" or may describe "plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue" and noted that it was using the former meaning.<sup>173</sup> Thus, the Court noted that the four facts that the plaintiff must plead and produce create a presumption, not an inference of "the fact at issue," which is intentional discrimination.<sup>174</sup> Unfortunately, despite distinguishing an inference from a presumption in its definition of prima facie case and saying that it was referring to a presumption, the Court described the *McDonnell Douglas* factors as giving rise to an inference.<sup>175</sup> The Court then returned to presumption language, saying, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated . . ." and noted that if the employer is silent, then the plaintiff must win.<sup>176</sup>

None of the cases explained why the four factors listed establish

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at the jobsite. *Id.* at 570. The district court found that 13.3% of the man-days were worked by blacks and that of the bricklayers Furnco hired, 20% were black. *Id.* at 570, 572 n.2.

168. *Id.* at 567.

169. *Id.* at 577-78.

170. *Id.* at 575-76.

171. *Id.*

172. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); see also *supra* note 153 (noting Court's failure in prior cases to provide support or definitions for its terminology).

173. *Burdine*, 450 U.S. at 254 n.7. The Court did not mention that a prima facie case can also involve proving evidence sufficient to shift the burden of proving affirmative defenses to the defendant. See *supra* notes 124-27 and accompanying text (explaining effect of evidence in prima facie case on defendant's burden).

174. *Burdine*, 450 U.S. at 253-54; see *supra* notes 55-78 and accompanying text (explaining difference between presumption and inference).

175. *Burdine*, 450 U.S. at 253-54 n.7.

176. *Id.* at 254.

the plaintiff's initial prima facie case.<sup>177</sup> Because they are minimal factors from which the Court will initially presume discrimination, it appears that *sub silentio* the Court is creating a presumption for the policy reasons of allowing the plaintiff to have access to discovery,<sup>178</sup> and not requiring the plaintiff to produce evidence negating all possible legitimate reasons for adverse employment action.<sup>179</sup> Creation of the presumption in *McDonnell Douglas* and *Burdine*, therefore, is a policy decision pronouncing that to require the plaintiff to plead more or to produce great quantities of evidence would unduly inhibit enforcement of Title VII.<sup>180</sup> Unfortunately, the disparate-treatment cases do not explain their allocation of proof in terms of statutory policy needs.<sup>181</sup> *Burdine* recognized that the plaintiff had a light burden in establishing a prima facie case of disparate-treatment, but did not explain the reasoning.<sup>182</sup> Creating burdens of production and presumptions for policy and convenience reasons, however, is consistent with general litigation principles.<sup>183</sup> Courts and litigants might find the *McDonnell Douglas* and *Burdine* formulas less confusing if the rationales for them were more explicitly articulated and the terms used to describe them more clearly defined.<sup>184</sup>

Neither *McDonnell Douglas* nor *Burdine* involved cases in which the fact finder found that the plaintiff proved as a matter of fact, not presumption, that the defendant had intentionally discriminated or proved that the defendant's justification of the adverse employment action was a pretext to hide intentional discrimination.<sup>185</sup> As illus-

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177. *Id.* at 253-54 (discussing *McDonnell Douglas* four part test at length); *McDonnell Douglas*, 411 U.S. at 802 (failing to explain why four selected factors were chosen despite characterizing standard as flexible).

178. *See supra* notes 65-66 and accompanying text (discussing policy reasons for shifting burden).

179. *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas* when stating that plaintiff can ultimately show intentional discrimination by persuading court that discriminatory reason more likely motivated employer or by indirectly showing that employer's explanation is not believable).

180. *Cf. Mendez, supra* note 18, at 1160 (concluding policy of Title VII should shift burden of proof, not just burden of production, to defendant in *McDonnell Douglas*-type cases).

181. *See supra* notes 153-55 and accompanying text (observing that Court provided no reasons for decisions on allocation of burden of persuasion); *see also Burdine*, 450 U.S. at 253 (explaining that *McDonnell Douglas* requirement that plaintiff establish prima facie case serves to bring court and litigants "expeditiously and fairly" to plaintiff's ultimate burden of proving intentional discrimination).

182. *Burdine*, 450 U.S. at 253 (describing plaintiff's burden as not onerous, failing to provide precedential or policy reasons for plaintiff's light burden, but explaining result in terms of expedition and fairness without elaborating).

183. *See supra* notes 37-50 and accompanying text (describing factors used in allocating burdens of proof).

184. *See supra* notes 153-59 and accompanying text (criticizing Court for lack of explanation or clarity of standards in *McDonnell Douglas* and *Burdine*).

185. *See Burdine*, 450 U.S. at 254, 256 (stating that prima facie case, articulated in *McDonnell Douglas*, creates "presumption" of unlawful discrimination and that plaintiff can rebut defendant's explanation by showing it is unworthy of credence).

trated by the confusion in *Price Waterhouse*,<sup>186</sup> which addressed the former issue, the Court was not clear as to the significance between a presumptive inference and a factual inference or the scope of *McDonnell Douglas* and *Burdine*.<sup>187</sup>

## 2. *Disparate-treatment after 1989—Price Waterhouse v. Hopkins*

### a. *The result*

In May of 1989, the Supreme Court decided a mixed motive disparate-treatment case, *Price Waterhouse v. Hopkins*.<sup>188</sup> A mixed motive case is one in which a Title VII defendant takes adverse employment action against a plaintiff for both legitimate and discriminatory reasons.<sup>189</sup> Because mixed motive cases themselves had been getting disparate-treatment from the lower courts, the Supreme Court granted certiorari to resolve the conflicts.<sup>190</sup> The lower courts had been split on a number of issues. First, once a court determined that the case involved both legitimate and discriminatory decision-making factors, a question existed as to which party had to prove what caused the adverse action.<sup>191</sup> Did the plaintiff have to prove that the decision would have been different, or did the defendant have to prove that the decision would have been the same, without the discrimination? Second, the courts disagreed as to the level of proof required on the issue of what would have happened absent the discrimination.<sup>192</sup> Finally, the courts' decisions differed regarding the effect of a finding that the employer would have made the same decision without the discrimination. Some courts held that such a finding would absolve the defendant of liability.<sup>193</sup> Others

186. 109 S. Ct. 1775 (1989).

187. See *infra* notes 210-320 and accompanying text (discussing confusion and disagreement in *Price Waterhouse* decision).

188. 109 S. Ct. 1775 (1989).

189. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1785 & n.6 (1989); see Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 864 (1989) (stating that mixed motive cases essentially involve employment decision motivated by both permissible and impermissible factors; for example, employer may fire employee in part because she is female, which is impermissible, and in part because of excessive absenteeism, which is permissible).

190. *Price Waterhouse*, 109 S. Ct. at 1781.

191. *Id.* at 1784 n.2 (discussing cases in which third, fourth, fifth, and seventh circuits held that plaintiff must show that, but for discrimination, decision would be favorable and cases in which first, second, sixth, and eleventh circuits held that employer must prove employment decision would have been same absent discrimination).

192. See, e.g., *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976) (stating defendant must prove justification for employment decision by preponderance of evidence), *cert. denied*, 429 U.S. 1041 (1977); *Harper v. Trans World Airlines*, 525 F.2d 409, 411 (8th Cir. 1975) (requiring defendant to present acceptable, legitimate business reasons for employment action); *Sabot v. Snyder*, 524 F.2d 1009, 1012 (10th Cir. 1975) (requiring employer to provide only credible evidence of nondiscriminatory motive).

193. See, e.g., *Berl v. County of Westchester*, 849 F.2d 712, 715 (2d Cir. 1988) (stating

held that it merely limited the defendant's liability.<sup>194</sup>

In *Price Waterhouse*, the plaintiff had claimed that she was denied partnership in an accounting firm in violation of Title VII section 703(a)(1)<sup>195</sup> because the firm had judged her based on sexual stereotypes.<sup>196</sup> The district court found that the defendant's articulated reason for not making her a partner, that her interpersonal skills were flawed, was legitimate and not a pretext for intentional sex discrimination.<sup>197</sup> The district court also found, however, that the firm had intentionally discriminated against her during the promotion process by "giving credence and effect to" sexually stereotyped comments made by the firm's partners.<sup>198</sup> The district court, at this point, shifted the burden of proof to the defendant to prove by clear and convincing evidence that the plaintiff would not have been made partner even if there had been no sex discrimination.<sup>199</sup> The court found that the defendant did not meet that burden.<sup>200</sup> According to the court, had the defendant met this burden, it would

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employer loses unless it can persuade fact finder that adverse action would have occurred even in absence of illegitimate reason); *Fields v. Clark Univ.*, 817 F.2d 931, 937 (1st Cir. 1987) (holding when unlawful discrimination is motivating factor in employment decision, defendant must prove same decision would have been made absent discrimination in order to avoid liability); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552, 1557 (11th Cir. 1983) (stating employer may only rebut finding of unlawful discrimination by showing same decision would have been made absent consideration of illegal factor).

194. See *Bibbs v. Block*, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc) (holding liability established when plaintiff shows unlawful motive part of decision but defendant may limit relief by showing decision would have been same absent discrimination); *Fadhl v. City of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (showing by plaintiff that unlawful motive was significant factor establishes liability, but relief may be limited by defendant showing result would have been same without discrimination).

195. 42 U.S.C. § 2000e-2(a) provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(a) (1982).

196. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1781 (1989) (plurality opinion). At *Price Waterhouse*, a senior manager becomes a partnership candidate when the person's name is submitted by the partners. *Id.* All partners may submit written comments on each candidate which are reviewed by the Admissions Committee, which then submits its recommendations to the Policy Board. *Id.* The Policy Board then decides whether to submit the candidate's name for a vote, hold it for the following year, or reject it. *Id.*

197. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114 (D.D.C. 1985) (describing variety of evidence that showed plaintiff's conduct justified criticism of her interpersonal skills).

198. *Id.* at 1118-19. Although the district court characterized the sexual stereotyping as "unconscious," it also found that the system created unconscious discrimination by relying on an "outmoded attitudes" determination. *Id.*

199. *Id.* at 1120 (stating once plaintiff proves sex discrimination played role in decision, she prevails unless employer demonstrates decision would have been same without discrimination).

200. *Id.* (observing that even when decision is mix of legitimate and discriminatory considerations, uncertainties will be resolved against employer in order to serve Title VII's remedial purpose).

have avoided equitable relief but not liability.<sup>201</sup>

The court of appeals affirmed the allocation of proof but reversed as to the consequences.<sup>202</sup> That court held that if the defendant proved by clear and convincing evidence that it would not have made the plaintiff a partner had there been no stereotyping, then defendant would avoid liability.<sup>203</sup>

The Supreme Court upheld in part and reversed in part the court of appeals' decision.<sup>204</sup> It reversed on the issue of the level of proof, holding that the defendant's burden was to prove that the plaintiff would have been denied partnership without the discrimination by a preponderance of the evidence, not a clear and convincing standard.<sup>205</sup> Otherwise, the Supreme Court, by a plurality with two separate concurrences, affirmed the court of appeals.<sup>206</sup> The Court affirmed the allocation to the defendant of proving that the adverse employment decision would have been the same without the discrimination, once the plaintiff proved that there were motivating factors or substantial discrimination in the decision-making process.<sup>207</sup> It also affirmed that if the defendant met this burden, the defendant would have no liability.<sup>208</sup> Three justices dissented.<sup>209</sup>

*b. The confusion—with clarification from basic principles*

Unfortunately, *Price Waterhouse* has the potential that Justice Kennedy foresees as causing "confusion and complexity,"<sup>210</sup> not because the area of law is confusing and complex, but because the opinions are. Although there were some agreements among the plurality, concurrences, and dissent, there were many disagreements as well.<sup>211</sup> The plurality and concurrences agreed that the burden of proving that the employment decision would have been the same

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201. *Id.* at 1120-21. The district court denied relief, however, on the ground that the plaintiff had voluntarily left the firm after the adverse promotion decision and had not been constructively discharged. *Id.* at 1121. The court of appeals reversed the constructive discharge findings. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 473 (D.C. Cir. 1987). This issue was not before the Supreme Court. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1781 n.1 (1989).

202. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 471, 473 (D.C. Cir. 1987).

203. *Id.* at 472.

204. *See infra* notes 205-08 and accompanying text (discussing portions of court of appeals decision affirmed by Supreme Court and those reversed).

205. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 (1989) (plurality opinion).

206. *Id.* at 1795 (plurality opinion); *id.* at 1795 (White, J., concurring); *id.* at 1796 (O'Connor, J., concurring).

207. *Id.* at 1787-88.

208. *Id.*

209. *Id.* at 1806 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).

210. *Id.* at 1810 (Kennedy, J., dissenting).

211. *See infra* notes 212-320 and accompanying text (discussing agreements and disagreements in multiple opinions in *Price Waterhouse* decision).

absent the discrimination was the defendant's, that the burden was met by a preponderance of the evidence, and that if met, the defendant would have no liability.<sup>212</sup>

The Justices disagreed as to the type of analysis to use in determining when to shift the burden of proof to the defendant.<sup>213</sup> They disagreed as to the applicability of precedent in that analysis.<sup>214</sup> Those Justices who agreed to shift the burden to the defendant disagreed as to what the plaintiff must prove to trigger the shift.<sup>215</sup> Finally, those Justices who agreed to shift the burden of proof to the defendant disagreed as to how the defendant could meet the burden.<sup>216</sup> A return to some basic litigation principles would harmonize the disagreements and guide subsequent decisions.<sup>217</sup>

*i. Shifting the burden of proof*

The plurality, concurrences, and dissent of *Price Waterhouse* disagreed as to when the burden of proof should shift to the defendant.<sup>218</sup> Oddly, for a case involving shifting the burden of proof, the Justices did not refer to treatises on evidence that analyze the issue. The only treatises referred to were tort treatises cited by Justices O'Connor and Kennedy, who discussed shifting burdens of proof in tort cases.<sup>219</sup>

Justice Brennan, writing for the plurality, began the analysis not by discussing the law with respect to allocation of burden of proof, but by discussing what constitutes a violation of Title VII and how that statute balances rights between employees and employers.<sup>220</sup>

212. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1795 (1989) (plurality opinion); *see id.* at 1796 (White, J., concurring) (agreeing with plurality that defendant must prove by preponderance of evidence that employment decision would have been same absent unlawful motivation, and if defendant carries this burden there is no Title VII violation); *see also id.* at 1796 (O'Connor, J., concurring). This Article will not address the level of proof and remedial issues.

213. *See infra* notes 218-65 and accompanying text (describing differences in burden shifting analyses).

214. *See infra* notes 266-94 and accompanying text (discussing various applications of precedent in burden shifting analyses).

215. *See infra* notes 295-316 and accompanying text (comparing differing views on what constitutes plaintiff's burden of proof).

216. *See infra* notes 219-20 and accompanying text (explaining disagreement on requirements for satisfying defendant's burden of proof).

217. *See infra* notes 256-65 and accompanying text (providing framework for evaluating requirements of *Price Waterhouse* standard).

218. *See infra* notes 219-65 and accompanying text (discussing varying opinions as to when burden should shift to defendant).

219. *See Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1798 (1989) (plurality opinion) (O'Connor, J., concurring) (quoting 2 J. WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153, at 865 (1912)); *id.* at 1807 (Kennedy, J., dissenting) (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

220. *Price Waterhouse*, 109 S. Ct. at 1784-87.

The plurality addressed the meaning of "because of . . ." sex in section 703(a)(1), although the plurality did not explicitly say what role the substance of a statute plays in allocating burdens of proof.<sup>221</sup> The plurality said that section 703(a) is violated when discrimination is a factor in the adverse employment decision without a showing that "but for" the discrimination the decision would have been favorable.<sup>222</sup> The plurality later noted, however, that the employer would avoid liability by proving as an affirmative defense that its discrimination did not cause the plaintiff's rejection.<sup>223</sup>

Apparently, by discussing what constitutes a violation and a defense, the plurality used the burden shifting theory which requires the plaintiff to prove the elements of a cause of action and the defendant to prove affirmative defenses.<sup>224</sup> As discussed above, this theory requires courts to decide which elements of a case are plaintiff's and which are defendant's.<sup>225</sup> The plurality, however, did not discuss allocation of elements. Apparently, too, the plurality seemed to believe that burden shifting theory required the plaintiff to prove that the defendant "violated" the act although the plurality also noted that if the defendant proved an affirmative defense, there would be no liability.<sup>226</sup> If there is no liability, it is not clear what purpose labeling the defendant a violator serves. Allocation of burdens theory does not require the plaintiff to prove that the defendant violated Title VII.<sup>227</sup> Policy, convenience, fairness, and probabilities all can justify shifting the burden of persuasion.<sup>228</sup>

Justice Kennedy apparently agreed with the "plead the elements" theory of burden shifting although he, too, did not discuss basic legal principles on that subject.<sup>229</sup> He reached a different result, however, because he disagreed as to what constitutes the elements of the plaintiff's case. Although the plurality believed that the plaintiff proved her case if she established that the defendant intention-

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221. *Id.* at 1785; *see supra* notes 37-50 and accompanying text (discussing factors which are considered in allocation of burdens).

222. *Price Waterhouse*, 109 S. Ct. at 1785.

223. *See id.* at 1783, 1787-88 (stating employer's burden "most appropriately deemed" affirmative defense and liability may be avoided only by proving same decision would have been made absent discrimination).

224. *Id.* at 1788.

225. *See supra* notes 30-53 and accompanying text (discussing different factors used to shift burdens of proof and noting that commentators agree that "plead the elements" rule for allocating burdens not useful).

226. *Price Waterhouse*, 109 S. Ct. at 1775.

227. *See supra* notes 20-140 and accompanying text (explaining allocation of burdens theory).

228. *See supra* notes 37-50 and accompanying text (describing factors which may be used in determining allocation of burdens of proof).

229. *Price Waterhouse*, 109 S. Ct. at 1809 (Kennedy, J., dissenting); *see supra* note 224 and "pleading the elements" rule).

ally discriminated in the decision process, the dissent believed that the plaintiff must prove not only the existence of intentional discrimination, but also the lack of its harmless error in the decision.<sup>230</sup> Thus, the dissent concluded that the plaintiff in a Title VII case has the burden of proving both intentional discrimination and a "but for" causal link between the discrimination and the adverse employment decision.<sup>231</sup> The dissent would allocate both burdens to the plaintiff because the statute's drafters did not intend to impose liability "in cases where discriminatory animus did not actually cause an adverse action . . ." and that "[t]he ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue."<sup>232</sup> Determining the ultimate question does not, however, determine the burden of proof.<sup>233</sup> Requiring the defendant to prove that already proven discrimination did not cause harm does not "impose liability . . . where discriminatory animus did not actually cause an adverse action."<sup>234</sup> Liability is imposed on the defendant when the defendant cannot prove lack of causation; no liability is imposed when the defendant proves that its discrimination did not cause an adverse employment action.

In his brief concurrence, Justice White asserted the needlessness of semantic discussions about causation and affirmative defenses.<sup>235</sup> Rather, he agreed with the plurality's burden shifting result that if the plaintiff proved that an illegitimate reason was a substantial or motivating factor in an adverse employment action, then the employer must prove that the decision would have been the same without the illegitimate consideration.<sup>236</sup> Neither he, nor the case he relied on, however, discussed basic burden of proof principles.<sup>237</sup>

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230. *Price Waterhouse*, 109 S. Ct. at 1784-86 (Kennedy, J., dissenting); see *id.* at 1809-10, 1814 (Kennedy, J., dissenting) (addressing elements that plaintiff need prove).

231. *Id.* at 1807 (Kennedy, J., dissenting).

232. *Id.* at 1811, 1813 (Kennedy, J., dissenting).

233. See *supra* notes 30-54 and accompanying text (discussing factors to consider when allocating burden of proof, and observing that commentators agree that determining ultimate issues does not determine burden of proof).

234. *Price Waterhouse*, 109 S. Ct. at 1811 (Kennedy, J., dissenting).

235. *Id.* at 1795 (White, J., concurring).

236. *Id.* at 1795-96 (White, J., concurring) (citing *Mount Healthy City School Dist. Bd. v. Doyle*, 429 U.S. 274 (1977)). The plaintiff in *Mount Healthy* alleged a violation of his first amendment rights when the school board refused to rehire him. *Mount Healthy City School Dist. Bd. v. Doyle*, 429 U.S. 274, 276 (1977). The district court found that the employer was motivated by legitimate and illegitimate factors. *Id.* at 284-85. The Supreme Court held that the burden was properly placed on the plaintiff to show his conduct was a substantial or motivating factor in the employer's decision. *Id.* at 287. The Court, however, also held that the district court should have then required the employer to show by a preponderance of the evidence that its decision would have been the same absent the protected conduct. *Id.* at 287.

237. *Price Waterhouse*, 109 S. Ct. at 1795-96 (White, J., concurring); see *Mount Healthy*, 429 U.S. at 287 (holding when employee carries burden of proving protected conduct was sub-

Justice O'Connor wrote a lengthy concurrence.<sup>238</sup> Although she agreed with the plurality's burden shifting result, Justice O'Connor disagreed with their view as to what constitutes a violation of, and thus with their view as to the elements of, Title VII.<sup>239</sup> In actuality, therefore, her disagreement lay with the plurality's unstated burden shifting theory of pleading the elements.<sup>240</sup> Justice O'Connor would shift the burden of persuasion to the defendant for policy reasons when the plaintiff has proved discrimination, even though the plaintiff has not proved liability.<sup>241</sup> Shifting the burden of proof to the defendant for the deterrent purposes underlying a statute is a legitimate burden shifting theory.<sup>242</sup>

Justice O'Connor believed that an employer violates Title VII when consideration of illegitimate criterion is the "but for" cause of an adverse employment action,<sup>243</sup> disagreeing with the plurality's discussion that distinguished the phrase "because of . . . sex" from "but for" causation.<sup>244</sup> She did not believe that it follows that the plaintiff has the burden of proving "but for" causation.<sup>245</sup> Implicitly, therefore, she recognized that there are other burden shifting theories besides the "pleading the elements" theory.<sup>246</sup> She appeared to recognize, again implicitly, a burden shifting theory based on policy. Referring to legislative history, she said that although Title VII "conditioned legal liability" on a discriminatory employment injury, it also sought to deter employers from relying on race or gender in making employment decisions.<sup>247</sup> She said that the employer is no longer entitled to the same presumption of good faith which is accorded employers facing only circumstantial evidence of discrimination,<sup>248</sup> noting that once the plaintiff establishes intentional discrimination, the plaintiff has proven the existence of the

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stantial factor in employment decision, employer must then show same decision would have been reached absent protected conduct, but not discussing burden of proof principles).

238. *Price Waterhouse*, 109 S. Ct. at 1796-1807 (O'Connor, J., concurring).

239. *Id.* at 1796-97 (O'Connor, J., concurring).

240. *See supra* note 224 and accompanying text (discussing plurality's pleading the elements rule); *see also supra* notes 30-54 (describing different factors used to shift burdens of proof).

241. *Price Waterhouse*, 109 S. Ct. at 1804-05 (O'Connor, J., concurring).

242. *See supra* notes 37-54 and accompanying text (discussing policy as valid reason for shifting burden of proof).

243. *Price Waterhouse*, 109 S. Ct. at 1797 (O'Connor, J., concurring).

244. *Id.* at 1797 (O'Connor, J., concurring).

245. *Id.* at 1797-98 (O'Connor, J., concurring).

246. *Id.* at 1797 (O'Connor, J., concurring). Justice O'Connor does appear to acknowledge the "plead the elements" theory when she says, "[n]o doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case." *Id.* (O'Connor, J., concurring).

247. *Id.* at 1798 (O'Connor, J., concurring).

248. *Id.* at 1798-99 (O'Connor, J., concurring).

type of conduct Title VII seeks to deter.<sup>249</sup> In addition, it may be extremely difficult to prove what might have been.<sup>250</sup> If it cannot be proven, the party without the burden of proof will win.<sup>251</sup> If the employer did not have the burden of proving that legitimate factors caused its employment decision, then it could win even though it actually used discrimination to make the decision.<sup>252</sup>

The concurrences of both Justices White and O'Connor rejected the plurality's characterization of the defendant's burden as an affirmative defense.<sup>253</sup> Neither of the concurring Justices explained why they rejected that characterization. They did agree with the plurality's result that the burden of persuasion shifts to the defendant.<sup>254</sup> Perhaps they believed that such a characterization requires a finding that the defendant had violated Title VII. This belief could

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249. *Id.* at 1798 (O'Connor, J., concurring).

250. *Id.* at 1798 (O'Connor, J., concurring) (stating "but-for" test can demand impossible probe into unknowable state of affairs (quoting Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956))); *see id.* at 1801 (O'Connor, J., concurring) (asserting that entire purpose of *McDonnell Douglas* prima facie case requirement to compensate for "fact that direct evidence of intentional discrimination is hard to come by").

251. *Id.* at 1802-03 (O'Connor, J., concurring).

252. *Id.* (O'Connor, J., concurring). Justice O'Connor gave another rationale besides deterrence for shifting the burden of proof—that a fact finder could conclude, absent further explanation, that the employer's discriminatory motivation caused the employment decision. This argument returns to the "prove the elements" burden shifting theory and finds the causation element proven as the result of a presumption, using the similar "absent explanation" phrase found in *Furnco and Burdine*. *Id.* at 1798 (O'Connor, J., concurring); *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (stating establishment of prima facie case creates presumption of unlawful discrimination and if employer is "silent" in light of such presumption, court must enter judgment for plaintiff); *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (observing that prima facie case raises inference of discrimination because court will assume acts, "if otherwise unexplained," are more likely than not based on impermissible factors); *see also supra* note 224 and accompanying text (discussing plurality's "prove the elements" theory). Justice O'Connor objected to the theory that the plaintiff had proved a Title VII violation, *Price Waterhouse*, 109 S. Ct. at 1798, 1804 (O'Connor, J., concurring), yet she would presume causation from plaintiff's facts. *Id.* at 1804-05 (O'Connor, J., concurring). In *Price Waterhouse*, however, the defendant had proffered an explanation as to cause and had articulated, as well as proven, another motive. *See id.* at 1781. Therefore, a presumption of but for causation would have burst. *See supra* notes 67-71, 114-20 and accompanying text (explaining bursting presumptions). Causation, but not "but for" causation, can be inferred. *See Price Waterhouse*, 109 S. Ct. at 1805 (O'Connor, J., concurring) (proposing that plaintiff be required to produce sufficient evidence for reasonable fact finder to draw an "inference" that employment decision was made "because of" plaintiff's protected status) (emphasis added). *But see id.* at 1804 (O'Connor, J., concurring) (stating that when plaintiff has made such strong showing fact finder is "entitled to presume that employer's discriminatory animus" made difference in outcome) (emphasis added). Justice O'Connor's policy discussions are perfectly adequate rationales for shifting the burden of proof, however. *See supra* notes 30-54 and accompanying text (discussing factors which may be considered in allocating burdens of proof). Apparently, she does not recognize the adequacy of the policy rationales because she adds the presumption rationale in a way that creates more confusion. *See Price Waterhouse*, 109 S. Ct. at 1803-04 (O'Connor, J., concurring) (observing that Title VII intended to deter explicit consideration of race, color, religion, sex, or national origin in employment decisions).

253. *Price Waterhouse*, 109 S. Ct. at 1796 (White, J., concurring); *id.* at 1804 (O'Connor, J., concurring).

254. *Id.* at 1795 (White, J., concurring); *id.* at 1806 (O'Connor, J., concurring).

be justified by the plurality's discussion of the defendant's violation prior to finding liability.<sup>255</sup> In litigation, however, the burdens of proof are allocated among the plaintiff and the defendant and only after each has met, or not met, those burdens is liability determined.<sup>256</sup> An affirmative defense is only a label to indicate that a defendant has the burden of persuasion.<sup>257</sup> Conversely, if the defendant has the burden of persuasion, then what defendant must prove, by definition, is an affirmative defense.

In addition, the structure of Title VII supports an affirmative defense allocation to the defendant.<sup>258</sup> Section 703(a) defines an unlawful employment practice as "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions or privileges of employment because of such individual's . . . sex."<sup>259</sup> It does not matter whether section 703(a) requires "but for" causation because another section does; section 706(g) provides that an employer will not be liable if the adverse employment decision was made for reasons other than sex, for example.<sup>260</sup> Structurally, this appears to be an affirmative defense, with the burden of persuasion allocated to the defendant to prove that the action for which relief is sought was caused by a reason other than sex.<sup>261</sup>

Thus, a litigation focused analysis of *Price Waterhouse* reveals that the plurality and concurrences have no substantive disagreement with respect to allocating proof in mixed motive disparate-treatment employment discrimination cases, only semantic disagreements.<sup>262</sup> Because six Justices agreed that the burden of proof should shift to the defendant, it is curious that they should have such long discussions disputing the rationale without really identifying the center of their dispute.<sup>263</sup> Although there is lengthy debate as to what consti-

255. *Id.* at 1784.

256. *See supra* notes 135-44 and accompanying text (explaining effect of presumption and inference on burdens of proof allocation).

257. *See supra* notes 91-96 and accompanying text (discussing affirmative defenses).

258. *See infra* notes 259-61 and accompanying text (finding support for affirmative defense language in Title VII).

259. 42 U.S.C. § 2000e-2(a) (1982).

260. 42 U.S.C. § 2000e-5(g) (1982).

261. *See supra* notes 91-96 and accompanying text (discussing structure of affirmative defenses); *see also supra* notes 24-140 and accompanying text (explaining allocation of burdens of proof).

262. *See supra* notes 220-53 and accompanying text (detailing agreement between plurality and concurrences on shifting burden to defendant but disagreement on language employed to evaluate same).

263. *See Price Waterhouse*, 109 S. Ct. at 1780 (announcing judgment of Court, Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens); *see also supra* notes 224-28, 236-42 and accompanying text (detailing agreement between plurality and concurrences to shift burden of proof to defendant).

tutes a violation of Title VII, the debate is unnecessary when one realizes that there are many theories justifying the shift of the burden of proof.<sup>264</sup> Lower courts and litigants in these cases should not have difficulty in knowing how to proceed with the allocation of the burden of persuasion because the differing rationales do not change the result.<sup>265</sup> Once the plaintiff has produced evidence that persuades the fact finder that discrimination motivated the employment action, the employer must persuade the fact finder that the action would have occurred even without the discrimination.

*ii. Application of Title VII precedent*

The Justices in *Price Waterhouse* also disagreed as to the significance of Title VII precedent.<sup>266</sup> The plurality and Justice White found it distinguishable.<sup>267</sup> Justice O'Connor, however, found that courts must depart from precedent, and Justice Kennedy found it controlling.<sup>268</sup>

The plurality said that its opinion was not inconsistent with *Burdine*,<sup>269</sup> because the opinion did not require the defendant to prove that its legitimate reason was true and did require the plaintiff to prove that gender played a part in the employment decision.<sup>270</sup> The plurality then said that *Price Waterhouse* is not a *Burdine* "shifting burdens" case, but rather an affirmative defense case.<sup>271</sup> Although Justice White, in his concurrence, believed that it was not necessary to discuss affirmative defenses, he did agree with the plurality that *Burdine* was inapposite because it involved one motive, not mixed motives, for the adverse employment decision.<sup>272</sup> Both the plurality and Justice White are correct to hold that *Burdine* is not apposite but neither opinion explains why clearly.

The distinction between a presumptive case and a finding of fact from inferences case explains the distinction between *Burdine* and

264. See *supra* notes 220-26, 238-44 and accompanying text (detailing discussions in plurality and concurring opinions as to what constitutes Title VII violation); see also *supra* notes 30-54 and accompanying text (discussing factors which may be used to shift burden of proof).

265. See *infra* notes 295-306 and accompanying text (explaining Court's view of what triggers shift of burden of proof to defendant).

266. See *infra* notes 261-72 (discussing Court's disagreement over significance of Title VII precedent).

267. *Price Waterhouse*, 109 S. Ct. at 1788-89; *id.* at 1795-96 (White, J., concurring).

268. *Id.* at 1801 (O'Connor, J., concurring); *id.* at 1809-13 (Kennedy, J., dissenting).

269. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) in explaining that when plaintiff successfully proves prima facie case, burden shifts to defendant to articulate legitimate, non-discriminatory reason for employment decision).

270. *Price Waterhouse*, 109 S. Ct. at 1788.

271. *Id.*

272. *Id.* at 1795-96 (White, J., concurring).

*Price Waterhouse*.<sup>273</sup> The plaintiff's case in *Burdine* is based only on a presumption, not on evidence, the inferences from which convinced a fact finder that discrimination had occurred.<sup>274</sup> In *Price Waterhouse*, however, the plaintiff produced evidence from which the fact finder found that the employer used a discriminatory factor in the hiring decision.<sup>275</sup> The plaintiff did not merely claim that she was a woman, applied for and was qualified for the promotion, was rejected, and that any number of people could have been made partner.<sup>276</sup> Rather, she produced evidence of sexual stereotyping.<sup>277</sup> Although a presumption based on the *McDonnell Douglas* factors will burst once a defendant articulates a legitimate reason for the adverse employment action,<sup>278</sup> the inference drawn from the evidence of stereotyping will not burst; it must be believed or not.<sup>279</sup> Thus, *Price Waterhouse* is not a presumptive case and the allocation of proof followed in the presumptive *McDonnell Douglas* and *Burdine* cases is not appropriate.

Justice O'Connor characterized the *Price Waterhouse* framework as a change in direction from *McDonnell Douglas* and *Burdine*,<sup>280</sup> because those cases emphasized that "plaintiff bears the burden of persuasion throughout the litigation" and assumed that the plaintiff must prove that the employer's explanation was not a motivating factor.<sup>281</sup> She is correct that those cases hold that the plaintiff retains the burden of persuasion, but they do so because they are "bursting bubble" presumption cases. The presumption bursts when a rebuttal is articulated, leaving the plaintiff to prove the elements for which he or she has the burden of proof, whatever they may be.<sup>282</sup>

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273. See *supra* notes 55-78, 107-10 and accompanying text (discussing difference between presumption and inference generally).

274. See *supra* notes 156-58 and accompanying text (explaining *Burdine's* holding with regard to requirements of prima facie case).

275. *Price Waterhouse*, 109 S. Ct. at 1791 (accepting district court's conclusion that number of partner's comments showed sex stereotyping).

276. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (summarizing plaintiff's initial burden of establishing prima facie case of discrimination); accord *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981) (relating plaintiff's burden of establishing prima facie case to shift in burden of proof to defendant).

277. *Price Waterhouse*, 109 S. Ct. at 1793-94 (characterizing as "inevitable" conclusion that firm took comments motivated by "stereotypical notions" of women's department into account in making decision).

278. See *supra* notes 68-71 and accompanying text (explaining effect of rebuttable presumption).

279. See *supra* notes 72-73 and accompanying text (explaining effect of factual inference).

280. *Price Waterhouse*, 109 S. Ct. at 1796 (O'Connor, J., concurring) (terming case as "supplement to" and "departure from" *McDonnell Douglas* and *Burdine*).

281. *Id.* at 1801 (O'Connor, J., concurring) (stating that *McDonnell Douglas* and *Burdine* assumed that plaintiff must show that employer's explanation was not "the true reason" either because it never motivated the employer or because it did not do so in particular case).

282. See *supra* notes 68-71 and accompanying text (explaining effect of rebuttable presumption).

Certainly, *McDonnell Douglas* and *Burdine* do not eliminate the possibility that a defendant might have an affirmative defense.<sup>283</sup>

Justice Kennedy, in contrast to the plurality and concurrences, believed that Title VII precedent alone controlled *Price Waterhouse*,<sup>284</sup> despite the fact that he acknowledged that the precedent is not clear.<sup>285</sup> His analysis of precedent, however, only resolved half of the issue in *Price Waterhouse*.

Justice Kennedy would have held that the plaintiff has the burden of proving both (1) intentional discrimination and (2) causation—that the adverse employment decision would have been favorable without the discrimination.<sup>286</sup> Although at times Justice Kennedy treated the two issues of discrimination and causation as if they were one, at other times he treated the issues as distinct.<sup>287</sup> For example, his statement that *Burdine* holds that the plaintiff has the burden of proving “that the defendant intentionally discriminated” indicates an awareness that precedent allocates to the plaintiff the burden of proving that the defendant intentionally discriminated.<sup>288</sup> That

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283. See *supra* note 94 and accompanying text (defining affirmative defenses). Unfortunately, Title VII precedent does not provide clear guidance because of its failure to define its terms. See *supra* notes 153-59 and accompanying text (criticizing ambiguous language in early Title VII cases). For example, *McDonnell Douglas* implies and *Burdine* holds that after the plaintiff establishes the prima facie case, the burden of persuasion remains with the plaintiff. See *supra* notes 150-87 and accompanying text (discussing burden of proof in *McDonnell Douglas* and *Burdine* cases). By not discussing the type of prima facie case involved in *McDonnell Douglas* and *Burdine*, the Court left open an implication that plaintiff's burden can never shift after the establishment of a prima facie case. See *supra* notes 153-55 and accompanying text (discussing plaintiff's burden of proof in *McDonnell Douglas*). Certain language from *Burdine* contributes to that implication. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff”). This is an incorrect implication, however, because at some point in all litigation, the burden of proof will shift to the defendant if the plaintiff's evidence convinces the fact finder of the plaintiff's case. See *supra* notes 80-134 and accompanying text (discussing allocation and shifting of burdens of proof during litigation process). The defendant will then have the burden of proving an affirmative defense. See *supra* notes 91-96 and accompanying text (explaining defendant's burden of proving affirmative defense). With respect to the “assumptions” of *McDonnell Douglas* and *Burdine*, *Price Waterhouse*, 109 S. Ct. at 1801 (O'Connor, J., concurring), they are implicit dicta. It is speculative to interpret what a case “assumes” with respect to facts and issues not before it.

284. *Price Waterhouse*, 109 S. Ct. at 1809-10 (Kennedy, J., dissenting) (adhering to established evidentiary framework of *Burdine* because it provides proper standard for disparate-treatment cases).

285. *Id.* at 1806, 1812 (Kennedy, J., dissenting) (explaining that law in this area is “already difficult for the bench and bar” and that “[l]ower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*”).

286. *Id.* at 1811 (Kennedy, J., dissenting).

287. *Id.* at 1810 (Kennedy, J., dissenting) (arguing that *Burdine* provides mechanism to determine “whether initial discrimination has caused employment decision”).

288. *Id.* at 1809 (Kennedy, J., dissenting) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). At a later point, the dissent again referred only to the issue of discrimination, repeating the belief that the framework provided by the precedents permits the plaintiff “to demonstrate intentional discrimination”. *Id.* at 1812 (Kennedy, J., dissenting) (quoting *Burdine*, 450 U.S. at 258).

statement says nothing about causation, however.

The precedent Justice Kennedy cited for allocating the burden of proving causation once discrimination has been proved is not case law but his "belief[ that] continued adherence to the *Burdine* framework is more consistent with the statutory mandate [and that] Congress' manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action . . . suggests to [Justice Kennedy] that an affirmative showing [by the plaintiff] of causation should be required."<sup>289</sup> This statement did not suggest that *Burdine* or other precedent had already allocated to the plaintiff the burden of proving causation, but rather that Justice Kennedy believed that *Burdine* should be so extended. Allocating the burden of persuasion to the defendant, however, does not impose liability on a defendant who can prove that its discrimination did not cause plaintiff's injury. It means that when there is doubt as to the cause, the defendant, who has been proved to have discriminated, will be found liable.

The dissent also relied on *Burdine* for the proposition that after the defendant has articulated a legitimate reason, "a plaintiff may succeed in meeting her ultimate burden of persuasion 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's preferred explanation is unworthy of credence.'"<sup>290</sup> He then cited a concurrence in *United States Postal Service Board v. Aikens*<sup>291</sup> as holding that direct proof involves "persuad[ing] the court that the employment decision more likely than not was motivated by a discriminatory reason."<sup>292</sup> His reliance on these cases implies that they are precedent for a holding that the plaintiff must prove that the discriminatory motive was the "more likely" motivation.<sup>293</sup> The discussion, however, in both of those cases was dicta, which is not controlling precedent. Both *Burdine* and *Aikens* considered whether the employer used its articulated reason to make the hiring decision.<sup>294</sup> One way of proving that the employer did not use the ar-

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289. *Id.* at 1811 (Kennedy, J., dissenting).

290. *Id.* at 1810 (Kennedy, J., dissenting) (quoting *Burdine*, 450 U.S. at 256).

291. 460 U.S. 711, 712 (1983) (considering charge of racial discrimination as motive for failure to promote black U.S. Postal Service employee). For a discussion of how *Aikens* added considerable confusion to disparate-treatment analysis, see Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After Aikens*, 88 COLUM. L. REV. 1114, 1123 (1988) (maintaining that *Aikens* further complicated issues by characterizing *McDonnell Douglas* as direct rather than indirect proof case).

292. *Price Waterhouse*, 109 S. Ct. at 1810 (Kennedy, J., dissenting) (quoting *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 717-18 (1983) (Blackmun, J., concurring)).

293. *Id.* at 1810 (Kennedy, J., dissenting).

294. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 260 (1981) (holding defendant bears burden of explaining nondiscriminatory reasons for its actions); *Aikens*, 460

ticated reason is to prove what reason the employer did use. Neither case involved a situation where the plaintiff did not prove pretext, did not prove that the legitimate reason was not the true reason, but proved that two factors went into the decision, one legitimate and one discriminatory.

iii. *Plaintiff's showing*—"substantial," "motivating," or "play a part"

The plurality summarized its resolution of the burden shifting issue by saying: "once a plaintiff in a Title VII case shows that gender played a *motivating part* in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to *play such a role*."<sup>295</sup> The plurality defined a "motivating part" of an employment decision as "one of those reasons" for the employer's decision.<sup>296</sup> The plurality noted that stereotypical remarks do not alone "inevitably prove that gender played a part in a particular employment decision;" the plaintiff must also show "that the employer actually relied on her gender."<sup>297</sup>

Justice O'Connor characterized the level of discrimination necessary as "substantial" and "relied upon" to shift the burden of persuasion to the defendant.<sup>298</sup> She defined "substantial" as evidence from which a fact finder could draw an inference that the discrimina-

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U.S. at 716 (remanding case on grounds that district court must decide which party's explanation of employer's motivation to believe).

295. *Price Waterhouse*, 109 S. Ct. at 1787-88 (emphasis added). The plurality characterized this formulation of the balance of burdens as the direct result of Title VII's balance of rights. *Id.* at 1788.

296. *Id.* at 1790 (posing situation in which, if one asked employer at moment of decision what its reasons were, response included as one reason that employee was female); *id.* at 1785 (referring to congressional intent to forbid employers to take gender into account); *id.* at 1788 (holding that plaintiff retains burden of persuasion of whether gender played a part in decision); *id.* at 1793 (upholding district court finding that sex stereotyping "was permitted to play a part") (quoting *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1120 (D.D.C. 1985)).

297. *Id.* at 1791 (holding that plaintiff can make this showing by offering sex stereotyped remarks as evidence that gender played a part in decision); *see id.* at 1786 (concluding that Congress intended that plaintiff must prove that employer relied upon sex-based considerations). The plurality rejected the suggestion of the defendant that sex stereotyping lacks legal relevance, noting that an employer who objects to aggressive women at the same time it requires this trait for job success, places women in a "Catch-22" situation: "out of a job if they behave aggressively and out of a job if they don't." *Id.* at 1791.

298. *Id.* at 1804 (O'Connor, J., concurring) (noting that, to avoid bearing burden of justifying its decision, employer need only avoid "substantial reliance on forbidden criteria"); *see id.* at 1805 (O'Connor, J., concurring) (noting that defendant placed "substantial negative reliance" on illegitimate criterion); *id.* at 1798 (O'Connor, J., concurring) (commenting that deterrence purpose of statute is triggered by evidence that illegitimate criterion was "substantial" factor in adverse decision); *id.* at 1803 (O'Connor, J., concurring) (noting conviction that standard of "substantial factor" does not conflict with congressional policy as embodied in Title VII).

tion caused the adverse employment decision.<sup>299</sup> Justice O'Connor believed that this is a different approach from that of the plurality who do not view causation as part of a section 703(a) "because of . . . sex" violation.<sup>300</sup> She believed that the plurality uses a lesser standard.<sup>301</sup> The plurality, on the other hand, did not believe that its description of the plaintiff's proof differs from Justice O'Connor's description.<sup>302</sup>

Their views can be harmonized. The plurality based its standard of proof on the words "motivating" and "rely."<sup>303</sup> These terms imply some degree of causation. Justice O'Connor's standard is "substantial reliance."<sup>304</sup> Justice White combines the terms when he relies upon a first amendment burden shifting case that uses the words "substantial" and "motivating" synonymously.<sup>305</sup> Based on these opinions, a lower court could safely shift the burden of persuasion to the defendant upon finding that the plaintiff had produced evidence of discrimination in the decisional process that is substantial enough to justify an inference that it in part caused, motivated, or was relied upon in the employer's decision. The plaintiff must produce more than a presumption to shift the burden of proof to the defendant. The plaintiff must produce evidence from which the fact finder can conclude or infer that the employer intentionally discriminated. This is consistent with the distinction between *Burdine*, which presumed discrimination from four minimal factors, and *Price Waterhouse*, which inferred discrimination from substantial evidence.<sup>306</sup>

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299. *Id.* at 1805 (O'Connor, J., concurring). Justice O'Connor also discussed the evidence that will not trigger the shift of the burden of proof to the defendant. It would not include stray remarks, statements unrelated to the decision-making process, testimony by a social psychologist "standing alone," or benign awareness of race or gender. *Id.* at 1804-05 (O'Connor, J., concurring).

300. *Id.* at 1805 (O'Connor, J., concurring).

301. *Id.* at 1804 (O'Connor, J., concurring) (characterizing plurality standard as decision "tainted" by awareness of sex in any way).

302. *Id.* at 1790 n.13 (expressing inability to understand why concurrence suggests that standards are meaningfully different).

303. See *supra* text accompanying notes 295-97 (describing level of proof that will shift burden to defendant).

304. See *supra* text accompanying notes 298-302 (relating Justice O'Connor's view of level of proof needed).

305. *Price Waterhouse*, 109 S. Ct. at 1795 (White, J., concurring) (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

306. See *supra* note 276 and accompanying text (summarizing four factors that establish prima facie case in disparate-treatment cases). The plurality and concurrences agreed that the evidence in *Price Waterhouse* was sufficient to trigger the defendant's burden of proof. *Id.* at 1796 (O'Connor, J., concurring) (agreeing with plurality that burden of persuasion should shift to employer to demonstrate that it would have reached same decision with no gender consideration and that this shift is part of liability phase of litigation); accord *id.* at 1795 (White, J., concurring) (agreeing that plaintiff met burden by showing unlawful motive was substantial factor and that burden properly shifted at that point to defendant to prove it would have

*iv. Plaintiff's evidence—"direct" or "circumstantial"*

Justice Kennedy in dissent claimed that the Court's holding requires the plaintiff to produce "direct evidence" of discrimination to shift the burden of persuasion to the defendant.<sup>307</sup> He criticized this result on the grounds that courts will have to distinguish between "direct" and "indirect" or "circumstantial" evidence.<sup>308</sup> The reference to direct evidence is from Justice O'Connor's concurrence.<sup>309</sup> The plurality did not use that term to describe the requisite evidence.

The distinction between direct and circumstantial evidence, however, is not the distinction that courts must draw.<sup>310</sup> The correct distinction is between a presumption and an inference. Justice O'Connor described *McDonnell Douglas* as a case based on "no direct evidence that the employer had relied on a forbidden factor,"<sup>311</sup> but one "based only on the statistical probability that when a number of potential causes for an employment decision are eliminated, an *inference* arises that an illegitimate factor was in fact the motivation."<sup>312</sup> Justice O'Connor, however, misstated *McDonnell Douglas*. The presumption of intentional discrimination in *McDonnell Douglas* was based on statistical probabilities before the defendant introduces evidence should the defendant remain silent and not introduce evidence. The statistical probability that eliminates legitimate reasons for the employment action arises only if the defendant does not offer an explanation. The plaintiff's prima facie case under *McDonnell Douglas* is established, therefore, before the defendant may articulate an explanation. Thus, it is not that the plaintiff has not offered "direct evidence" of intentional discrimination, rather, plaintiff has not yet offered either direct or circumstantial evidence that discrimination occurred. The plaintiff need offer only evidence that she ap-

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made same decision). Even the dissent agreed that a finding of "but for" causation was warranted by the evidence. *Id.* at 1814 (Kennedy, J., dissenting).

307. *Price Waterhouse*, 109 S. Ct. at 1812 (Kennedy, J., dissenting) (opining that *Price Waterhouse* scheme applies only when plaintiff has produced direct and substantial proof of impermissible motive).

308. *Id.* (Kennedy, J., dissenting) (predicting that cases will become more difficult because courts must develop standards to determine when to apply burden shift).

309. *Id.* at 1805 (O'Connor, J., concurring) (characterizing what is required as being what Hopkins showed, "direct evidence" that decision-makers substantially relied on illegitimate criterion); see *id.* at 1804 (O'Connor, J., concurring) (writing that plaintiff in disparate-treatment case must show by "direct evidence" that illegitimate criterion was substantial factor in its decision).

310. *But see* Note, *supra* note 19, at 893 (concluding that most useful approach is to focus on whether plaintiff's evidence is direct or indirect).

311. *Price Waterhouse*, 109 S. Ct. at 1801 (O'Connor, J., concurring) (emphasis added).

312. *Id.* (O'Connor, J., concurring) (noting that *McDonnell Douglas* prima facie case is not difficult to prove and this compensates for fact that direct evidence of intentional discrimination is "hard to come by").

plied for a job, was qualified, rejected and protected by Title VII and that the job remained open.<sup>313</sup> The court will presume discrimination until the defendant articulates an explanation, at which point the presumptive inference disappears, indicating that it was not a factual inference.<sup>314</sup>

Thus, when Justice O'Connor asserts that the plaintiff must offer direct evidence to shift the burden of persuasion to the defendant, she really means that the plaintiff must produce some evidence, either direct or circumstantial, that the employer intentionally discriminated.<sup>315</sup> The distinction the courts must make in deciding the burden shifting issue is between a presumption and an inference, not between direct or indirect evidence. A presumption is a legally mandated conclusion that is based on minimal, judicially identified evidence. An inference is logically drawn from evidence above that minimum, and can be drawn from direct, circumstantial, or indirect evidence.<sup>316</sup>

#### *v. Defendant's proof*

The plurality said that, to meet its burden of persuasion, the defendant had to prove "objective" evidence that its discrimination did not cause the decision.<sup>317</sup> The plurality also held that proof that the decision could have been justified was not the same as proving that it had been justifiably made.<sup>318</sup>

Justice White, disagreeing with the plurality, suggested that the defendant could meet its burden merely with testimony.<sup>319</sup> The plurality strongly disagreed with Justice White, believing that al-

313. See *supra* note 161 and accompanying text (discussing facts needed to satisfy *prima facie* case).

314. See *supra* notes 30-54 (discussing difference between inference and presumption). Once the defendant articulates an explanation, the plaintiff may rebut the defendant's evidence by offering "competent evidence that the presumptively valid reasons for [. . . the decision] were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

315. *Price Waterhouse*, 109 S. Ct. at 1805 (O'Connor, J., concurring) (noting that, under her approach, plaintiff must offer evidence sufficient to allow fact finder to infer that decision was made on basis of illegitimate criterion).

316. See *supra* notes 55-78 and accompanying text (discussing presumptions and inferences).

317. *Price Waterhouse*, 109 S. Ct. at 1791 (holding that, in most cases, employer should present "objective evidence" of its decision, absent illegal motive).

318. *Id.* (relying on *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 (1979), which quoted *Ayers v. Western Line Consol. School Dist.*, 555 F.2d 1309, 1315 (5th Cir. 1977)). *Ayers* held that a showing that the same decision was justified on other grounds is not equivalent to proving that the same decision would have been made. *Ayers*, 555 F.2d at 1315.

319. *Price Waterhouse*, 109 S. Ct. at 1796 (White, J., concurring) (reasoning that, in context of mixed motive case where legitimate motive justified decision, where employer credibly testifies to existence of legitimate reason for decision, "this should be ample proof").

lowing the defendant to meet its burden with mere testimony defeats the point of the burden.<sup>320</sup>

In this instance, it is the plurality that appears to confuse the difference between the burden of production and the burden of persuasion. If *Price Waterhouse* had held that the defendant had only the burden of producing evidence about causation, then allowing the burden to be met with subjective testimony would undermine any benefit that the plaintiff might have obtained by the shift.

*Price Waterhouse*, however, held that the burden of proof shifted to the defendant. Even if the defendant produces subjective testimony, the fact finder might not believe it. When the fact finder does believe the testimony, however, no viable argument exists to prohibit it from having a probative effect.<sup>321</sup>

### C. Allocation of Proof in Disparate-Impact Cases

#### 1. Disparate-impact cases prior to 1989

In prior disparate-impact cases, a plaintiff established his or her prima facie case by showing that a neutral employment practice caused a disproportionate exclusion of a Title VII class from the employer's workforce.<sup>322</sup> The employment practice could be an objective screening device such as a standardized test or required educational level,<sup>323</sup> or a subjective screening device such as discretionary supervisory opinion.<sup>324</sup> Plaintiffs did not have to prove that the employer intended to discriminate; proof of a disparate-impact on a protected class caused by the employment practice was sufficient for plaintiff's case.<sup>325</sup> Defendant then had the burden of proving a business necessity for the employment practice causing

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320. *Id.* at 1791 n.14 (characterizing Justice White's suggestion as "baffling"). The plurality notes that the premise in a mixed motive case is that a legitimate reason for the decision exists, and that the employer must prove not the existence of the legitimate reason but that it was the motivating force behind the decision. *Id.* at 1791-92.

321. *See id.* at 1796 (White, J., concurring) (stating that employer must credibly testify as to legitimate motive).

322. *See, e.g.,* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (challenging minimum height and weight requirement that affected women applicants for prison guard positions); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (contending that seniority system effectively perpetuated minority group's low status); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (contesting intelligence tests and high school diploma requirement that barred minority employment).

323. *See Griggs*, 401 U.S. at 431 (ruling that practices, such as intelligence tests, that are fair in form but effectively discriminatory are prohibited unless practice is related to job performance).

324. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988) (holding that subjective selection methods of promotion may have same effect as objective methods, thus proper analysis is disparate-impact).

325. *See Griggs*, 401 U.S. at 430-31 (holding that employer's practice violated Title VII even though district court had found that employer did not discriminate intentionally).

the disparate-impact.<sup>326</sup>

2. *Disparate-impact cases after 1989*—*Wards Cove Packing Co. v. Atonio*

a. *The holding as it erroneously conforms to disparate-treatment cases*

In *Wards Cove*, the Supreme Court decided that not only are plaintiffs in disparate-impact cases required to prove disparate-impact caused by a neutral employment practice, but also, if the employer produces evidence to justify the practice, the plaintiffs will have the burden of proving that the employer did not need to use the employment practice or that the employer could use another practice equally well to achieve the same purposes without the discriminatory impact.<sup>327</sup> This allocation of proof is similar to that in disparate-treatment cases. In fact, the Court cited a disparate-treatment case, *Texas Department of Community Affairs v. Burdine*,<sup>328</sup> and also used language describing the allocation of proof that was similar to that used in *Burdine*.<sup>329</sup> *Wards Cove* spoke of the plaintiff “establish[ing] a prima facie case”<sup>330</sup> by proving that “application of a specific or particular employment practice . . . created the disparate-impact.”<sup>331</sup> If established, “the case will shift to any business justification [the employers] offer for their use of these practices.”<sup>332</sup> At this point “the employer carries the burden of producing evidence of a business justification for his employment practice,” but “[t]he burden of persuasion, however, remains with the disparate-impact plaintiff.”<sup>333</sup> *Burdine* had also explained that the defendant’s burden was to produce evidence but that the plaintiff retains the burden of persuasion.<sup>334</sup>

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326. See *Dothard*, 433 U.S. at 329 (holding that once it is shown that employment standards are discriminatory, employer must prove that challenged standards are related to job); *Griggs*, 401 U.S. at 432 (holding that employer must prove that requirement has manifest relationship to employment).

327. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989). The ruling also requires the plaintiff to identify a particular employment practice and show that it has a significant disparate-impact on employment opportunities. *Id.* at 2125. The Court also articulated a broad standard of business necessity—more than a “mere insubstantial justification” but less than “essential” or “indispensable.” *Id.* at 2126. This Article does not address those issues.

328. 450 U.S. 248 (1981).

329. *Wards Cove*, 109 S. Ct. at 2126 (citing *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981)).

330. *Id.* at 2125.

331. *Id.* at 2124-25. The plaintiffs in *Wards Cove*, non-white workers in an Alaskan cannery, charged that racial discrimination resulted from the employer’s hiring and promotion practices. *Id.* at 2120. The practices included nepotism, a rehire preference, a lack of objective hiring criteria, and a practice of not promoting from within. *Id.*

332. *Id.* at 2125.

333. *Id.* at 2126.

334. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254, 256 (1981).

The Court defended its burden of production holding, saying that it "conforms to the rule in disparate-treatment cases," citing *Burdine* and Rule 301 of the Federal Rules of Evidence.<sup>335</sup> Both *Burdine* and Rule 301, however, deal with bursting presumptions.<sup>336</sup> In *Burdine*, the plaintiff retained the burden of persuasion on the element of intentional discrimination. *Burdine* held that the plaintiff could establish a prima facie case by pleading four facts from which a court must presume intentional discrimination.<sup>337</sup> Once the defendant articulated an explanation, by producing evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff's presumption of intentional discrimination disappears.<sup>338</sup> At that point, no evidence of intentional discrimination exists and the plaintiff retains the burden of proving intentional discrimination.

In a disparate-impact case, however, to reach the stage in which the defendant justifies the employment practice, the plaintiff must have already proved that an employment practice caused disparate-impact. No presumptions are involved in this prima facie case; this is not merely a convenient allocation of production to enable a plaintiff to survive a motion to dismiss or a motion for a directed verdict.<sup>339</sup> Defendant's evidence of a business justification for the practice, therefore, does not make plaintiff's prima facie case disappear. Plaintiff had proved, not presumed, its case, and therefore, the burden should shift to the defendant to prove, not merely to articulate, a defense.

*Wards Cove* did not explicitly state which element plaintiff retains the burden of proving after the defendant provides evidence of

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335. *Wards Cove*, 109 S. Ct. at 2126.

336. See *supra* notes 58-71 and accompanying text (explaining that presumptions are court-made devices that are rebuttable if defendant produces evidence so that presumption in favor of plaintiff bursts or disappears).

337. *Burdine*, 450 U.S. at 253-54 (explaining that initial burden of plaintiff is not onerous and effectively eliminates the most common nondiscriminatory reasons for decisions).

338. *Id.* at 255 (explaining that if defendant produces evidence, then presumption raised by plaintiff's prima facie case is rebutted); see *supra* notes 153-58 and accompanying text (noting that *Burdine* clarified confusion engendered by Court's failure in *McDonnell Douglas* to define whether defendant's burden was to "articulate" or "prove" alternate explanation for discriminatory treatment); see also *supra* notes 114-19 and accompanying text (explaining that rebuttable presumption, without independently probative facts, shifts only burden of production to defendant and that if defendant articulates alternate explanation, presumption disappears).

339. See *supra* notes 81-134 and accompanying text (explaining effect of presumptions throughout litigation). See generally Note, *supra* note 19, at 948 (noting that plaintiff in disparate-impact case has higher standard of proof to meet than plaintiff in disparate-treatment case). But see Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. Rev. 419, 436 (1982) (noting that lower burden for defendant in disparate-impact case would parallel burden in disparate-treatment case).

business justification. The Court implied that the element could be either causation or discrimination.<sup>340</sup> The Court also wrote that the plaintiff must prove that it was “because of such individual’s race, color, etc., that he was denied a desired employment opportunity.”<sup>341</sup> Is the “because of” language referring to causation, as it did in Justice O’Connor’s concurrence and Justice Kennedy’s dissent in *Price Waterhouse*,<sup>342</sup> or is it referring to intentional discrimination? In order to shift the burden to the defendant either to prove or to articulate business necessity, the plaintiff must have already proved causation. Thus, the issue on which the plaintiff retains the burden cannot be causation.

If the issue that the plaintiff must prove after the employer produces evidence of business justification is not causation, it must be intentional discrimination. If that is what the plaintiff retains the burden of proving, then the Court has effectively overruled *Griggs*, which explicitly held that a finding of intentional discrimination was not necessary in a disparate-impact case.<sup>343</sup> The *Wards Cove* Court, however, said that intent is not an element.<sup>344</sup> Thus, the Court itself eliminated intentional discrimination as an element for which the plaintiff retains the burden of persuasion.

In summary, a close reading of *Wards Cove* indicates that the plaintiff does not need to produce additional evidence of causation or any evidence of intentional discrimination. Rather, *Wards Cove* has allocated to the plaintiff as part of the plaintiff’s case the burden of proving that the defendant does not have a defense of business justification. Although there are many factors for allocating burdens of

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340. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2126 (1989) (quoting *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790 (1988) (O’Connor, J., concurring) and finding that “the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times”).

341. *Id.* (quoting 42 U.S.C. § 2000e-2(a)) (emphasis added).

342. *Price Waterhouse*, 109 S. Ct. at 1797 (O’Connor, J., concurring) (asserting that congressional intent was that plaintiff establish but-for causation); *accord id.* at 1807 (Kennedy, J., dissenting) (contending that Title VII requires showing that illegitimate motive caused decision at issue).

343. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (noting that court of appeals held that employer adopted restrictive job requirements without any intention to discriminate but that absence of discriminatory intent does not excuse employment practices that operate as “built-in headwinds” for minority groups if they are unrelated to job performance). The Court held invalid a requirement that applicants have a high school diploma or pass a standardized intelligence test. The Court found that neither requirement was related to the employee’s ability to successfully perform the job, that both requirements had a disparate-impact on blacks and that the company had a history of filling the positions in question with whites only. Ultimately, the employer was found liable for the disparate-impact the tests had caused. *Id.*

344. *Wards Cove*, 109 S. Ct. at 2119 (noting that “a factually neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a “disparate-treatment” case”).

persuasion, requiring a plaintiff to prove an absence of a defense is unusual and is not justified by either *Burdine* or the Federal Rules of Evidence.<sup>345</sup>

*b. Proposed legislative correction*

Congress is considering legislation, which will be titled the Civil Rights Act of 1990, to change some of the *Wards Cove* conclusions.<sup>346</sup> Well-established litigation principles support the passage of this legislation. Congress should restore the normal allocation of burdens of proof; that is, if plaintiff proves an employment practice or practices caused a disparate-impact, the burden then should shift to the employer to prove a business necessity for the practice. Because proof of a disparate-impact violation does not involve the use of a presumption, the legislation should avoid the use of the terms presumption or rebuttal.<sup>347</sup> In addition, because the term prima facie case has different meanings depending upon the stage of litigation in which it is used, use of that term can create confusion and should therefore be avoided.<sup>348</sup> The early House Bill introduced to change *Wards Cove* contained a number of these problems by using both the terms "prima facie violation" and "defendant may rebut."<sup>349</sup>

The Senate bill and the current House bill avoid these problems.<sup>350</sup> These bills require a plaintiff to "demonstrate" that

345. See *supra* note 335-38 and accompanying text (discussing *Burdine* and Rule 301).

346. See, e.g., H.R. 2598, 101st Cong., 1st Sess., 135 CONG. REC. H2471 (daily ed. June 12, 1989); H.R. 3157, 101st Cong., 1st Sess., 135 CONG. REC. H5332 (daily ed. Aug. 4, 1989); S. 1261, 101st Cong., 1st Sess., 135 CONG. REC. S7504 (daily ed. June 23, 1989); H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990).

347. See *supra* note 339 and accompanying text (explaining plaintiff's burden and use of presumption).

348. See *supra* notes 80-134 and accompanying text (explaining application of prima facie case during six possible stages of litigation).

349. See H.R. 2598, 101st Cong., 1st Sess., 135 CONG. REC. H2471 (daily ed. June 12, 1989). House Bill 2598 provided

That section 703 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) is amended by adding at the end the following:

- (k) A *prima facie* violation of this title shall be deemed to have been made out by proof that the representation of the group receiving protection under this title of which plaintiff is a member is significantly less represented in the position or among those receiving the benefit in question than among the qualified applicants, or likely qualified applicants, for the position, or eligible persons, or likely eligible persons, for the benefit. The defendant may *rebut* such a showing by proving that each part of the selection process in question was a business necessity for the position or benefit in question was essential to the performance of the defendant's legitimate functions.

*Id.* (emphasis added).

Later, the phrase "essential to the performance of the defendant's legitimate functions" was changed to "business necessity." H.R. 3157, 101st Cong., 1st Sess., 135 CONG. REC. H5332 (daily ed. Aug. 4, 1989).

350. The proposed legislation from the Senate provides:

an employment practice (proposed section 703k(1)(4)) or employment practices (proposed section 703k(1)(B)) "results in a disparate-impact . . ." "Demonstrate" is defined as "meets the burdens of production and persuasion" (proposed section 701(m)). Thus, the bills make clear that the plaintiff has the burden of producing evidence and persuading the fact finder that the evidence is true of

#### SEC. 3 DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) is amended by adding at the end thereof the following new subsections:

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "group of employment practices" means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

(o) The term "required by business necessity" means that the challenged practice or group of practices bears a substantial and demonstrable relationship to effective job performance.

(p) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).

#### SEC 4. RESTORING THE BURDEN OF PROOF IN DISPARATE-IMPACT CASES

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE-IMPACT CASES.—

(1) An unlawful employment practice based on disparate impact is established under this section when—

(A) a complaining party demonstrates that an employment practice results in a disparate-impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate by objective evidence that such practice is required by business necessity; or

(B) a complaining party demonstrates that a group of employment practices results in a disparate-impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate by objective evidence that such group of employment practices is required by business necessity, except that—

(i) if a complaining party demonstrates that a group of employment practices results in a disparate-impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate-impact; and

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate-impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

S. 2104, 101st Cong., 2d Sess. (1990). The House bill is substantially the same as the Senate bill, but changes the definitions of "group employment practices" and "respondent" in a way that does not change the discussion in this Article. To provisions 703(k)(1)(A) and (B), the House bill has added that the respondent must demonstrate business necessity "by objective evidence." This addition, apparently, responds to the debate between the plurality and Justice White with respect to the type of evidence the defendant should produce when the defendant has the burden of proof in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1990); see *supra* notes 205-65 and accompanying text (discussing *Price Waterhouse*); see also H.R. 4000, 101st Cong., 2d Sess. (1990).

what, prior to *Wards Cove*, was considered plaintiff's case.<sup>351</sup>

The proposed bills then require the respondent to "demonstrate" that such practice or group of practices are "required by business necessity" (proposed section 703(k)(1)(A) and (B)). These provisions make clear that both the burden of producing evidence and the burden of proving the evidence, persuading the fact finder that the evidence of business necessity is true, have shifted to the defendant. This shift is consistent with the litigation principles described above that shift the burden of proof to the defendant after plaintiffs have proved their case with compelling evidence, not with mandatory conclusions based on presumptions.<sup>352</sup> In a disparate-impact case the plaintiff must, as the proposed bills provide, prove that a disparate-impact results from an employment practice or practices. A rebuttable presumption, however, is not part of this proof. In addition, the bills speak in terms of an "unlawful employment practice," which is the same phraseology and structure used in other subsections of section 703.<sup>353</sup> The bills permit a plaintiff to demonstrate that a "group of employment practices" resulted in a disparate-impact, (proposed section 703k(1)(B)), changing *Wards Cove's* insistence that a plaintiff identify a particular employment practice.<sup>354</sup> The words "results in" a disparate-impact make explicit what has always been viewed as part of plaintiff's disparate-impact case, that the plaintiff must prove that the disparate-impact was the result of the employment practice or practices, not simply that there is an imbalance in the work force.<sup>355</sup> The structure of the sections describing an unlawful employment practice take into account Justices White's and O'Connor's apparent concern in *Price Waterhouse* that an employer not be labeled as a "violator" prematurely.<sup>356</sup> Under the proposed statute, if the employer can prove the defense, not only is there no liability, but also there is no label of unlawful employment practice and therefore no violation. An unlawful employment practice can be determined only after it is determined whether the employer has proved a business necessity (proposed sections 703(k)(1)(A) and (B)). Finally, the phraseology of the employer's defense, "business necessity," which is defined as "essential

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351. See *supra* note 350 (describing bills).

352. See *supra* notes 17-54 and accompanying text (describing principles of litigation); see also *supra* note 350 (discussing bills).

353. See 42 U.S.C. § 2000e-2 (1982).

354. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124-25 (1989). That issue is not addressed or analyzed in this Article.

355. *Id.* at 2123 (discussing quality of statistical evidence necessary to prove disparate-impact). That issue is not addressed or analyzed in this Article.

356. See *supra* note 255 and accompanying text (noting Justice White's and Justice O'Connor's seeming reluctance to stigmatize defendant prematurely).

to effective job performance" (proposed section 701(o)) restores that defense which was weakened by *Wards Cove*.<sup>357</sup>

Shifting the burden of proving business necessity to the defendant is also consistent with the result in *Price Waterhouse*, which, like disparate-impact cases, is not a presumptive case.<sup>358</sup> In *Price Waterhouse*, the Court held that when a plaintiff has produced evidence from which a court can infer factually, not as a matter of presumption, that there was substantial or motivating discrimination in the employment decision, then the burden of proof shifts to the defendant to prove that the discrimination did not cause the employment decision.<sup>359</sup> It should follow that in a disparate-impact case, when a plaintiff proves disparate-impact by direct or inferential evidence rather than by a presumption, then the defendant should prove its defense of business necessity.

#### CONCLUSION

As Part I of this Article demonstrated, the terms "prima facie case," "presumption," "affirmative defense," and "burden of proof" are all labels for the function of allocating the production or proof of facts between the plaintiff and the defendant. "Prima facie case" appears three times during the course of a litigation, at the pleading stage, the production of evidence stage, and the proof stage, creating a higher degree of burden for the plaintiff at each stage. The factors used to determine what is the plaintiff's prima facie case to be pleaded and produced, whether there is a presumption, and whether the plaintiff has proved a prima facie case to require the defendant to prove an affirmative defense all rest on policy, convenience, fairness, and probability.

In the course of litigation the plaintiff will initially have the burden of pleading, then producing, and finally proving plaintiff's prima facie case. If the plaintiff uses a presumption, depending on the jurisdiction, the defendant might then have the burden of proof, but more typically, the defendant will just have to produce admissible evidence to rebut and burst the plaintiff's presumption. The plaintiff will retain the burden of proving his or her case. The defendant will have the burden of pleading, producing, and proving affirmative defenses. The defendant's burdens with respect to af-

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357. *Wards Cove*, 109 S. Ct. at 2126. The strength of the business necessity defense is not analyzed in this Article.

358. See *supra* notes 275-97 and accompanying text (discussing why *Price Waterhouse* is not presumptive case).

359. *Price Waterhouse*, 109 S. Ct. at 1779.

firmative defenses will arise after the plaintiff has met whatever has been determined to be part of the plaintiff's burden.

Because burdens are allocated based on policy, fairness, convenience, and probability, the Title VII discrimination cases, whether disparate-impact or disparate-treatment, should consider those factors in allocating burdens. Once it is determined what the plaintiff should be required to prove, if the plaintiff proves those facts by direct or inferential evidence, then the burden of persuasion should shift to the defendant. If the plaintiff proves its case only through the use of a judicially mandated presumption, then the defendant's burden is one of production only, not persuasion.

The disparate-treatment cases have correctly determined that only the burden of production shifts to the defendant if the plaintiff establishes a prima facie case by a presumption. If, however, the plaintiff has produced sufficient evidence, either direct or inferential, from which a fact finder can conclude, as a matter of fact, that the employer relied on or was motivated in part by discrimination in making an adverse employment decision, then the burden of persuasion should shift to the defendant.

As disparate-impact cases are based on facts or factual inferences, once the plaintiff has proved its case, the burden of persuasion should shift to the defendant. The most recent disparate-impact case that requires the plaintiff, as part of the plaintiff's case, to prove lack of a business justification for an employment practice, in addition to proving that the practice caused disproportionate impact, is inconvenient, unfair, and unnecessary. The Civil Rights Act of 1990 is therefore necessary to restore basic litigation principles to the allocation of burden of proof in disparate-impact cases so that once the plaintiff proves that disparate-impact resulted from an employment practice or practices, the defendant must prove the business necessity of that which caused the impact.