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I. INTRODUCTION

The United States has a host of federal laws that prohibit discrimination on the basis of race, sex, religion, age, handicap, national origin, and veteran's preference; these laws encompass a broad range of activities that include employment, education, housing, voting, and public accommodation.[1] Until recently, courts

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1. *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691e (1976); Equal Pay Act, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979); State and Local Financial Assistance Act (Revenue Sharing Act of 1972), 31 U.S.C. § 1242(a) (1976); Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981, 1982, 1983 (1976); Civil Rights Act of 1964, tit. II, 42 U.S.C. §§ 2000a to 2000a-6 (1976 & Supp. II 1978) (public accommodations); Civil Rights Act of 1964, tit. VI, 42 U.S.C. §§ 2000d to 2000d-4 (1976 & Supp. II 1978) (federally funded programs); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978) (employment) [hereinafter referred to as Title VII]; Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976). *See generally* Larson, *Discrimination as a Field of Law*, 18 WASHBURN L.J. 413 (1979) (arguing that the time has come to consider discrimination as a separate field of law).

Federal civil rights litigation—especially discrimination cases—has increased phenomenally since 1965. During the past decade, for example, the total civil caseload increased 100%—from 77,193 cases in fiscal 1969 to 154,666 cases in fiscal 1979. Civil rights cases, on the other hand, which are broadly defined as actions arising under any civil rights statute, increased 431% in the same period, easily outpacing the aggregate rise in civil filings. *Compare* Annual Report of the Director of the Administrative Office of the United States Courts 117,120 (1969) *with* Annual Report of the Director of the Administrative Office of the United States Courts 4, 60 (1979). Among the catalysts that sparked this spate of litigation

and commentators have focused their attention primarily on the development of substantive theories of liability and remedies for proven violations.[2] They have expended extraordinarily little effort, however, on the development of a coherent framework for allocating the burdens of proof[3] in discrimination cases.[4] The failure

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were the Supreme Court's "revitalization" of the Civil Rights Act of 1870, 42 U.S.C. §§ 1981, 1982 (1976), the comprehensive civil rights legislation of the 1960's, particularly Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978), and the development of strict scrutiny equal protection analysis, *see* Hunter v. Erickson, 393 U.S. 385 (1969); Loving v. Virginia, 388 U.S. 1 (1967). *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225 (1976).

2. *See* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Discrimination and* Weber, 59 N.C. L. REV. 531, 537 & n.28 (1981).

3. The term "burden of proof" has two independent meanings. On the one hand, it is used to denote the degree to which a factfinder must be subjectively persuaded—based upon the evidence presented—that a particular fact is more likely true than not. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (beyond a reasonable doubt); Hobson v. Eaton, 399 F.2d 781, 784-85 (6th Cir. 1968) (clear and convincing), *cert. denied*, 394 U.S. 928 (1969); F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 7.5-.8 (2d ed. 1977); C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 336-341 (2d ed. E. Cleary 1972); 9 J. WIGMORE, EVIDENCE §§ 2497-2498 (Chadbourn rev. 1981); Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955). On the other hand, the term may refer to the duty of a party to come forward with evidence to prove a particular fact. This duty initially is allocated to the party seeking a change in the status quo, usually the plaintiff in a civil case or the prosecutor in a criminal case. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 523 (1958); Palmer v. Hoffman, 318 U.S. 109, 117-19 (1943); M. GREEN, BASIC CIVIL PROCEDURE 110-11 (2d ed. 1979); C. MCCORMICK, *supra*, § 338; 9 J. WIGMORE, *supra*, §§ 2487-2489. Unless otherwise specified, this Article uses the term "burden of proof" to mean a degree of persuasion. The term "burdens of proof," however, will typically be used to refer to both the burden of producing evidence and the burden of persuasion, though it may also include the burden of pleading.

4. For a recent article that considers one aspect of the burdens of proof in disparate treatment discrimination cases, see Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980). Other commentators have considered the burden of proof question in these cases, but have not attempted to provide a framework for analyzing the subject in a coherent fashion. *See, e.g.*, 2 A. LARSON, EMPLOYMENT DISCRIMINATION LAW §§ 50.00-.40 (1978) (employment discrimination); C. SULLIVAN, M. ZIMMER & R. RICHARD, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 67-69 (1980) (employment discrimination); Friedman, *Congress, The Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37, 51-54 (1981) (employment discrimination); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979) [hereinafter cited as *Critique*]; Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 463-64 (1978) (actions under 42 U.S.C. § 1983); Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination Act*, 41 OHIO ST. L.J. 349, 369-80 (1980) (age discrimination). *See also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, ch. 36, at 306-16 (1976 & Supp. 1979).

of the courts to formulate a coherent framework for allocating burdens of proof is a major defect in the enforcement of laws prohibiting discrimination, since the allocation of the burdens of proof during trial often has a significant effect on the outcome of a case and frequently may be dispositive.[5] Indeed, the concept of a burden of proof is one of the most important procedural notions in our legal system; it helps implement the substantive laws by instructing the factfinder on the degree of confidence he should have in the correctness of factual conclusions for a particular type of case.[6]

Burdens of proof govern the process of factfinding,[7] and a factual dispute is at the heart of virtually every discrimination case. Upon the conclusion of a trial at which evidence is presented, the factfinder—either a judge or a jury[8]—must make a decision. The factfinder is not, however, left simply to his own devices in receiving notice, collecting evidence, and determining how, when, and by whom the evidence should be presented. Instead, the courts and legislatures have developed a substantial array of procedural rules that the factfinder must consider and administer in the decision-making process. Among the most important of these rules are the ones that allocate the burdens of pleading, producing evidence, and persuasion, the last of which encompasses degrees of persuasion as well. The burden of pleading refers to the process of notifying the factfinder about the nature of the dispute between the parties. The burden of persuasion contains the dual elements of location and weight: the location specifies the party who will lose if the burden is not met, and the weight specifies how persuasive the evidence must be to sustain this burden. The burden of production determines the timing of the presentation of the evidence and like-

5. Lavine v. Milne, 424 U.S. 577, 585 (1976); Sampson v. Channell, 110 F.2d 754, 758 (1st Cir. 1940); *see* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 270-71 (1971).

6. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

7. *See id.* at 423, 427.

8. Some discrimination cases must be tried before a jury. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575 (1978) (right to jury trial under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976)); Curtis v. Loether, 415 U.S. 189 (1974) (defendant in housing discrimination case under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1970), entitled to jury trial). Others are tried before the court sitting without a jury. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975) (no right to jury trial under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1970)). It is unclear whether there is a right to a jury trial under the civil rights legislation enacted during Reconstruction. *See, e.g.*, Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981, 1982, 1983 (1976).

wise has two important features: "[F]irst, like . . . the burden of persuasion, it provides that when the evidence is inadequate, the party with the burden loses; second, unlike . . . the burden of persuasion, it operates in a jury trial to remove the issue from the jury. When the burden of producing evidence is not satisfied, the judge resolves the issue."[9]

Discrimination cases generally are considered to be civil actions in which the plaintiff must establish his claim for relief by the preponderance of the evidence standard.[10] Despite this well-established rule, however, courts disagree on how the burdens of pleading and proof should be allocated between plaintiffs and defendants to determine discrimination *vel non*.[11] The Supreme Court has been presented with several opportunities to formulate a coherent framework for allocating burdens in discrimination cases;

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9. *See* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1300 n.3 (1977).

10. *See* Teamsters v. United States, 431 U.S. 324, 336 (1977). The usual formulation of the standard in civil cases is that there must be a preponderance of evidence in favor of the party having the burden of persuasion before he is entitled to a decision in his favor. F. JAMES & G. HAZARD, *supra* note 3, § 7.6, at 243.

11. *See, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (Title VII); Contreras v. City of Los Angeles, 25 Fair Empl. Prac. Cas. 866 (9th Cir. 1981) (Title VII); Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) (voting); Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980) (Title VII); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978) (age); Houghton v. McDonnell Douglas Corp., 553 F.2d 561 (8th Cir. 1977) (age); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) (age). *Cf.* Gomez v. Toledo, 446 U.S. 635 (1980) (claim nnder 42 U.S.C. § 1983) (question left undecided). This disagreement is also reflected in the commentary on the attempts by the Supreme Court to provide a coherent framework for this problem. Professor Larson, for example, interpreted McDonnell Douglas v. Green, 411 U.S. 792 (1973), "as . . . the vehicle for the promulgation of a general rule designed to bring order out of a chaotic situation that had developed within the circuits and districts." 2 A. LARSON, *supra* note 4, § 50.10, at 10-144. Professor Larson concludes that the decision in *McDonnell Douglas* was a conscious effort by the Court "to construct a general working formula designed to rationalize a segment of this boisterous field of law." *Id.* Professor Mendez, on the other hand, relying on some of the same cases as Professor Larson, concludes that in each instance in which the Court has attempted to define the burdens of proof for the parties in a disparate treatment discrimination case, "the Court has failed to achieve a clear definition." Mendez, *supra* note 4, at 1130. *See also* Friedman, *Critique*, *supra* note 4.

Part of the confusion over the term "burden of proof" results from the insensitivity of courts to the distinction between the burden of persuasion and the burden of producing evidence. Under Roman law, the courts separately heard plaintiffs' and defendants' cases; thus, since each tiine segment contained one clear affirmation, the term "burden of proof" had a simple meaning. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 364-66 (1898). Common law combined the issues by a plea of confession and avoidance and tried all issues together; that procedure led to the confusion between the burden of production to rebut an opponent's case and the burden of persuasion to prove one's own case. *See id.* at 355-64.

unfortunately, however, its efforts to date have contributed to rather than clarified the confusion in this area.[12] The Court has established different rules for allocating the burdens of pleading and proof under the several substantive theories of discrimination, but it has never attempted to articulate a rationale for these different approaches. Recently, in *Texas Department of Community Affairs v. Burdine*,[13] the Court attempted to clarify some of the confusion that its earlier cases had generated. Unfortunately, even though it is a unanimous opinion, *Burdine* fails to achieve this result because the Court decided the case without extensive analysis.

A review of the discrimination cases also suggests that the burden of proof issue may well be the battleground upon which some judges are attempting to repudiate the disparate impact theory of discrimination.[14] A court may be hesitant to repudiate outright well-established substantive theories of liability, even when there is a belief that these theories are misguided. As a result, a court instead may adopt procedural rules designed to achieve effectively the same result.[15] One such procedural device that courts

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12. *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) and notes 141-46 *infra* and accompanying text; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and notes 130-32 *infra* and accompanying text; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and notes 126-29 *infra* and accompanying text; Griggs v. Duke Power Co., 401 U.S. 424 (1971) and notes 90-95 *infra* and accompanying text.

13. 101 S. Ct. 1089 (1981).

14. *See* Belton, *supra* note 2, at 554 n.105. The disparate impact theory of discrimination provides that facially neutral practices which have an adverse impact on the opportunities of members of a protected class are illegal irrespective of any specific intent to create that impact, unless the practice is mandated by business necessity or has a manifest relationship to some legitimate interest of the defendant. *See* notes 90-95 *infra* and accompanying text.

15. Justice Douglas once observed,

> It is sometimes thought to be astute political management of a shift in position to proclaim that no change is underway. That is designed as a sedative to instill confidence and allay doubts. . . . Precedents, though distinguished and qualified out of existence, apparently have been kept alive. The theory is that the outward appearance of stability is what is important.
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> . . . But the more blunt, open, and direct course is truer to the democratic traditions. . . . A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.

Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949). An example of the observation made by Justice Douglas can be found in Vance v. Terrazas, 444 U.S. 252 (1980), in which the Court used a definition/application dichotomy in determining the scope of congressional power to enact a burden of proof standard different from the one adopted by a prior Court decision. In an earlier case the Court had interpreted the fourteenth amendment to require that an "intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proven conduct" be shown before Congress stripped a person of citizenship. *Id.* at 260 (referring to Afroyim v. Rusk, 387 U.S. 253, 257 (1967)). A later

often use to limit the reach of substantive theories is to allocate the burdens of pleading and proof on the various elements of a claim for relief in a way that will favor a desired outcome. While this approach may produce a just decision in the particular case under consideration, however, it more often than not also produces confusing language and strained reasoning, which in turn results in considerable disharmony in subsequent judicial treatment of burden of proof issues.[16] Moreover, such an approach often thwarts the judicial goal of rendering fair and just decisions.

If the national policy of eliminating discrimination is to be achieved, the courts—to whom the major responsibility for effectuating this goal is delegated—must establish a coherent framework for allocating the burdens of pleading and proof that provides "a

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decision, based on the Nationality Act of 1940, ch. 876, § 401(c), 54 Stat. 1168, and not "rooted in the Constitution," held the burden of proof standard to be a "clear, convincing, and unequivocal" showing of the requisito intent. *Id.* at 264-65 n.8 (referring to Nishikawa v. Dulles, 356 U.S. 129, 138 (1958)). The Court upheld the amendment in *Vance* on the ground that "since Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished." *Id.* at 266. The Court distinguished its earlier constitutional holding that conditioned expatriation on intent from its earlier statutory holding, stating that the latter, in effect, usurped the "traditional powers of Congress to prescribe rules of evidence and standards of proof in federal courts." *Id.* at 265. The Court thus deferred to a "congressional judgment . . . that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship." *Id.* at 266-67. The Court did not budge, however, on the constitutionally imposed intent requirement; instead, it used the requirement as a counterbalance to the lowered evidentiary burden. The Court did not seem to realize that either intent is not an evidentiary standard—an unlikely proposition—or that the constitutional definition blocked any inconsistent congressional standard. *See also* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 609-610 (2d ed. 1947); F. JAMES & G. HAZARD, *supra* note 3, § 7.8, at 252.

16. The concept of burden of proof is more than just a formal technique of persuasion. The Court has noted recently that

> [w]e probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." In cases involving individual rights, whether criminal or civil, " [t]he standard of proof [at a minimum] reflects the value society places on individual liberties."

Addington v. Texas, 441 U.S. 418, 425 (1978) (citing Tippet v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)). Terms such as "standard of proof" and "prima facie case" refer to procedural and evidentiary issues, but they also strike at the heart of substantive constitutional and statutory proscriptions. *See* Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 208-09 (1979).

sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[17] The purpose of this Article, therefore, is to propose such a coherent approach to the allocation of the burdens of pleading and proof in discrimination cases. Towards this end, part II of the Article examines the definitional and operational effect of the terms and concepts that courts traditionally use to allocate burdens, since a clear understanding of both the problem and the analytical framework suggested herein requires familiarity with the semantics of the burden of proof concepts. Part III then identifies the problem and its sources and considers the statutory as well as the constitutional substantive discrimination theories enunciated by the Supreme Court.

Part IV of the Article discusses the basic propositions for the suggested approach, and part V explores the procedural and public policy reasons for their adoption. It may be helpful, however, to briefly state these propositions at the outset. First, the courts should adopt a "but for" rule on the element of causation and apply it consistently.[18] Second, in the pleading stage of a case, the plaintiff *should have* the burden of pleading a discrimination claim pursuant to rule 8(a) of the Federal Rules of Civil Procedure.[19] Third, if the defendant asserts an independent ground of justification—whether based upon a specific statutory exception or a judicially created defense—it should be treated as an affirmative defense, which the defendant, under rule 8(c) of the Federal Rules of Civil Procedure, has the burden of pleading.[20] Fourth, the establishment of a prima facie case should create a presumption rather than an inference of discrimination.[21] Fifth, if the defendant does not rebut the presumption of discrimination either by successfully attacking the evidentiary support of the plaintiff's prima facie case or, more importantly, by proving an independent ground of justification, plaintiff in most situations should be entitled to relief.[22] In addition, when a defendant asserts an independent ground of justification based upon either a specific statutory exception or a judicially created defense, he should have both the initial burden of producing evidence and the ultimate burden of persuasion on that

17. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
18. *See* notes 208-25 *infra* and accompanying text.
19. *See* note 226 *infra* and accompanying text.
20. *See* notes 227-46 *infra* and accompanying text.
21. *See* notes 247-70 *infra* and accompanying text.
22. *See* notes 274-95 *infra* and accompanying text.

defense.[23] Sixth, the preponderance of the evidence standard should apply to determine whether the defendant has proven justification,[24] and the plaintiff at all times should have the civil litigant's traditional burden of establishing his claim by a preponderance of all the evidence. In this connection, the court should abandon the "articulation" standard because it tends to inject into discrimination cases the scintilla of evidence rule, which generally has been rejected by the federal courts.[25] Last, the pretext stage of proof enunciated in *McDonnell Douglas Corp. v. Green*[26] should be eliminated, since it allows for the analytically bankrupt possibility that a court could find both the defense of a legitimate, nondiscriminatory reason or business justification and a pretext in the same case.[27]

II. Burdens of Proof: Definitions and Concepts

It is essential at the outset to discuss briefly the terms and concepts most commonly used in the allocation of the burdens of proof. A court will often use these terms and concepts interchangeably and will rarely bother to remove the confusion by explicating their exact meanings. Therefore, a clear understanding of discrimination cases is possible only for those who have a firm grasp on the semantical jungle that shrouds this confused area of the law.[28]

A. Relevant Elements and Issues

When a plaintiff comes into a court demanding that it take some action, substantive law determines the relevant elements or issues[29] that must be established or resolved before the plaintiff's demands will be met. In other words, before the court can arrive at a final decision, it must first rule upon the various elements of the plaintiff's case. Substantive law thus can be viewed as rules of conditional imperatives that have a syllogistic form: *If* such and such,

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23. *See id.*

24. *See* notes 296-302 *infra* and accompanying text.

25. *See* note 301 *infra* and accompanying text.

26. 411 U.S. 792 (1973).

27. *See* notes 298-302 *infra* and accompanying text.

28. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979) (burden of proof more than a semantic exercise).

29. The proper designation for factual issues that must be decided by a court has been the subject of lively debate. Thus, for example, courts have discarded terms such as "principle fact," "ultimate fact," and "operative fact" in favor of the term "material fact," since the existence or nonexistence of the former terms may be disputed. Michael & Adler, *The Trial of an Issue of Fact: I*, 34 Colum. L. Rev. 1224, 1252 (1934).

and unless so and so, *then* the defendant is liable. In the absence of either direct evidence or an admission of liability by the defendant, a rule of law that imposes upon the plaintiff the obligation to plead and prove all of the "ifs," "ands," and "unlesses" would make it particularly difficult—if not impossible—for him ever to prevail.[30]

Fortunately, the courts and the legislatures have not adopted such a rule. Instead, they have interpreted substantive law to impose upon defendants certain obligations to plead and prove some of the "ifs" and "unlesses." Any civil case thus can be viewed in terms of this division: *If* the plaintiff pleads and proves *A, B,* and *C, then* the plaintiff's demands will be met *unless* the defendant establishes *X, Y,* and *Z.* In a civil action for negligence, for example, *A, B,* and *C* might represent proof of the defendant's negligence and the damages resulting therefrom. *X, Y,* and *Z* might represent contributory negligence, assumption of the risk, or the contention that the plaintiff's injury was beyond the scope of the defendant's liability. In a discrimination case, *A, B,* and *C* might represent proof of disparate impact or disparate treatment,[31] and *X, Y,* and *Z* might represent either a statutory defense or a judicially created defense such as business necessity or a legitimate, nondiscriminatory reason. In other words, our adversary system of justice imposes the obligation upon the plaintiff to plead and prove a prima facie case and upon the defendant to plead and prove affirmative defenses.

B. The Prima Facie Case Doctrine

Since the plaintiff in a civil action is the party who is seeking to change the status quo by inducing the court to take some action in his favor, policy considerations of fairness suggest that the plaintiff should be required to prove his claim to relief. The critical question, however, concerns the extent to which the plaintiff must prove his case at the outset. Is it fair, for example, to require the plaintiff to prove each and every substantive element of his case before he is entitled to the relief he seeks? It is in response to this policy question that the "prima facie case" doctrine is directed. Alternatively stated, the prima facie case doctrine helps to answer the following question: In the absence of conflicting evidence, how

30. *See* Cleary, *Presuming and Pleading: An Essay On Juristic Immaturity,* 12 STAN. L. REV. 5, 7 (1959).

31. *See* notes 90-100 *infra* and accompanying text.

much evidence on the elements of his case should a plaintiff be required to submit in order to sustain a judgment in his favor? Substantive law thus becomes important, for it sets forth those elements that are deemed sufficient to entitle the plaintiff to recover—*if* he can prove them, and *unless* the defendant establishes other offsetting elements.[32]

C. *Affirmative Defenses*

At common law an affirmative defense was a defense that both admitted the validity of the plaintiff's claim and at the same time set up new matters to avoid liability. This type of defense served a threefold purpose; it provided the basis for the judgment, a means of forming issues of fact, and a record of adjudicated matters. In performing these functions, the defense also gave sufficient notice to the opposing party to enable him to prepare a responsive pleading and to prepare for trial.[33]

Rule 8(c) of the Federal Rules of Civil Procedure is the lineal descendant of this common law rule of "confession and avoidance," which allowed a defendant who was willing to admit the plaintiff's prima facie case to allege new matters that would defeat the plaintiff's otherwise valid claim.[34] Rule 8(c) requires that a party responding to any claim for relief must affirmatively plead any matter constituting an avoidance or affirmative defense. The rule enumerates nineteen of the most commonly invoked affirmative defenses, but this list is not intended to be exhaustive.[35] The

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32. Cleary, *supra* note 30, at 7-8. A social policy is reflected in the rule that requires the plaintiff to carry the burden of producing evidence on a disputed issue at the very beginning of the trial. As the authors of a recent treatise on evidence stated,

> Thus, in a typical negligence case, plaintiff initially has the burden of producing evidence of defendant's negligence. Plaintiff is the legal aggressor, and the substantive law reflects the social policy of placing the burden of justifying his aggression upon the party seeking to disturb the status quo by exacting damages from defendant. At trial the penalty for not producing evidence when obligated to do so is nonsuit, dismissal, or adverse finding, or when trial is by jury, directed verdict or adverse instruction to the jury.

1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 66, at 526 (1980).

The term "prima facie case" is often used in two senses and, like the term "burden of proof," is ambiguous and often misleading. It may mean evidence that is sufficient to get to the factfinder; on the other hand, it may mean evidence that is sufficient to shift the burden of producing evidence. *See* 9 J. WIGMORE, *supra* note 3, § 2494.

33. For a discussion of affirmative defenses, see 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1270 (1969).

34. *Id.*

35. FED. R. CIV. P. 8(c). The rule provides as follows:

Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth af-

draftsmen of the federal rules recognized that certain defenses other than those specifically enumerated should be affirmatively set forth to be put in issue. Rule 8(c), therefore, provides that any "other matter constituting an avoidance or affirmative defense" must be pleaded. Neither the rule itself nor federal case law, however, has set forth a universal test for courts to use in determining whether a defendant is required to plead affirmatively a defense not specifically enumerated. Courts usually rely upon a variety of factors in making this determination; considerations of policy, fairness, and probability of success, however, typically are given the greatest weight.[36]

As a general rule, the procedural effect of pleading an affirmative defense is to place upon the defendant the burdens of pleading, production of evidence, and persuasion.[37] The defendant thus carries a heavy burden by pleading such a defense, but if he successfully meets this burden, he generally will win his case.

D. The Three Burdens: Pleading, Production of Evidence, and Persuasion

A leading characteristic of the Anglo-American procedural system is its adversary nature. In civil litigation the decisions of whether to initiate and prosecute the litigation, investigate the pertinent facts, and present evidence and legal arguments to the courts generally are left to the parties themselves. The court's function, in general, is limited to deciding, on the evidence presented, the claims submitted by the parties. Since this system requires that all evidence be presented by the parties themselves, the courts have devised procedural rules to dispose of those cases in which either the claim or the evidence is so inadequate—or so conflicting—that neither party can convince the factfinder of his version of the case. The burdens of pleading, production of evidence, and persuasion are the procedural devices that courts have developed to aid them in making this determination.[38]

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firmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in hankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

36. *See* C. WRIGHT & A. MILLER, *supra* note 33, § 1271.

37. *See id.* § 1271, at 311-16.

38. The subject of hurdens of proof in civil litigation has received extensive treatment in the literature. *See, e.g.*, F. JAMES & G. HAZARD, *supra* noto 3, §§ 7.5-.9; E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 72-86 (1956); J.

The burden of pleading imposes upon a party the obligation to notify his opponent and the court, in the appropriate manner, of the elements upon which he intends to rely either to sustain or to defeat liability. The policy behind the pleading burden is to provide notice to the courts and to the other party of the nature of a claim or defense upon which evidence will be presented to the court.[39]

The burden of producing evidence, or—as it is sometimes called—the burden of going forward with the evidence, is the obligation imposed upon a party during trial to present evidence on the element at issue. The evidence presented must be of sufficient substance to permit the factfinder to act upon it. This burden aids the court in determining whether, if the trial were halted at the conclusion of the party's presentation, the court would immediately decide the case itself or instead send it to the jury. In jury cases the penalty that is imposed upon a party who has failed to meet the burden of production on a particular element of the case is to have that element taken away from the jury through one of a variety of procedural devices such as nonsuit, directed verdict, or dismissal. Thus, the burden of producing evidence first comes into play at the beginning of trial.[40]

The burden of persuasion refers to the risk of uncertainty about an element's resolution. When the parties are in dispute over a material element of a case, the party having the burden of persuasion on that element will lose if the factfinder's mind is in equipoise after he has considered all the relevant evidence.[41] The degree of certainty required to determine whether the burden of persuasion has been met is subject to different standards; for example, some cases have relied upon the preponderance of the evidence test, while others have required a showing of clear and convincing evidence.[42] In a jury case the burden of persuasion is introduced to the jury by the court's instructions. Jurors are told what to do if they find that the evidence favors either the plaintiff

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THAYER, *supra* note 11, at 353-89; 9 J. WIGMORE, *supra* note 3, §§ 2485-2489; Cleary, *supra* note 30, at 15-25; Dworkin, *Easy Cases, Bad Law, and Burdens of Proof*, 25 VAND. L. REV. 1151 (1972); James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961); Laughlin, *The Location of the Burden of Persuasion*, 18 U. PITT. L. REV. 3 (1956); Morgan, *How to Approach Burden of Proof and Presumptions*, 25 ROCKY MTN. L. REV. 34 (1952-1953).

39. *See* Gomez v. Toledo, 446 U.S. 635 (1980); F. JAMES & G. HAZARD, *supra* note 3, §§ 2.1-.3; 5 C. WRIGHT & A. MILLER, *supra* note 33, § 1202.

40. *See* F. JAMES & G. HAZARD, *supra* note 3, § 7.7, at 245.

41. *See id.* § 7.6, at 243.

42. *See* McBaine, *supra* note 3.

or the defendant, as well as what to do if they find that the evidence is equally balanced on the various elements of the case. In a case tried by the court, the burden of persuasion becomes relevant only when the judge, after all the evidence has been presented, finds that the evidence for both sides is equally persuasive.[43]

The burdens of production and persuasion may or may not be assigned to the same party. A number of cases have assigned to the plaintiff the burdens of pleading, production, and persuasion on the elements necessary to establish a prima facie case, but have assigned to the defendants these same burdens on affirmative defenses.[44] The plaintiff, for example, may be required to plead, introduce evidence, and persuade the factfinder on the existence of element *A*, while the defendant may have to plead and prove the existence of element *B* as an affirmative defense.

E. Tests for Allocating the Burdens

As stated above, the courts have not yet developed any universal rule or set of policy considerations for courts to rely upon in determining how the three burdens should be allocated between the parties. If legislation has specified which party must bear a particular burden, this resolves the issue, so long as the statute does not transgress constitutional limitations.[45] Absent clear directives from the legislative branch, however, the nearest thing to a general rule for allocating burdens is the one that imposes upon the plaintiff the burden of pleading and proving the elements of a prima facie case through a showing of a causal connection between his injury and the defendant's conduct. A corollary to this rule requires the plaintiff to plead and prove *only* those facts necessary to establish a prima facie case; if the defendant intends to rely upon the nonexistence or nonfulfillment of other conditions that are not necessary to the plaintiff's case, then he must plead and prove those conditions under the affirmative defense rule.[46]

Many different burden allocation tests have emerged from the cases and literature, but there is little consensus on a favored approach. All the tests, however, are grounded in considerations such as policy rationales, fairness, and the probability that the event in

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43. *See* F. JAMES & G. HAZARD, *supra* note 3, § 7.6.

44. *Id.*

45. *See* Vance v. Terrazas, 444 U.S. 252, 265-66 (1980); Patterson v. New York, 432 U.S. 197 (1977).

46. *See* F. JAMES & G. HAZARD, *supra* note 3, § 2.9, at 77-78.

question actually occurred.[47] Unfortunately, these considerations do not afford complete guidance to courts in making their determinations, though courts have made some efforts to ascribe meaning to them.[48] The courts' concern for policy considerations, for example, is reflected in Judge Clark's often quoted remark that "[o]ne who must bear the risk of getting the matter properly set before the court . . . has to that extent the dice loaded against him."[49] Courts have interpreted this remark to establish a test that places the burden for a particular element on the initiating party. Thus, this party will lose the lawsuit if notice of that element is not brought to the attention of the court, and evidence of its existence or nonexistence is not presented.[50] Considerations of fairness, on the other hand, are concerned with the possibility that evidence on a particular element may lie more within the knowledge or control of one party than another.[51] A court's concern for fairness, then, may lead it to allocate the burdens on that question to the more knowledgeable party.

Courts also give considerable weight to estimates of the probability that an event occurred by a departure from a supposed norm.[52] The probabilities may relate to the type of situation out of which the litigation arises, or they may relate to the litigation itself. The standards are quite different and often produce different

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47. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973) (citing 9 J. WIGMORE, *supra* note 3, § 2486, at 275 (3d ed. 1940)); Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959); Palmer v. Hoffman, 318 U.S. 109, 117 (1943); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939).

48. *See* F. JAMES & G. HAZARD, *supra* note 3, § 7.8, at 249-53; Cleary, *supra* note 30, at 8-14; Laughlin, *supra* note 38.

49. C. CLARK, *supra* note 15, at 609.

50. Judge Clark has defined the meaning of the word "policy" in this context as follows:

> [J]ust as certain disfavored allegations made by the plaintiff . . . must be set forth with the greatest particularity, so like disfavored defenses must be particularly alleged by the defendant. These may include such matters as fraud, statute of frauds . . . statute of limitations, truth in slander and libel . . . and so on. In other cases the mere question of convenience may seem more prominent, as in the case of payment, where the defendant can more easily show the affirmative of payment at a certain time than the plaintiff can the negative of nonpayment over a period of time. Again it may be an issue which may be generally used for dilatory tactics, such as the question of the plaintiff's right to sue . . . a vital question, but one usually raised by the defendant on technical grounds. These have been thought of as issues "likely to take the opposite party by surprise," which perhaps conveys the general idea of fairness or the lack thereof, though there is little real surprise where the case is well prepared in advance.

Id. (footnotes omitted).

51. *See* Gomez v. Toledo, 446 U.S. 635 (1980).

52. *See* Cleary, *supra* note 30.

results. If one assumes, for example, that most people pay their bills, the probability is that any bill selected at random has been paid. A plaintiff suing to collect a bill, therefore, would be responsible for demonstrating nonpayment as an element of his prima facie case. If, however, one views the probabilities solely from the standpoint of those bills upon which suit is brought, he will reach a different conclusion: plaintiffs are not prone to sue for paid bills; thus, the probability is that the bill is unpaid. Hence, from this viewpoint payment would be an affirmative defense.[53] If this rationale were applied to discrimination cases, and it were assumed that individuals comply with the law, the probability is that a charge of discrimination against a defendant is unfounded. Therefore, a plaintiff bringing suit would have to establish discrimination as an element of his prima facie case. If, however, one analyzes the situation from the vantage point of either the legislative history or the number of suits that are brought,[54] the result will be different, since plaintiffs are not likely to sue when they have been fairly treated; hence, compliance with the law would be an affirmative defense.

F. Degrees of Belief

The judiciary and the legislatures have devised different standards for the evaluation of evidence to meet the burden of persuasion in different types of cases and issues. The most obvious difference, of course, is between criminal and civil cases. Courts and legislatures have designed standards as a means to control the mental processes of the factfinder and as a guide to judges in cases tried by the court without a jury. These standards essentially provide a measurement of the persuasive force required for the fulfillment of the burden of persuasion. The tests generally fit into one of the following three categories: Proof by a preponderance of the evidence; proof by clear and convincing evidence; and proof beyond a reasonable doubt.[55]

The test applied in most civil cases requires a preponderance of the evidence to be in favor of the party who has the burden of proof on an issue. The terms "preponderance" and "the greater

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53. *Id.* at 13.

54. *See* note 1 *supra*. *Cf.* Setser v. Novack Inv. Co., 638 F.2d 1137, 1143-44 (8th Cir. 1981) (affirmative action plan is not a complete defense to claim of reverse discrimination). *But see* United Steelworkers v. Weber, 443 U.S. 193 (1979). *See generally* Belton, *supra* note 2.

55. *See generally* McBaine, *supra* note 3.

weight of evidence" generally are considered synonymous; they simply mean that the factfinder must believe that the existence of a fact is more probable than its nonexistence.[56] A court's instruction to a jury usually includes a cautionary statement that the greater weight or preponderance of the evidence does not necessarily mean either the greater quantity of evidence or the larger number of witnesses. The typical instruction goes on to state that the standard instead refers to the greater persuasiveness of the evidence, and that the jury must factor the credibility of witnesses and the weight to be given their testimony into the evaluation of all the evidence as a whole.[57] Notwithstanding these elaborate statements, however, it is generally believed that the instructions actually mislead and confuse the jury rather than enlighten them.[58] They are also believed to have little, if any, effect upon the thinking process of the average juryman, whose intuitions, feelings, and experiences are in fact what influence his convictions about the greater weight of the evidence.[59]

A second standard of proof used in civil cases is expressed in a variety of ways and lies somewhere between the preponderance of the evidence and proof beyond a reasonable doubt, which is the standard used in criminal cases. It is most commonly articulated as proof by "clear and convincing evidence."[60] Other similar expressions include "clear, precise, and indubitable evidence," "clear conviction without hesitation," "clear, satisfactory, and convincing evidence," and the like.[61] This higher standard of proof usually becomes a substantive consideration in actions in which the court believes that the status quo should not be altered by a "mere pre-

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56. Proof by a preponderance or the greater weight of the evidence is the common standard for civil proceedings. 9 J. WIGMORE, *supra* note 3, § 2498. Under this test the trier of fact

> must believe that it is more probable that the facts are true or exist than it is that they are false or do not exist; but, it is not necessary to believe that there is a high probability that they are true or exist, or necessary to believe to a point of almost certainty, or beyond a reasonable doubt, that they are true or exist, or necessary to believe that they certainly are true or exist.

McBaine, *supra* note 3, at 261; *see* C. MCCORMICK, *supra* note 3, § 339, at 794-95.

57. *See* Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 64 (1933).

58. *See* Morse, *Evidentiary Lexicology*, 59 DICK. L. REV. 86 (1954).

59. *See* McBaine, *supra* note 3; Morse, *supra* note 58.

60. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (school desegregation case); United Steelworkers v. Warrier & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960) (labor case). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

61. *See* McBaine, *supra* note 3, at 253.

ponderance of evidence."[62]

G. Presumptions and Inferences

Few areas of the law have produced as much confusion and discord as the subject of presumptions.[63] Presumptions contain elements of both substantive and procedural law and are caught in a conflict between modern doctrinal development and judicial inertia. They have been defined, classified, explained, and criticized in numerous court opinions and in volumes of legal commentaries.[64] One basic source of conflict concerns the exact nature of their precise procedural effect. Closely related to this conflict is the tension between the varying theories on the quantity and quality of evidence required to rebut a presumption. Moreover, jurists and scholars alike differ on the propriety of giving the jury instructions about presumptions. Courts and commentators have made assiduous efforts at classification and have carefully articulated the bases on which various presumptions rest. This overall confusion is man-

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62. This intermediate burden of proof standard—clear and convincing evidence—reduces the probability that an innocent party will be held liable. *See* Addington v. Texas, 441 U.S. 418, 432 (1979); *In re* Winship, 397 U.S. 358, 369-70 (1970) (Harlan, J., concurring). This standard requires a belief by the factfinder

> that it is highly probable that the facts are true or exist; while it is not necessary to believe to the point of almost certainty, or beyond a reasonable doubt that they are true or exist, or that they certainly are true or exist; yet it is not sufficient to believe that it is merely more probable that they are true or exist than it is that they are false or do not exist.

McBaine, *supra* note 3, at 262-63. *See also* J. MAGUIRE, EVIDENCE 180-81 (1947); C. MCCORMICK, *supra* note 3, § 340(b), at 796-98; J. WEINSTEIN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 17 (5th ed. 1976). This intermediate standard is also applied to proceedings in which a party attempts to prove fraud, undue influence, the provisions of a lost will or deed, a parol gift, a mutual mistake sufficient to allow a court to reform a contract, and the invalidity of a notary's certificate. 9 J. WIGMORE, *supra* note 3, § 2498. The phrases "clear and convincing," "clear, unequivocal, and convincing," "convincing proof," and "clear and substantial" have all been used to indicate an intermediate standard.

63. "Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair." Morgan, *Presumptions*, 12 WASH. L. REV. 255, 255 (1937).

64. *See, e.g.*, C. MCCORMICK, *supra* note 3, §§ 336-347; J. THAYER, *supra* note 11, at 313-52; 9 J. WIGMORE, *supra* note 3, §§ 2483-2540; Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324 (1952); Hecht & Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U. L. REV. 527 (1978); Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275; Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953); McCormick, *Charges on Presumptions and Burden of Proof*, 5 N.C. L. REV. 291 (1927); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931) [hereinafter cited as *Observations*]; Morgan, *Techniques in the Use of Presumptions*, 24 IOWA L. REV. 413 (1939); Reaugh, *Presumptions and the Burden of Proof* (pts. 1-2), 36 ILL. L. REV. 703, 819 (1942).

ifest in discrimination cases, particularly in the characterization of the plaintiff's prima facie case, which is sometimes referred to as a presumption and at other times as an inference.[65]

A presumption, generally defined, is a rule of law that deals with the assumption—at least temporarily—of a certain factual situation based upon proof of other usually logically related facts.[66] Presumptions usually are developed for reasons of convenience, policy, probability, or necessity. The weight of authority holds that genuine presumptions are neither evidence nor substitutes for evidence, but are merely procedural devices that shift the burden of producing evidence to the party against whom it operates. They are rebuttable and not conclusive, though they are more than mere permissible inferences.[67] Indeed, a "conclusive presumption" is not a presumption at all, but rather is a rule of substantive law. Although there is nothing sacrosanct about the term presumption, and many variations of the term theoretically could exist, only those devices that operate as burden-shifters are properly labelled presumptions.[68] A presumption that purports to operate against a party who has both the burden of persuasion and the burden of going forward with the evidence, therefore, is anomalous and redundant, since it merely restates the already existing burden of proof on a given issue. Nevertheless, inaccurate use of the term to include other concepts has resulted in confusing and incongruous attempts to apply a presumption analysis in inappropriate situations.

An inference, unlike a presumption, is a deduction warranted by human reason and experience that the factfinder *may* make from established facts. The term refers to a process of reasoning from a premise to a conclusion, the end result of which has the directive force of a rule of law—which characterizes a presumption.[69] For example, the doctrine of *res ipsa loquitur*,[70] which makes the finding of a set of facts in itself sufficient to submit an issue to the jury, does not create a presumption of negligence. The jury may find negligence, but it is not required to do so even in the

65. *See* note 135 *infra* and accompanying text.

66. This is a simplified definition based upon a composite of those definitions that are stated in various sources. *See* note 64 *supra*.

67. *See* Hecht & Pinzler, *supra* note 64, at 529.

68. *See* Gausewitz, *supra* note 64, at 325.

69. *See* Legille v. Dann, 544 F.2d 1, 5 n.24 (D.C. Cir. 1976).

70. *See generally* Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).

absence of rebuttal evidence. Indeed, if an inference is truly mandatory, it amounts to a presumption. "Permissive inference," therefore, is a redundant phrase. The use of the term "compulsory inferences," however, is justified on occasion to indicate an inference so strong that it must be acceptable to a reasonable mind, but not strong enough to amount to a recognized presumption.

III. The Problem and Its Sources

A. *The Causation Principle*

Federal laws that prohibit discrimination[71] generally contain broad prohibitory language which makes it unlawful to discriminate on the basis of race, sex, national origin, religion, or age. Some of these laws make it unlawful to engage in "intentional discrimination";[72] others simply use the term "discriminate" without the qualification of "intent";[73] and still others contain neither version of these terms.[74] Courts have held that a determination of discrimination requires a finding of a nexus between the plaintiff's claim and the defendant's conduct.[75] The operative nexus between the

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71. The concept of "discrimination" is susceptible to varying interpretations. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (Powell, J., plurality opinion); Belton, *supra* note 2; Fiss, *supra* note 5.

72. *E.g.*, Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1976). Section 706(g) provides that "[i]f a court finds that the respondent has intentionally engaged in or is intentionally engaging in" prohibited practices, then the court may order an appropriate remedy. The major substantive provisions under Title VII do not use the term "intent." *Id.* §§ 2000e-2(a)(1)-2(a)(2). *But see id.* §§ 2000e-2(h), -5(g).

73. The Equal Pay Act of 1963 provides that "[n]o employer having employees subject to any provisions of this section shall discriminate . . . on the basis of sex by paying [unequal wages]." 29 U.S.C. § 206(d) (1976).

74. *E.g.*, U.S. Const. amend. XIV, § 1. The fourteenth amendment states that "[n]o State shall make or enforce any laws which . . . deny to any person within its jurisdiction the equal protection of the laws." The Civil Rights Statute of 1866, 42 U.S.C. § 1981 (1976), does not use the terms "discriminate," "effect," or "intent" but simply provides for "the same right . . . to make and enforce contracts"; this statute has been held, however, to prohibit racial discrimination in the private sector. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (employment); *accord*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (housing). *See also* 42 U.S.C. § 1983 (1976).

75. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 489 (1979) (Rehnquist, J., dissenting); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977) (constitutional case); EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 194 (3d Cir. 1980) ("There must be a logical and rational connection between the basic facts presented in evidence and the ultimate fact to be inferred."); Smith v. University of N.C., 632 F.2d 316, 336 (4th Cir. 1980) (age discrimination case) ("While *Mt. Healthy* arises under the First and Fourteenth Amendments, both in it and in our ADEA case, the question of causality is involved in essentially the same fashion."); De La Cruz v. Tormey, 582 F.2d 45, 59 (9th Cir. 1978) (equal protection and Title IX); Rogers v. EEOC, 403 F. Supp. 1240, 1242 (D.D.C. 1975) (employment discrimination). *See also* Young v. Klutznick, 652 F.2d 617, 630-31 nn.3-5 (6th Cir.

prohibited conduct and liability generally is expressed in terms such as "based on,"[76] "because of,"[77] "on the ground of,"[78] "adversely affect,"[79] or "tend to."[80] This nexus generally is referred to as either causation-in-fact or the causation principle.[81] The justification for the causation principle is that legal liability should be imposed only in those cases in which the defendant's conduct and the plaintiff's claim are so significantly and closely related that the law should impose liability.[82]

While the effective enforcement of discrimination laws requires evidence that affords a reasonable basis upon which to find a causal connection between the plaintiff's claim and the defendant's conduct, such a finding is not, in all cases, susceptible of clear and certain demonstration. Moreover, it is increasingly rare to encounter the kinds of direct and overt practices that originally prompted Congress to enact the discrimination laws. Many claims of discrimination today deal with systemic, subtle, and sterotypical practices—which developed when overt discrimination was lawful—and are imbedded in basic institutional and organizational structures.[83] Thus, if the requirements for proof of a causal rela-

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1981) (Keith, J., dissenting).

76. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976).

77. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), -2(c)(1) (1976).

78. *See, e.g.*, State and Local Financial Assistance Act (Revenue Sharing Act of 1972), 31 U.S.C. §§ 1221, 1242(a)(1) (1976). The Act provides that "[n]o person in the United States, shall *on the ground of* race, color, national origin, or sex he excluded from participation in, be denied the benefits of, or be subject to discrimination [in federally funded programs]." (emphasis added). *See also* Omnibus Crime Control and Safe Street Act of 1968, 42 U.S.C. § 3766 (1976).

79. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2) (1976).

80. *Id.*

81. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971). Dean Prosser summarized the notion as follows:

> Causation is a fact. It is a matter of what has in fact occurred. A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only the positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event.

Id. § 41, at 237 (footnotes omitted). *See generally* Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

82. As Dean Prosser stated, "Some boundaries must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." W. PROSSER, *supra* note 81, § 41, at 237.

83. *See, e.g.*, City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978) ("Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals."); Teamsters v. United States, 431 U.S. 324, 365 n.51 (1977) ("The far-ranging ef-

tionsbip are too rigorous, effective enforcement will not be achieved.[84] On the other hand, lenient proof requirements may result in a finding of discrimination when the defendant's conduct is legitimate, arbitrary, or simply unreasonable.[85]

A difficult substantive and policy problem that the causation principle presents in discrimination cases is that concepts such as "because of," "based on," "tend to," or "adversely affect" may be construed as requiring any one of the following: (1) An effects test; (2) an intent test; (3) both effect and intent; or (4) either effect or intent.[86] Major substantive doctrines have developed around these alternatives; these doctrines, however, have been relied upon by tlie courts in ways that contribute to rather than clarify tlie confusion about the allocation of the burdens of pleading and proof. No attempt is made here to resolve this fundamental substantive problem;[87] since it generally is agreed, however, that procedure ex-

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fects of subtle discriminatory practices have not escaped the scrutiny of the federal courts . . . ."); Franks v. Bowman Transp. Co., 424 U.S. 747, 764-65 n.21 (1976) ("employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs."); Rodriquez v. Board of Educ., 620 F.2d 362, 364 (2d Cir. 1980) (discrimination unaccompanied by pecuniary loss is "subtle" and remediable even when other terms of employment are not unequal); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 231 (5th Cir. 1974) (recognizing that procedures which depend almost entirely on subjective evaluations and favorable recommendations from immediate supervisors may provide a "ready mechanism" for discrimination).

84. *See, e.g.,* County of Washington v. Gunther, 101 S. Ct. 2242 (1981); Jackson v. United States Steel Corp., 624 F.2d 436, 440-41 (3d Cir. 1980) (courts should not be "overly demanding" in the proof required to establish a prima facie case). According to the analysis in *Gunther,* Congress intended Title VII's prohibition of discriminatory employment practices to be broadly construed. 101 S. Ct. at 2248. Thus, the Court stated that Title VII's proscription applies "not only [to] overt discrimination but also [to] practices that are fair in form, but discriminatory in operation." *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). "The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach." *Id.*

85. Powell v. Syracuse Univ., 580 F.2d 1150, 1156-57 (2d Cir. 1978) ("[T]he law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory."); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1257 (5th Cir. 1977) ("Title VII and section 1981 do not protect against unfair business decisions—only against decisions motivated by unlawful animus.").

86. Disagreements among courts within the various circuits over the appropriate analytical approach are often manifest in the cases. *See, e.g.,* Chrisner v. Completo Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981); Wright v. National Archives & Records, 609 F.2d 702 (4th Cir. 1969). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-85 (1978) (Marshall, J., concurring in part and dissenting in part); Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 YALE L.J. 1269 (1968) (discussing the problem in the context of the National Labor Relations Act); Fiss, *supra* note 5.

87. For a discussion of some of the substantive analytical problems under statutes

ists only for the purpose of effectively implementing substantive law, a brief review of the substantive developments is necessary.

1. Intent v. Effect: The Statutory Cases

Title VII of the Civil Rights Act of 1964[88] is the principal statute under which the major substantive theories of discrimination law have developed.[89] Congress enacted Title VII to prohibit discrimination on the basis of race, religion, sex, or national origin. The goal of Title VII could have been accomplished in a variety of ways. Congress could have expressed the prohibition in terms of motive or intent, or it could have defined discrimination solely in terms of effect. Unfortunately, the statutory language that Congress chose did not identify clearly which of these concepts is necessary for a finding of unlawful discrimination. The Supreme Court, however, has interpreted Title VII to embrace both substantive concepts.

In *Griggs v. Duke Power Co.*[90] the Supreme Court, in its first major Title VII case, adopted an effects test and specifically rejected an intent or motive test. In rejecting the argument that discriminatory intent is an essential element in a violation of Title

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prohibiting discrimination, see Belton, *supra* note 2; Fiss, *supra* note 5.

The role of discriminatory motivation as an indispensable element in race discrimination cases has been the subject of much commentary. According to Professor Brest, "[t]he Court's entire line of civil rights precedent, beginning in 1879 with *Strauder v. West Virginia* [100 U.S. 303 (1880)], explicitly turns on the race-dependence of the practices invalidated." Brest, *The Supreme Court 1975 Term-Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 27 (1976) (footnote omitted). *But see* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208-09 (1970).

88. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978).

89. Title VII was the first comprehensive federal statute to make it an unlawful employment practice for employers, unions, and employment agencies to discriminate on the basis of race, sex, national origin, or religion. *See* Belton, *supra* note 1. Many of the substantive and procedural developments under Title VII have been applied to other forms of discrimination such as age, equal pay, credit, housing, and public accommodation. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (Age Discrimination in Employment Act and Title VII share a common purpose and the same construction should apply to both); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980) (many courts, in setting forth the elements of proof and the allocation of the burdens of proof in discrimination cases, have borrowed from Title VII law); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (housing discrimination under 1968 Fair Housing Act); United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) (housing); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974) (Title VII prima facie concept applicable in housing discrimination case under 42 U.S.C. § 1982 (1976), and the Fair Housing Act of 1968); Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 111 (D. Conn. 1979) (Title VI and the Revenue Sharing Act).

90. 401 U.S. 424 (1971).

VII, the Court held that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' " for protected groups and "are unrelated to measuring job capability."[91] Title VII was held to be directed at the "*consequences* of employment practices, not simply the motivation."[92] *Griggs* thus established the "disparate impact" theory of discrimination.[93] Broadly read, this theory holds that facially neutral practices which have an adverse impact on the opportunities of members of protected classes—practices that on their face do not separate or classify according to an impermissible criteria—are unlawful unless the practice is shown to be mandated by business necessity or to have a manifest relationship to some legitimate interest of the defendant. Under this interpretation, *Griggs* stands for the proposition that the Title VII prohibition proscribes *any* conduct which operates as the functional equivalent of intentional discrimination.[94] Lower courts have read *Griggs* in just this way: once a finding of disparate impact is made, courts generally do not require independent proof of a specific intent to bring about that impact.[95]

In *McDonnell Douglas Corp. v. Green*,[96] decided several years after *Griggs*, the Court enunciated the "disparate treatment" theory of discrimination under Title VII. Disparate treatment, unlike disparate impact, requires a finding of a specific intent to discriminate. A violation under the disparate treatment theory requires proof from which the factfinder can infer—if the conduct remains unexplained—that more likely than not the action was "based on a

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91. *Id.* at 432.

92. *Id.*

93. This test is referred to in many forms: Disproportionate impact; discriminatory impact; disparate effects; adverse impact or effects; and disparate effects. The Court in Washington v. Davis, 426 U.S. 229, 242 (1976), used the terms "discriminatory impact," and "disproportionate impact" interchangeably. The term "effects" was used throughout *Davis* and Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252 (1977).

94. *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Fiss, *supra* note 5, at 296-304.

95. *See* United States v. Lee Way Freight, Inc., 625 F.2d 918, 942 (10th Cir. 1979) ("in reexamining disparate impact, it should be recognized that it is not necessary to show that there has been intentional disparate treatment directed against any particular member of that class. The disparate impact or consequence is enough."). *But see* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 143 n.23 (3d Cir. 1977) (court, comparing the disparate impact theory with the constitutional standard, *see* notes 116-24 *infra* and accompanying text, noted that once disparate impact is shown, the normal course will be to search out other facts that, in conjunction with the impact, will demonstrate discriminatory purpose).

96. 411 U.S. 792 (1973).

discriminatory criterion illegal under the Act."[97] Proof of discriminatory intent, however, can be inferred from circumstantial evidence.[98]

McDonnell Douglas did not reverse the *Griggs* disparate impact theory; indeed, it preserved the *Griggs* effects test by reiterating the premises upon which it had been decided.[99] Yet it was this

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97. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977)). The Court has made clear that a distinction between disparate impact and disparate treatment turns on the element of intent:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Compare, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432, with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806 . . . . Either theory may, of course, be applied to a particular set of facts.

Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). *See also* Board of Educ. v. Harris, 444 U.S. 130 (1979). This distinction is analogous to the de facto/de jure distinction in school desegregation cases. *See* Moses v. Washington Parish School Bd., 276 F. Supp. 834, 840 (E.D. La. 1967); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

98. *See* Note, *The Role of Circumstantial Evidence In Proving Discriminatory Intent: Developments Since* Washington v. Davis, 19 B.C. L. REV. 795 (1978).

99. The Court reaffirmed in *McDonnell Douglas* the premise on which *Griggs* was decided by noting that the ultimate goal of Title VII is the elimination of "discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." 411 U.S. at 800. The Court, however, held that the court of appeals erred in applying the *Griggs* theory of discrimination to the facts of the case:

> The court below appeared to rely upon *Griggs* . . . in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." . . . But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives . . . . [Plaintiff], however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And [defendant] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. [Defendant] assertedly rejected [plaintiff] for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Id. at 805-06 (citations omitted). The Court later attempted to explain the distinction between *Griggs* and *McDonnell Douglas* on the ground that *Griggs* interpreted only 42 U.S.C. § 2000e-2(h). Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 n.21 (1975). Unlike 42 U.S.C.

Procrustean attempt to distinguish *Griggs* and at the same time enunciate a new theory that has become a critical source of the present confusion on the allocation of the burdens of pleading and proof in discrimination cases, since some claims of discrimination now must be analyzed from the standpoint of intent. Thus, in the disparate treatment cases courts cannot base an ultimate finding of discrimination on the effects of a practice; under *McDonnell Douglas*, plaintiffs are instead required to present evidence sufficient to support a finding of specific intent to discriminate.[100]

The Court's reading of these two theories of discrimination into Title VII has resulted in important and far-reaching consequences. One of the most significant consequences is that courts must make largely artificial judgments in many discrimination cases. Only an unsophisticated defendant will leave the kind of direct evidence of an intent that can be challenged under the laws prohibiting discrimination.[101] Thus, while the evidence of a prior

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§ 2000e-2(a)(2), however, 42 U.S.C. § 2000e-2(h), specifically refers to "intent."

100. The *McDonnell Douglas* theory of a prima facie case holds that a complainant in a discrimination case must initially carry the burden to prove discrimination. The Court stated,

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (footnotes omitted). Later, when the Supreme Court held in Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977), that intent is an element in a disparate treatment case but not in a disparate impact case, the question of how to reconcile *McDonnell Douglas* with the *Teamsters'* footnote became one of concern for the lower courts. Several courts of appeals attempted to reconcile these cases on the ground that the elements of a prima facie case give rise to an inference of discriminatory intent. *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 63 n.2 (2d Cir. 1980) (" '[p]roof of discriminatory motive is critical,' but the elements of a *prima facie* case set forth in *McDonnell Douglas* supply the requisite proof as an initial matter") (quoting Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)); Meyer v. Missouri State Highway Comm'n, 567 F.2d 804, 808 (8th Cir. 1977) ("showing of differences in treatment" necessary to establish a prima facie case under *McDonnell Douglas* "often implies discriminatory intent"), *cert. denied*, 435 U.S. 1013 (1978); Chavez v. Tempe Union High School Dist. No. 213, 565 F.2d 1087, 1091 (9th Cir. 1977) ("[a] showing of the four factors in McDonnell Douglas raises an inference of discriminatory motive"). The courts recognize, however, that it is much easier to prevail on a discrimination claim under disparate impact than under disparate treatment, *see, e.g.*, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 369 n.9 (4th Cir. 1980), and that either theory may be applied to a particular set of facts. Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980).

101. *See, e.g.*, United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.) ("in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find"), *cert. denied*, 439 U.S. 824 (1978).

history of subjective intent to discriminate was clear in *Griggs*,[102] one could only speculate about the actual intent in *McDonnell Douglas* because the decision seemed to treat the absence of prior history of racial discrimination as critical to the result.[103]

Another consequence of the Court's reading of an intent requirement into the statutory language has been the concealment and distortion of congressional approval for the disparate impact standard.[104] It has also forced the courts to create an artificial and untenable dichotomy in the statutory prohibitions against discrimination. Because of this dichotomy, a finding of discrimination depends in substantial part upon which theory is given precedence in a particular case. In *Furnco Construction Corp. v. Waters*,[105] for example, defendant had a policy of employing only bricklayers who had worked with one of its superintendents in the past; applicants who applied at the job site were not considered for employment. The company maintained a list of former employees, and defendant's superintendents used it to make their employment decisions. Defendant's alleged justification for its policy of refusing to hire at the job site was based on business necessity[106]—the need to assure that only qualified bricklayers were employed. Plaintiffs, black bricklayers who had applied at the job site and had been rejected, relied upon both the disparate treatment and disparate impact theories.[107] A majority of the Court, however, analyzed the case only under the disparate treatment theory. Notwithstanding

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102. "[P]rior to July 2, 1965, the effective date of [Title VII], . . . the Company openly discriminated on the basis of race." Griggs v. Duke Power Co., 401 U.S. 424, 426-27 (1971).

103. In attempting to distinguish *Griggs* in *McDonnell Douglas* the Court stated that "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens. . . . Respondent, however, appears in different clothing." 411 U.S. at 806 (citation omitted).

104. *Griggs* was decided before the 1972 amendments to Title VII. The legislative history of the 1972 amendment reveals that Congress generally approved of the theory that the Court had adopted in *Griggs*. *See* Teamsters v. United States, 431 U.S. 324, 390-91 (Marshall, J., dissenting); S. REP. No. 415, 92d Cong., 1st Sess. 5 & n.1 (1971), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 414 (1972); H.R. REP. No. 238, 92d Cong., 1st Sess. 8, 21-22 (1971), *reprinted in* EEOC, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 68, 80-81 (1972). *McDonnell Douglas*, decided after the 1972 amendments to Title VII, did not refer to this legislative history.

105. 438 U.S. 567 (1978).

106. *Id.* at 570-71.

107. *Id.* at 572-73.

defendant's concession that plaintiffs were fully qualified,[108] and even though the Court relied heavily on a disparate impact/business necessity analysis in reaching its result, the Court refused even to consider whether liability could be established under plaintiffs' alternative theory of disparate impact.[109] The importance of *Furnco* is not merely the Court's failure to suggest standards for determining when disparate impact or disparate treatment is the appropriate analytical approach for a particular discrimination case; the decision is also notable because it suggests that the same set of operative facts may yield a different outcome on liability depending upon which discrimination theory a court chooses to use.[110]

A more profound result of the tension between the two theories can be found in the Court's construction of section 703(h) of the Civil Rights Act of 1964, which provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide *seniority or merit system* . . . provided that such differences are not the result of an *intention* to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an

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108. *Id.* at 576 ("Furnco has conceded that [plaintiffs] were qualified in every respect for the jobs which were about to be open.").

109. *Id.* at 580-81.

110. In City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978), the Court held that "the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes." Later, in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court analyzed a disparate treatment case and stated that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579 (emphasis in original). Some courts have read this portion of *Furnco* to deemphasize the use of statistics in disparate treatment cases, even though the Court sanctioned their use in *McDonnell Douglas*. *See, e.g.*, EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980). *See generally* Belton, *supra* note 2.

The problem is most dramatically illustrated in cases in which the question of qualifications is at issue. A question often considered by the courts, for example, is whether a plaintiff or defendant has the burden on the "best qualified" issue when it seems clear that plaintiff meets the basic qualification standard. Disparate treatment analysis may suggest that the plaintiff must show that he or she is the best qualified to establish a prima facie case. *See* Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980). Disparate impact analysis, on the other hand, may require defendant to show that plaintiff is not the best qualified. *See id.* at 1203 (Swygert, J., dissenting). *Compare* Holder v. Old Ben Coal Co., 618 F.2d 1198 (7th Cir. 1980) *with* Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979). Moreover, there are disagreements among courts within the various circuits on the appropriate analytical approach to many of the discrimination cases. *See, e.g.*, Patterson v. American Tobacco Co., 634 F.2d 744 (4th Cir. 1980); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979).

> employer to give and to act upon the results of any *professionally developed ability test* provided that such test, its administration or action upon the results is not designed, *intended* or used to discriminate because of race, color, sex or national origin.[111]

The Court in *Griggs* construed this section as a congressional mandate to adopt the disparate impact theory when, for example, professionally developed ability tests are at issue; therefore, a plaintiff need not prove intent to discriminate.[112] In *Teamsters v. United States*,[113] however, the Court construed this same section to require proof of intent to discriminate in cases which deal with claims that seniority systems are unlawful under Title VII. The two lines of cases derive from the same statutory language, which speaks in terms of intent on both testing and seniority. The Supreme Court, however, has adopted different theories of discrimination for the two categories of claims. The Court has not attempted to resolve this inconsistency; indeed, it does not even seem to recognize that it exists.

Finally, there is yet one other important problem that is manifest in the two statutory theories. The defendant's basic defense to a disparate impact claim is the business necessity or job-relatedness doctrine; his basic defense to a disparate treatment claim, however, is the loosely defined doctrine of a legitimate, nondiscriminatory reason. The courts have developed several well-defined models of business necessity;[114] but they have not attempted to

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111. Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976) (emphasis added).

112. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

113. 431 U.S. 324, 343-56 (1977); *accord*, California Brewers Ass'n v. Bryant, 444 U.S. 948 (1980).

114. The business necessity defense, one of the major defenses in discrimination cases, also has its doctrinal foundations in *Griggs*. The Court in *Griggs* stated that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431 (1971). The business necessity defense is not mentioned specifically in the statutory language of Title VII. It was developed out of an interpretation of section 703(h), 42 U.S.C. § 2000e-2(h) (1976), which exempts the use of professionally developed ability tests unless they are administered or used in a manner that is intended or designed to discriminate on the basis of one of the prohibited criteria. *See* B. SCHLEI & P. GROSSMAN, *supra* note 4, at 45.

The Supreme Court has not attempted to define the contours of the business necessity defense. It is clear, however, that the defense is not limited to the kind of practices which were under scrutiny in *Griggs*. Thus, for example, the Court applied a variant of the defense in Dothard v. Rawlinson, 433 U.S. 321, 332 (1977), which was a sex discrimination case that dealt with height and weight requirements for jobs in a prison system.

The leading statement of the doctrine is found in Robinson v. Lorillard Corp., 444 F.2d

provide explicit criteria for the doctrine of a legitimate, nondiscriminatory reason, even though the Supreme Court has held that disparate treatment is the "most obvious evil that Congress had in mind when it enacted Title VII."[115] The seminal disparate treatment case, *McDonnell Douglas*, merely provided one example of an acceptable legitimate, nondiscriminatory reason for disparate treatment, namely, that an employer may refuse to hire a member of a protected class if that person has engaged in illegal activity directed at the employer.

2. Purposeful Discrimination: The Constitutional Cases

After *Griggs* a number of lower courts adopted the disparate impact analysis in discrimination cases that were brought under the equal protection clause of the fifth and fourteenth amendments.[116] The Supreme Court, however, reversed this trend in *Washington v. Davis*[117] when it made clear that the *Griggs* statutory disparate impact test is not applicable to constitutional claims. Rejecting the court of appeals' holding that a finding of disparate impact made out a prima facie constitutional violation, the Court in *Washington* held that because "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race,"[118] official action is not unconstitutional "*solely* because it

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791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), in which the court construed *Griggs* and other lower court decisions on business necessity and held that

> [c]ollectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Id. at 798 (footnotes omitted). Under this formulation of the business necessity test, it is the defendant's burden to show the absence of acceptable alternative practices. *But see* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

115. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). One commentator has argued that the loosely defined defense of a legitimate, nondiscriminatory reason is an extension of the "just cause" defense in labor law union contract cases. Blumrosen, *Strangers No More: All Workers Are Entitled To "Just Cause" Protection Under Title VII*, 2 LAB. REL. L.J. 519 (1978).

116. *See, e.g.*, cases cited in Washington v. Davis, 426 U.S. 229, 244 n.12 (1976).

117. 426 U.S. 229 (1976).

118. *Id.* at 239.

has a racially disproportionate impact."[119] The Court held that the plaintiff instead must show a "racially discriminatory purpose"[120] as part of his prima facie case.[121]

The Supreme Court has never fully explored the parameters of the constitutional discriminatory purpose requirement. In *Washington v. Davis* the Court said merely that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . . It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[122] Later, the Court in *Personnel Administrator v. Feeney*[123] coupled its rejection of a foreseeability test with the following statement: "[Discriminatory purpose] implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an

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119. *Id.*

120. *Id.* The Court noted that "[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standard applicable under Title VII, and we decline to do so today." *Id.* The Court did say, however, that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242.

The more recent developments of the requirement to show purposeful or intentional discrimination in equal protection cases had their genesis in the school desegregation cases. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973). Thereafter, the Supreme Court extended the requirement to embrace all claims based on the equal protection clause. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The *Davis* standard of purposeful discrimination has been described as an "impact-plus" tost. Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3d Cir. 1977).

Prior to *Davis*, a number of courts generally had assumed that the analytical approach to claims under Title VII was applicable in constitutional cases. Discriminatory practices having a disparate impact on a protected class were held unlawful—regardless of intent—unless they were justified by business necessity. *See* 426 U.S. at 244-45, 244 n.12.

The lower courts are split on the issue whether discrimination claims under § 1981 and § 1982 are subject to the constitutional purposeful discrimination analysis or the proof standards established in the statutory cases. Indeed, Justice Powell's dissent in County of Los Angeles v. Davis, 440 U.S. 625, 636 (1979), observed that the case presented "the important question—heretofore unresolved by this Court—whether cases brought under 42 U.S.C. § 1981, like those brought directly under the Fourtsenth Amendment, require proof of racially discriminatory intent or purpose." *Id.* at 637; *see* Gay v. Local No. 30, 489 F. Supp. 282, 299-300 n.18 (N.D. Cal. 1980) (collecting cases on both interpretations of § 1981).

121. *See* Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (burden of proof does not shift under the constitutional standard until the plaintiff has made out a prima facie case of discriminatory purpose).

122. 426 U.S. 229, 242 (1976).

123. 442 U.S. 256 (1979).

identifiable group."[124] *Feeney* is uncontrovertible to the extent that it suggests the need for some kind of causal relationship in discrimination cases. If the "because of" standard is construed literally, however, it seems to require a very particular kind of causation—a *sine qua non* relationship between the defendant's conduct and the plaintiff's injury. It also implies that a showing of a very particular kind of motivation is required in discrimination cases—animus, a desire to harm.

B. *The Burdens of Proof: A Two- Or Three-Step "Judicial Minuet"?*

Intimately related to the causation issue is the allocation of the burdens of proof. As a general rule, plaintiffs in civil actions have the ultimate burden of persuasion on the issue of causation.[125] It is on this issue that the allocation of the burdens of proof becomes critically important. The Supreme Court has adopted different rules for the allocation of the burdens of proof in statutory and constitutional cases; the Court has not, however, provided a satisfactory reason for these differences.

1. The Statutory Cases

McDonnell Douglas Corp. v. Green,[126] a disparate treatment case, is the Court's seminal treatment of the burdens allocation issue. The Court in *McDonnell Douglas* established a three-step formulation that courts generally have applied in the statutory cases. First, the plaintiff has the initial burden of establishing a prima facie disparate treatment case of discrimination.[127] Second, if the plaintiff establishes a prima facie case, the burden then shifts to the defendant to "*articulate* a legitimate, nondiscriminatory reason" that explains his conduct.[128] Assuming the defendant meets this burden, the plaintiff, in stage three, must be given the opportunity to prove that the defendant's presumptively valid justification was in fact merely a pretext for discriminatory conduct.[129]

Three years after *McDonnell Douglas,* the disparate treatment three-step formula was adopted in the disparate impact cases, despite the implication in *Griggs* that a two-step approach applies

124. *Id.* at 279.
125. W. PROSSER, *supra* note 81.
126. 411 U.S. 792 (1973).
127. *Id.* at 802.
128. *Id.* at 802 (emphasis added).
129. *Id.* at 804.

under this theory.[130] The Court in *Albemarle Paper Co. v. Moody*[131] held that a plaintiff in a disparate impact case has the initial burden of establishing a prima facie case which proves that the defendant's policy or practice has a substantial impact on members of a protected class. The burden then shifts to the defendant to prove that the practice is mandated by business necessity or that the practice has a manifest relationship to the defendant's business. If the defendant meets this burden, the plaintiff then must be given the opportunity to show that other practices or policies with a lesser differential impact on the protected class would serve the defendant's legitimate interest.[132]

The allocation of the burdens of proof in this line of cases left many questions unanswered. First, the Court did not state whether a prima facie case under either the disparate impact or the disparate treatment theory creates an inference or a presumption of discrimination. The characterization of the prima facie case either as an inference or as a presumption has important consequences in any burdens of proof allocation analysis. If a prima facie case creates an inference of discrimination, and the defendant neither rebuts the plaintiff's evidence nor introduces any independent evidence of justification, a court could—but would not be required to—find in the plaintiff's favor.[133] If, however, a prima facie case establishes a presumption, a court under these circumstances arguably would be required to find for the plaintiff.[134] Unfortunately,

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130. 401 U.S. 424 (1971).

131. 422 U.S. 405 (1975).

132. *Id.* at 425. The courts have applied this approach under the various statutory prohibitions against discrimination in a wide range of cases. *See* cases cited note 89 *supra*.

133. *See* notes 63-70 *supra* and accompanying text. *See also* Legille v. Dann, 544 F.2d 1, 5 n.24 (D.C. Cir. 1976) (an inference is a conclusion that the trier of fact is permitted, but not compelled, to draw from the facts). Inference analysis of the prima facie case would be similar to the application of the *res ipsa loquitur* doctrine, which means that the facts of the occurrence warrant the inference but do not compel it. *See, e.g.*, Furnco Constr. Corp. v. Walters, 438 U.S. 567, 576 (1978); Sweeney v. Erving, 228 U.S. 233, 240 (1913); Prosser, *supra* note 70. In *Furnco* the Court noted that a prima facie case is not the equivalent of an "ultimate finding of fact as to discriminatory" conduct. *But see* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981).

134. A presumption, sometimes called a presumption of law, is an inference that the law directs the trier of fact to make if it finds a given set of facts. *See* notes 63-70 *supra* and accompanying text. *See also* Legille v. Dann, 544 F.2d 1, 5 n.24 (D.C. Cir. 1976); C. McCormick, *supra* note 3. Courts have used a presumption analysis even in those civil rights cases in which intentional discrimination must be shown. *See* Teamsters v. United States, 431 U.S. 324, 359 n.45 (1977); Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973); Williams v. Anderson, 562 F.2d 1081, 1087-89 (8th Cir. 1977). Perhaps a major reason why the courts tend to use the terms "presumption" and "inference" interchangeably is because there is general agreement that the term "presumption" "is the slipperiest member of the family of

courts have used both terms to characterize the weight of prima facie cases under all theories of discrimination in statutory and constitutional cases.[135]

A second question remaining after these three cases concerns the Court's adoption of the "articulate" standard to describe the defendant's burden of proving the defense of the legitimate, nondiscriminatory reason in disparate treatment cases. This distinction between "articulate" and "prove" has been the source of much confusion on the burdens allocation issue. Some courts have emphasized the Court's choice of the term "articulate" instead of "prove" and imposed upon the defendant only the burden of producing evidence on the question of a legitimate, nondiscriminatory justification.[136] Other courts have reasoned that assigning such a minimal burden to the defendant is meaningless and have held that the prima facie case still shifts the burden of persuasion to the defendant.[137] Thus, to prevail under this latter view a defendant has to prove—by a preponderance of the evidence—that a legitimate, nondiscriminatory explanation supported its action.

The Supreme Court discussed the burdens of proof issue again in two opinions rendered in 1978. Both were analyzed under the disparate treatment theory. In *Furnco Construction Corp. v. Waters*[138] the Court affirmed the court of appeals' ruling that plaintiffs had established a prima face case under the *McDonnell Doug-*

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legal terms, except its first cousin, 'burden of proof.' " C. MCCORMICK, *supra* note 3, at 802-03; *see* notes 247-69 *infra* and accompanying text.

135. Indeed, the Supreme Court has characterized the prima facie case as a presumption and an inference in the same opinion. *See* Teamsters v. United States, 431 U.S. 342, 361, 359 n.45 (1977). *But see* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1094 (1981). *See also* Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978) (statutory case—inference); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (constitutional case—presumption); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 693 (6th Cir. 1979) (inference); Williams v. Anderson, 562 F.2d 1081, 1087 (8th Cir. 1977) (presumption); Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974) (housing—inference).

136. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150, 1155-56 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); Barnes v. St. Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 347-48 (10th Cir. 1975); Gates v. Georgia-Pac. Corp., 492 F.2d 292, 295-96 (9th Cir. 1974); Croker v. Boeing Co., 437 F. Supp. 1138, 1182-83 (E.D. Pa. 1977).

137. *See, e.g.*, Williams v. Bell, 587 F.2d 1240, 1245-46 n.45 (D.C. Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3d Cir. 1976). *See also* Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), *vacated and remanded*, 439 U.S. 24 (1978); Vuyamich v. Republic Nat'l Bank, No. CA-3-6982-G, slip op. at 2 n.3 (N.D. Tex. Aug. 4, 1981).

138. 438 U.S. 567 (1978).

las standard. The Court then attempted to explain the burdens that shifted to defendant:

> When the prima facie case is understood in light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the [defendant] is merely that of *proving* that he based his . . . decision on a legitimate consideration and not an illegitimate one . . . . To dispel the adverse inference from a prima facie [case] under *McDonnell Douglas*, the [defendant] need only "*articulate* some legitimate, nondiscriminatory reason."[139]

The imprecise analysis used by the Court in *Furnco* failed to clarify the burdens of proof issue. Instead of attempting to resolve the conflict among the lower courts, the Court even further begged the question by using both "articulate" and "prove" in the same paragraph. It can be argued that the Court meant that the two terms are synonymous and interchangeable, and that it intended to impose the burden of persuasion on a defendant asserting a legitimate, nondiscriminatory defense in the same way that *Griggs* seems to have imposed this burden on the business necessity defense in disparate impact cases.[140] *Furnco*, however, contained no discussion about the scope and extent of the defendant's burden, nor did it specifically recognize the conflict in the lower courts.

Several months after *Furnco*, the Court in *Board of Trustees of Keene State College v. Sweeney*[141] again faced the question of the articulate/prove distinction. The Supreme Court stated that the lower court's opinion read *McDonnell Douglas* to require the defendant to prove the absence of discriminatory motive,[142] even though the lower court had also held that "the ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, who must convince the court by a preponderance of the evidence" that she has been a victim of unlawful discrimination.[143] The Court, in a five-to-four per curiam opinion, vacated the decision, holding that

> [w]hile words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas*

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139. *Id.* at 577-78 (emphasis added) (citation omitted).

140. *See, e.g.*, Silberhorn v. General Iron Works Co., 584 F.2d 970, 971 (10th Cir. 1978) (construing *McDonnell Douglas* and *Furnco* as shifting to the defendant the obligation to prove by a preponderance of the evidence its legitimate, nondiscriminatory reason).

141. 439 U.S. 24 (1978).

142. *Id.* at 25.

143. *Id.* at 27 (Stevens, J., dissenting) (quoting Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 177 (1st Cir. 1978)).

> analysis in *Furnco Construction Co. v. Waters*, we made it clear that the former will suffice to meet the [plaintiff's] prima facie case of discrimination. . . . The Court of Appeals appears to have imposed a heavier burden on the [defendant] than *Furnco* warrants . . . .[144]

Thus, the Court in *Sweeney* tacitly acknowledged that its own earlier choice of terminology was the source of confusion in the lower courts about the allocation of the burdens of proof. The Court adhered to its "articulation" standard and stated clearly that this standard does not impose as heavy a burden of proof on a defendant as the lower court's standard. By asserting its adherence to the "articulate" language in *McDonnell Douglas* without more clearly defining a defendant's exact burden on his defenses, the Court only perpetuated the already prevalent ambiguity and uncertainty surrounding the burdens allocation problem.[145]

The four dissenting Justices in *Sweeney*, in an opinion by Justice Stevens, did not directly confront the confusion that *McDonnell Douglas* had spawned; they did make some effort, however, to separate more clearly and consider an important aspect of the issue. The dissent stated that it could find no operative distinction between the terms "prove" and "articulate" because both terms contemplate the presentation of evidence rather than the mere allegation of a nondiscriminatory purpose.[146] Nevertheless, the dis-

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144. *Id.* at 25 (citations omitted).

145. *See* sources cited notes 4 and 11 *supra*. It is far from clear, however, that the lower courts were not influenced by the *Sweeney* articulation standard when deciding cases under the disparate impact theory. In Lignons v. Bechtel Power Corp., 625 F.2d 771 (8th Cir. 1980), for example, the court relied upon the *Sweeney* standard and seemed to apply variants of both the disparate impact and disparate treatment theories. The court used a disparate impact analysis to uphold a district court finding of a prima facie case, but it used a disparate treatment rationale to hold that defendant had rebutted the prima facie case. *Compare* Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563 (5th Cir. 1979) (the defendant must show legitimate nondiscriminatory business reason by preponderance of the evidence), *rev'd*, 101 S. Ct. 1089 (1981) *with* Grano v. Department of Dev., 637 F.2d 1073, 1080 n.4 (6th Cir. 1980) *and* Lieberman v. Gant, 630 F.2d 60, 65 n.7 (2d Cir. 1980). *See also* Otero v. Mesa County Valley School Dist., 470 F. Supp. 326 (D. Colo. 1979).

146. 439 U.S. at 28-29 (Stevens, J., dissenting). The dissenting Justices in *Sweeney* examined the ways in which the per curiam opinion differed from their own viewpoint. They identified two grounds: (1) "Articulate" must mean something more than "prove," and (2) what the employer must "articulate" is simply a legitimate reason and not the "real reason for the employment decision." They argued, however, that articulation in a trial context amounts to proving a fact, and that any showing of a nondiscriminatory reason "simultaneously demonstrat[es] that the action was not motivated by an illegitimate factor such as race." *Id.* at 29. The majority "agreed" with the dissenters' definition of defendant's burden to the extent that it was "satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.' " *Id.* at 25 n.2 (quoting dissent at 28-29).

Some courts appear to believe that the Court in *Sweeney* was unanimous in its view of the obligation that shifted to the defendant. *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 65

senters failed to provide any more meaningful guidance on the burdens of proof issue than the majority. The dissent's deficiency, like the majority's, lies in their failure to define clearly the scope and extent of the defendant's burden. Moreover, the dissenters also failed to specify whether the defendant must prove his defense by a preponderance of the evidence or some lesser standard.

Texas Department of Community Affairs v. Burdine[147] is the Court's latest attempt to clarify the burdens allocation problem. In *Burdine* the Court expressly limited its decision to the narrow question whether a prima facie case under the disparate treatment theory shifts the burden to the defendant to persuade the court by a preponderance of the evidence on a defense of a legitimate, nondiscriminatory reason.[148] In responding to this narrow question, however, the Court added an additional requirement to the prima facie doctrine first announced in *McDonnell Douglas*: "[T]he plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination."[149] The requirement that the prima facie case must be proven by a preponderance of the evidence is a novel requirement in burdens allocation analysis. Generally, a prima facie case can be established if a plaintiff meets his burden of producing evidence.[150] The adoption of the preponderance of the evidence test to determine whether a prima facie case has been established suggests a high threshold requirement and seems to be inconsistent with the Court's earlier pronouncements.[151] The adoption of this new test may be inadvertent, or it may portend an important shift in the manner of deciding discrimination cases. In either event, this choice of words is not likely to eliminate the confusion or contribute to the development of a coherent framework for future cases.

Notwithstanding this novel approach to the prima facie case doctrine, the real significance of *Burdine* lies in its treatment of the burden that shifts to the defendant after a prima facie case has been established. On this point the Court attempted to explicate in some detail the nature of the burden:

> [I]f the plaintiff succeeds in proving the prima facie case, the burden shifts to

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(2d Cir. 1980).

147. 101 S. Ct. 1089 (1981).

148. *Id.* at 1092.

149. *Id.* at 1091.

150. *See* Cleary, *supra* note 30, at 7; C. McCORMICK, *supra* note 3, § 338.

151. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973).

> the defendant "to articulate some legitimate, nondiscriminatory reason for [his action]".
>
> . . . .
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> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.[152]

Although *Burdine* makes clear that only the production burden shifts to the defendant, the Court identified some of the factors that must be considered in determining the sufficiency of the defendant's evidence. First, the defendant must clearly set forth, through the introduction of legally sufficient evidence, the reasons for his action. Second, an articulation that is not admitted into evidence will not be sufficient. Third, the defendant's burden cannot be met through an answer to the complaint or an argument by his counsel.[153] Fourth, the articulation must be legally sufficient to justify a judgment in the defendant's favor.[154] Last, the defendant's explanation of a legitimate, nondiscriminatory reason must be clear and reasonably specific.[155]

The Court in *Burdine* rejected the court of appeals' construction that *Sweeney* placed upon the defendant the burden of persuasion to prove a legitimate, nondiscriminatory reason. The lower court had read *Sweeney* this way because it feared that "[i]f an employer need only to *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions."[156] The Supreme Court, however, reaffirmed its *McDonnell Douglas* articulation standard and rejected the rationale of the court of appeals on the ground that limiting the defendant's evidentiary burden on this standard would not unduly hinder the plaintiff. The Court set forth several reasons for this reasoning. First, the requirement that the defendant's articulation be clear and reasonably specific imposes upon him an obligation to rebut the prima facie case and provides the plaintiff

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152. Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1093, 1094.

153. *Id.* at 1094 & n.9.

154. *Id.* For a discussion of legally sufficient evidence, see Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250 (5th Cir. 1980); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969); James, *Sufficiency of the Evidence and Jury Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961).

155. 101 S. Ct. at 1094, 1096.

156. *Id.* at 1096 (citations omitted) (brackets in original).

with a "full and fair opportunity" to demonstrate pretext. Second, the defendant will have an incentive to persuade the factfinder that his action was lawful even though he does not have the formal burden of persuasion. Last, the liberal rules of discovery allow the plaintiff to test out the defendant's asserted legitimate, nondiscriminatory reason defense.[157] The concern of the court of appeals seems to have been legitimized in *Burdine,* however, when the Court stated that "*[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons.*"[158] This statement is perhaps the most disturbing point in the case because it suggests that the defendant need not prove the "real reason" for his action even if improper criteria were used.[159]

The Court in *Burdine* also expanded upon the plaintiff's obligation to demonstrate pretext. The plaintiff retains the burden of persuasion on the issue of discrimination, but this burden merges with the plaintiff's obligation to prove pretext should the defendant meet his burden of producing evidence under the articulation standard. Thus, the plaintiff can prevail on the ultimate issue of liability either directly, by persuading the factfinder that a discriminatory reason more likely than not motivated the defendant, or indirectly, by showing that the defendant's asserted justification defense is unworthy of credence.[160]

The Court in *Burdine* also held that a prima facie case creates a presumption of discrimination and that "if the [defendant remains] silent in the face of [this] presumption, [the] court must enter judgment for the plaintiff."[161] The Court, however, adopted the presumption characterization of a prima facie case that creates only a rebuttable presumption; it specifically rejected the presumption analysis that permits the factfinder to infer the ultimate fact at issue.[162] For this proposition the Court simply cited to rule 301 of the Federal Rules of Civil Procedure.[163] Rule 301 has been a source of controversy in the analysis of presumptions since its adoption, and it raises a very difficult and complex statutory construction problem.[164] The failure of the Court to confront this stat-

157. *Id.*
158. *Id.* at 1094 (emphasis added).
159. *Id.*
160. *Id.* at 1095.
161. *Id.* at 1094.
162. *Id.* at 1094 & n.7.
163. *Id.* at 1094 n.8.
164. *See* notes 271-95 *infra* and accompanying text.

utory construction problem is one of the basic defects in its analysis in *Burdine*.

Burdine may have clarified some of the confusion that the earlier cases had created, but the Court again failed to offer an overall framework for analyzing the burdens allocation problem in future cases or under other theories of discrimination. *Burdine* appears to have implicitly rejected the majority's opinion in *Sweeney*, even though the Court cites to *Sweeney* as if it fully supports the *Burdine* result.[165] A comparison of the majority and dissenting opinions in *Sweeney* and the unanimous opinion in *Burdine*, however, demonstrates that the Court is still struggling with the problem of devising an appropriate and comprehensive framework on burdens allocation in discrimination cases.

The *McDonnell Douglas* articulate/prove distinction has not been formally adopted in the disparate impact cases. Few courts, if any, have held in these cases that a defendant's obligation is merely to "articulate" a business necessity rationale;[166] rather, the standard appears to be that the defendant has the obligation to "prove" business necessity by a preponderance of the evidence.[167] Even in the disparate impact class of cases, however, the courts have neither clearly nor uniformly enunciated a coherent framework on burdens of proof allocation. Some courts have construed *Griggs* to stand for the proposition that defendants have both the burden of producing evidence and the burden of persuasion on the issue of business necessity.[168] This reading of *Griggs* adopts a two-

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165. *See* 101 S. Ct. at 1093, 1094. If *Sweeney* is still good law—and *Burdine* suggests that it is—then it is unclear whether the majority or the minority in *Sweeney* changed its position to make *Burdine* a unanimous decision. The holding in *Burdine* that a defendant need not persuade the court that he was motivated by the proffered reason suggests that the dissenters in *Sweeney* accepted the majority's position that a quantifiable distinction does in fact exist between the obligation "to articulate" and the obligation "to prove."

166. *See* note 114 *supra*.

167. In *Griggs* the Court held that "the touchstone is business necessity." 401 U.S. 424, 431 (1971). "More than that," the Court stated, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* at 432. *See also* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980) ("The employer's burden of proving job-relatedness to rebut a claim of disparate impact is greater than its burden of merely showing a legitimate, nondiscriminatory reason in response to a claim of discriminatory treatment."); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 330 (5th Cir. 1977) ("Once the plaintiff . . . has presented a prima facie case of discrimination, the 'onus of going forward with the evidence and the burden of persuasion' is on the defendant."); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (defendant has burden of proof on bona fide occupational qualification).

168. *See, e.g.*, Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04 (8th Cir. 1980); United States v. Local 169, 457 F.2d 210, 214 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972);

step approach on burdens of proof allocation in disparate impact cases.[169] After *Albemarle Paper Co. v. Moody*,[170] however, a case that seemed to adopt the *McDonnell Douglas* disparate treatment three-step approach in a disparate impact case, the lower courts have reached divergent results on the burden that shifts to the defendant. Some courts have held that the plaintiff has the burden of proof on the existence of an alternative policy and practice that would have a lesser differential impact on the protected class.[171]

United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971).

169. Although the court does not articulate its holding in exactly these terms, the leading case in support of this position is Rohinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), in which the court construed the *Griggs* business necessity rationale to impose upon defendants the burden to prove, among other things, the absence of alternative policies that would have a lesser differential impact on opportunities for members of a protected class. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (suggesting that the showing of job-relatedness of a challenged practice ends further inquiry); Dothard v. Rawlinson, 433 U.S. 321, 331, 333 (1977) (defendant has the burden of proving the statutory bona fide occupational qualification exception) (citing with approval, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1971)). *See also* Head v. Timkin Roller Bearing Co., 486 F.2d 870, 877 (6th Cir. 1973) (reversible error to allocate burden of showing absence of alternative methods to plaintiff); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

170. 422 U.S. 405 (1975).

171. In light of *Furnco*, the *Moody* Court's application of the analysis used in *McDonnell Douglas* has been interpreted to broaden the discretion of trial courts. In Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 372 n.18 (4th Cir. 1980), for example, a majority of the court noted,

> The concept of pretext as a part of the plaintiff's proof was first recognized in *McDonnell Douglas, supra*, a disparate treatment case. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 . . . (1975), a disparate impact case, the Supreme Court characterized this rebuttal phase of a plaintiff's case by stating: "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" [The Court went on to state that such a showing would be evidence of employer "pretext."] Since this is essentially equivalent to one element of the *Lorillard* business necessity test, it might appear that the scheme of proof implicit in *Lorillard, supra*, absorbs the "pretext" function in disparate impact/business necessity cases. Subjective motivation of the employer plays no role in determining whether "business necessity" is a legitimate defense. It would seem, since "pretext" is subjective in nature, it would not be part of the scheme of proof in disparate impact cases. The Supreme Court, however, appeared to use it in that context in *Albemarle*. I would not approve or disapprove its use here. The legitimacy of Eastern's "business necessity" must be decided from objective facts. If a district court, however, wishes to view the fact from different perspectives, it should not be inhibited by semantic obstacles from using any tool that might be helpful in resolving these difficult legal/factual questions. In light of the *Furnco*-announced elasticity of analysis, a trial court should not be formalistically precluded from utilizing pretext even in disparate impact cases if viewing the employer's actions from that perspective contributes to the objective understanding of whether the practice is necessary.

Other courts have held that the defendants have the burden of persuasion on this issue; that this defense must be demonstrated by a clear and convincing standard;[172] and that proof by the plaintiff of alternative approaches simply means that the defendant has not carried his burden.[173] Moreover, this confusion and conflict on burdens of proof allocation in the disparate impact cases is manifest not only between the circuits, but also within them.[174]

The Supreme Court has not faced this problem in the disparate impact cases squarely, but the implications in its decisions suggest divergent results. Even though the Court seems to have adopted the *McDonnell Douglas* three-step approach in disparate impact cases, there are indications that the issue is still in doubt. A footnote in *McDonnell Douglas*, for example, suggests that the Court was not deciding this question as it applies to disparate impact cases.[175] Later, however, the Court appears to have decided precisely this question in *Moody*. On the other hand, the Court in *Burdine* specifically noted that it was addressing only the "narrow question" of the allocation of the burdens of proof in disparate treatment cases[176] and—notwithstanding *Moody*—implicitly suggested that a different burdens of proof allocation might be applicable in a disparate impact case.[177]

Although the *Griggs* disparate impact theory has not been repudiated, several recent cases suggest that defendants may have a lighter burden on business necessity than earlier cases seemed to

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172. Some courts impose the higher standard of proof on defendants under the business necessity doctrine. *See, e.g.*, Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978) ("convincing evidence"); Richardson v. Pennsylvania Dep't of Health, 561 F.2d 489 (3d Cir. 1977) ("probing judicial review"); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) ("convincing proof"); Day v. Mathews, 530 F.2d 1083, 1086 (D.C. Cir. 1976).

173. *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018-20 (2d Cir. 1980); Blake v. City of Los Angeles, 595 F.2d 1367, 1376-78 (9th Cir. 1979).

174. *See* cases cited note 11 *supra*.

175. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973).

176. Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1092 (1981).

177. *Id.* at 1093 n.5. The Court stated "[w]e have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Id.* (citations omitted).

The court in Vuyanich v. Republic Nat'l Bank, No. CA-3-6982-G (N.D. Tex. Aug. 4, 1981), held that *Burdine* does not change the sequence of proof required in a Title VII class action disparate impact case. The court held also that in a disparate impact case the plaintiff always has the burden of persuasion to prove impact, and the defendant always has the burden of persuasion to prove the defense of business necessity on any practice that he has relied upon to justify the impact. *Id.* at 7. *Vuyanich* is one of the few cases which explicitly holds that the defendant has the burden of persuasion on the business necessity defense.

impose. In *New York City Transit Authority v. Beazer*[178] plaintiffs, representing a class of blacks and Hispanics, challenged defendant's policy of limiting the employment opportunities of methadone users. One of the theories upon which plaintiffs relied was the disparate impact theory. The Supreme Court, in a six to three decision, reversed the lower court decision that had ruled in favor of plaintiffs.[179] An analysis of *Beazer* through comparison with prior cases suggests that it imposes a more onerous burden upon plaintiffs to establish a prima facie case and a correspondingly lighter burden on defendants to rebut plaintiffs' showing.

In *Dothard v. Rawlinson*,[180] for example, a leading case on the use of statistics in discrimination cases, a female applicant for the position of prison guard challenged a state statute on the ground that the height and weight requirements for the position of prison guard excluded a disproportionate percentage of women. Plaintiff introduced national statistics to show that a substantially smaller percentage of women were employed as prison guards than were in the total work force, and that, on the basis of national census statistics, the statute would exclude a far greater percentage of women than men. Defendant's rebuttal attacked plaintiff's reliance upon national statistics, arguing that plaintiff should be required to produce data about the actual applicants for the job. The Court rejected defendant's position and declared that "[t]here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."[181] The Court thus approved the reliance upon general population statistics, provided there is no reason to believe that the data did not reflect the characteristics of the relevant labor market.[182]

The Court in *Beazer*, however, applied a much more exacting level of scrutiny to the absence of applicant flow data than it had applied in *Dothard*. Specifically, the Court held in *Beazer* that the city-wide statistics upon which plaintiffs relied were "virtually irrelevant" because the data failed to account for several variables

178. 440 U.S. 568 (1979).

179. *Id.* at 582-87. The Court also rejected plaintiffs' claim under the equal protection clause on the ground that the exclusion of methadone users has a rational basis. *Id.* at 587-94.

180. 433 U.S. 321 (1977).

181. *Id.* at 330.

182. *Id.*

that could skew the results.[183] The Court reversed in *Beazer* even though defendant offered no independent evidence from which it could be inferred that the failure to account for these variables would invalidate the conclusions drawn by the lower court. If the analysis in *Beazer* were adopted as a general rule in disparate impact cases, a defendant conceivably could rebut a prima facie case on the ground that the plaintiff failed to introduce applicant flow data by merely "articulating" the existence of uncontrollable variables. If this analysis of *Beazer* is correct, then the burden imposed upon a defendant after a plaintiff establishes a prima facie case would be, in effect, the same as the "articulation" burden adopted in the disparate treatment cases.[184]

2. The Constitutional Cases

The Supreme Court has adopted a different approach to the burdens of proof allocation problem in constitutional discrimination cases. In *Washington v. Davis*[185] the Court held that the statutory disparate impact theory "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution"; thus, the Court was "not disposed to adopt this more rigorous standard"[186] in constitutional cases. It held, therefore, that after a plaintiff establishes a prima facie case, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic results."[187]

The *Davis* approach was explicated further in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[188] Finding that plaintiffs had failed to establish a prima facie case,

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183. New York City Transit Auth. v. Beazer, 440 U.S. 568, 586 (1979).

184. *See* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1260-62, 1260 n.8 (6th Cir. 1981) (placing burden of persuasion on defendant to show alternative practice is reversible error, if defendant's justification is not insufficient); Contreras v. City of Los Angeles, 25 Fair Empl. Prac. Cas. 866 (9th Cir. 1981) (placing burden on plaintiffs to prove alternative methods). *But see* Vuyanich v. Republic Nat'l Bank, No. CA-3-6982-G (N.D. Tex. Aug. 4, 1981) (plaintiff in a disparate impact case is not required to offer, in stage three, additional evidence of pretext to meet evidence offered by defendant that is addressed solely to an attack on plaintiff's prima facie case).

185. 426 U.S. 229 (1976).

186. *Id.* at 247.

187. *Id.* at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

188. 429 U.S. 252 (1977).

the Court held that

> [*Washington v.*] *Davis* does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[189]

Assuming that the plaintiff makes a threshold showing of a prima facie case, therefore, the burden that shifts to the defendant under the *Arlington Heights* analysis is the obligation to prove that the same decision would have been made without any consideration of an unconstitutional purpose.[190]

The Court made the constitutional approach even more explicit in another case decided the same day as *Arlington Heights*. In *Mt. Healthy City School District Board of Education v. Doyle*[191] plaintiff, an untenured teacher, alleged that defendant had not renewed his contract for reasons that violated his protected rights under the first amendment. Defendant asserted two reasons in refusing to renew plaintiff's contract: Plaintiff's use of obscene language and gestures in the school cafeteria and his disclosure to a local radio station of a change in school board policies. The district court, relying upon a substantial motive test, held that defendant's reliance upon protected constitutional activity had played a substantial part in defendant's decision and, therefore, plaintiff was entitled to relief. The court of appeals affirmed, also relying on an "in part" test. The Supreme Court, however, reversed, holding that

> [a] rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the [lower court] is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire,

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189. *Id.* at 265 (emphasis added).

190. The *Arlington Heights* Court stated,

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have *shifted to* [*defendant*] *the burden of establishing* that the same decision would have resulted even had the impermissible purpose not been considered. If this were *established*, the [plaintiff] in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

Id. at 270-71 n.21 (emphasis added).

191. 429 U.S. 274 (1977).

> and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.[192]

From this rationale, the Court fashioned the following rule on the burdens of proof:

> Initially . . . the burden [is] properly placed upon the [plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"— or, to put it in other words, that it was a "motivating factor" in the [defendant's] decision not to rehire him. [Plaintiff] having carried that burden, however, the [court] should . . . determine whether the [defendant] had shown by a *preponderance* of the evidence that it would have reached the same decision as to [plaintiff's] reemployment even in the absence of the protected conduct.[193]

Davis, *Arlington Heights*, and *Mt. Healthy* are significant in several respects. First, unlike the statutory discrimination cases, the Court established a two-step approach to burdens of proof allocation. Initially, a plaintiff must establish a prima facie case that the discriminatory conduct was a "substantial" or "motivating" factor in causing the injury claimed by the plaintiff. Once this is accomplished, the burden shifts to the defendant to prove, by a preponderance of the evidence, that the same decision would have been reached even without any unconstitutional considerations. Thus, these cases recognize that efforts to determine the "dominant motive" or the "primary motive" is usually unavailing.[194] Second, the constitutional cases impose a burden of persuasion on the defendant that is substantially heavier than the obligation to "articulate" a legitimate reason for his decision. Third, if, as the Court held in *Davis*, statutory claims of discrimination entail "a more probing judicial" review,[195] the lighter burden imposed upon defendants in statutory cases such as *Burdine* and *Beazer* do little to encourage this heightened level of scrutiny. Last, the burden that *Mt. Healthy* places upon the defendants is not really directed at the prima facie case itself. Plainly, if a defendant can prove that his decision was not motivated by unconstitutional considerations,

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192. *Id.* at 285-86.

193. *Id.* at 287 (emphasis added) (footnotes omitted).

194. *See, e.g., id.* at 287.

195. Washington v. Davis, 426 U.S. 229, 247 (1976). The *Davis* Court suggested that a claim of discrimination that may not be sustained under the more rigorous statutory standard may nevertheless be sustained under a constitutional challenge. *Id.* at 249. *See* Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1046 (7th Cir. 1980) ("[W]hat may not constitute discrimination under the [constitution] may be discrimination under a statute"); Blake v. City of Los Angeles, 595 F.2d 1367, 1378 & n.5 (9th Cir. 1979).

he does not need to rely upon the *Mt. Healthy* rationale at all. If a defendant is unable to show this absence of consideration, however, he has a second chance to escape liability under *Mt. Healthy* by producing evidence and persuading the court that the same decision would have been made even without the unconstitutional consideration.

IV. Burdens Allocation: A Proposed Framework

A. *Elements of a Discrimination Case*

A defendant may escape liability in one of two ways: He can rebut any of the basic facts undergirding the plaintiff's prima facie case, or he can prove any one of the specific statutory or judicially created defenses.[196] Thus, characterizing an element as part of the plaintiff's or the defendant's case can have important consequences for the allocation of the burdens. For example, in *Corning Glass Works v. Brennan*,[197] an equal pay case, defendant originally had segregated its work by sex—females were assigned to the day shift and males to the night shift. The females were paid less than the males. The issue before the Court was whether plaintiff had failed to establish a prima facie case on the "equal work" element, since liability does not attach unless a determination is made that unequal pay is being given for work performed "under similar working conditions."[198] Assuming that the working conditions were similar and the pay unequal, liability could be imposed only if a finding were made that the inequality was because of "a factor other than sex."[199] The Court, relying on the legislative history, held that the shift assignments did not constitute a difference in "working conditions."[200] The important point in *Corning Glass* is not so much the actual holding of the case but its implications for the allocation of proof burdens. If the Court had held that the different shifts constituted dissimilar working conditions, plaintiff would not have made out a prima facie case, and defendant would have prevailed. Since the Court held that the shift difference was irrelevant to the "equal work" element, this difference could be considered only under one of the exceptions to the general proscription against un-

196. *See, e.g.*, Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979); Mosby v. Webster College, 563 F.2d 901, 903-04 (8th Cir. 1977); Vuyanich v. Republic Nat'l Bank, No. CA-3-6982-G (N.D. Tex. Aug. 4, 1981).

197. 417 U.S. 188 (1974).

198. *Id.* at 197.

199. *Id.*

200. *Id.* at 198-204.

equal pay under similar working conditions. Defendant had relied expressly upon the "any factor other than sex" exception, but the Court rejected that section's applicability because the shift difference had its genesis in sex discrimination. Thus, *Corning Glass* demonstrates that an ultimate finding of discrimination may turn upon whether a legislature or a court deems an element to be part of the plaintiff's or the defendant's case.[201]

A court must receive evidence on the following four basic propositions before it can reach an ultimate finding of discrimination: (1) That the defendant made an adverse decision on the plaintiff's asserted right in an activity in which discrimination is prohibited; (2) that the plaintiff is a member of a protected class; (3) that a causal relationship exists between the defendant's conduct and the plaintiff's claim; and (4) that the claimed discriminatory conduct does not fall within either a statutory or a judicially created exception.[202] As a general rule, liability will not attach until a court makes an ultimate finding on all four basic propositions.[203]

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201. *See* Sullivan, *The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 548 (1978).

202. The courts in discrimination cases have not been consistent in assigning to one party or the other the evidentiary burden on these four propositions. This Article makes specific proposals for the assignment of these burdens. *See* notes 226-309 *infra* and accompanying text. *See generally* text accompanying note 31 *supra*.

203. The framework proposed here is applicable to both constitutional and statutory cases. Although there may be differences in the substantive standards under the various laws, the basic distinction between the two categories appears to center on the element of intent. Moreover, the courts have tended to apply the same substantive standards to both categories of cases when intent is an element of the claim. *See, e.g.*, Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980); Williams v. Anderson, 562 F.2d 1081, 1087 (8th Cir. 1977) (noting the relationship between Title VII and § 1983 claims); United States v. City of Black Jack, 508 F.2d 1179, 1185 n.2 (8th Cir. 1975).

It appears, however, that the courts have imposed a greater burden of proof on the defendants in some discrimination cases arising under the constitution and 42 U.S.C. § 1983. The Court in Keyes v. School Dist. No. 1, 413 U.S. 189, 209 (1973), for example, held a defendant to the standard of justifying its conduct by a "clear and convincing" showing. *See also* Jones v. Pitt County Bd. of Educ., 528 F.2d 414, 417 (4th Cir. 1975). The framework offered here does not propose a change on the degree of persuasion because it appears that this rule is grounded in constitutional considerations. The other proposals suggested in this framework, however, would be applicable to this special class of cases.

Some courts have attempted to distinguish the constitutional cases from the statutory disparate treatment cases on the ground that discriminatory motive *may* be a critical element. *See, e.g.*, Marshall v. Kirkland, 602 F.2d 1282, 1299 (8th Cir. 1979). The Court in Washington v. Davis, 426 U.S. 229 (1976), observed that "[i]t is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* at 242. Thus, it appears that evidence of disparate impact under some circumstances will by itself be sufficient to meet the constitutional purposeful discrimination standard; therefore, in these situations the constitutional cases are not analytically

As we have seen, these propositions are subsumed under two distinct substantive theories of discrimination: The disparate impact theory and the disparate treatment theory.[204] Moreover, in addition to the statutory exceptions contained in the various pieces of discrimination legislation,[205] these two theories also have been held to be subject to two judicially developed defenses: business necessity and a legitimate, nondiscriminatory reason. The basic defense to a disparate impact claim is business necessity, and the typical defense to a disparate treatment claim is a legitimate, nondiscriminatory reason.[206] Moreover, both theories may be challenged with a statutory defense.

The analysis of these four basic propositions raises two fundamental questions: (1) Which party should have the burdens of pleading, production, and persuasion on each of the substantive theories and defenses? and (2) What is the applicable standard to use in determining the causal connection between the plaintiff's claim and the defendant's conduct? Although these two questions are interrelated,[207] the first question can be characterized as the burdens of proof problem, and the second question can be characterized as the causation problem. The "causation" problem is considered first not only because it is typically the most critical determination in a discrimination case, but also because it is the determination to which the burdens of proof should be directed.

B. Causation: A "But For" Test

Causation in discrimination cases is a complex legal standard that often also takes on the role of a factual conclusion. Courts

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different from the statutory disparate impact cases. Justice White also has suggested that under some circumstances the inquiry into discriminatory purpose may well be encompassed by the inquiry into discriminatory effect. *Id.* at 248. *See* Castaneda v. Partida, 430 U.S. 482 (1977) (disparate impact in the Texas "keyman" system of selecting grand jurors held sufficient proof of discriminatory intent).

204. *See* notes 88-100 *supra* and accompanying text.

205. Statutory defenses are contained in the Equal Pay Act, of 1963, 29 U.S.C. § 206(d)(1)(iv) (1976) (protecting pay differentials based upon any factor other than sex); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979) (bona fide occupation qualification (BFOQ) defense—§ 623(f)); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978) (BFOQ defense—§ 2000e-2(e); inability to reasonably accommodate without undue hardship defense—§ 2000e-2(j)); bona fide seniority system defense—§ 2000e-2(h); professionally developed ability test defense—§ 2000e-2(h)); and the Fair Housing Act of 1968, 42 U.S.C. § 3605 (1976) (bona fide individual ability test defense—§ 2000d-2(h)).

206. *See* notes 114-15 *supra* and accompanying text; Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1268 (5th Cir. 1980).

207. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

encounter considerable difficulty—particularly at the appellate level—in deciding whether a finding of discriminatory purpose—or its absence—is a conclusion of law, which is subject to plenary examination, or a finding of fact, which is subject only to a limited standard of review.[208] Some courts have astutely noted, however, that the ultimate determination of discrimination *vel non* is properly characterized as a "mixed question of law and fact."[209] Even to speak in terms of the intent of a defendant is to engage in somewhat of a legal fiction,[210] since as a practical matter, the process of decisionmaking quite often does not involve any intent whatsoever. The concept of discrimination is a creation of the law, and, consequently, the determination of which facts are relevant to an ultimate finding of discrimination is likewise a matter of law. Similarly, to the extent that a finding of a discriminatory purpose is a factual conclusion, it is an "elusive" or "ultimate" fact.[211] Like neg-

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208. Many appellate decisions have characterized the issue of a defendant's motive in discrimination cases as one of "ultimate fact" that is subject to plenary review. *See, e.g.*, Jefferies v. Harris County Community Action Assoc., 615 F.2d 1025, 1031 n.5 (5th Cir. 1980); Causey v. Ford Motor Co., 516 F.2d 416, 420-21 (5th Cir. 1975). On the other hand, recent Supreme Court cases have treated the question of motivation in discrimination cases as one of "subsidiary" fact, which is subject only to the "clearly erroneous" standard of review. *See, e.g.*, Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979). Unfortunately, in the majority of the cases, appellate courts do not articulate their standard of review at all. *See* Van Ooteghem v. Gray, 628 F.2d 488, 491 (5th Cir. 1980).

FED. R. CIV. P. 52(a) provides that "findings of fact" in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The Court has said that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

209. *See, e.g.*, Wiggins v. Spector Freight Sys., Inc., 583 F.2d 882, 885 (6th Cir. 1978); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975).

210. The discriminatory purpose requirement occasionally referred to is in terms of "intent" or "motive." While these terms might profitably be given slightly different shades of meaning, they tend to be used indiscriminately by the courts and should be considered equivalent for the purposes of discrimination cases. *See, e.g.*, Ely, *supra* note 87, at 1217-21. *Cf.* United States v. Board of School Comm'rs, 573 F.2d 400, 412 n.30 (7th Cir.) (the terms "purpose" and "intent" must be distinguished from the word "motive," which usually refers to an individual's subjective intent), *cert. denied*, 439 U.S. 824 (1978); Feeney v. Commissioner of Mass., 451 F. Supp. 143, 149-50 (D. Mass. 1978) (although "purpose" of the law was to aid veterans, "intent" was to achieve that purpose by subordinating employment opportunities of women), *rev'd sub nom.* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

211. "Ultimate facts" conventionally are thought of as final—and essentially conclusive—inferences drawn from "basic facts." Causey v. Ford Motor Co., 516 F.2d 416, 420-21 (5th Cir. 1975). This concept can be found in diverse areas of the law—for example, the traditional evidentiary rule that testimony about basic facts is allowed, but testimony about ultimate facts—or "ultimate issues"—is not. *See* C. MCCORMICK, *supra* note 3, § 12, at 26.

ligence, discriminatory purpose can be determined only by applying legal standards to a large pool of "basic" or "historical" facts.[212] Furthermore, the kinds of evidence that are relevant to a finding of an intent to discriminate usually will differ from the evidence bearing on the intent, for example, of a criminal defendant, since discrimination must, in most cases, be inferred from circumstantial evidence.[213]

As stated above, there is no clear consensus on the proper standard of causation in discrimination cases. The standard has been variously defined to require evidence that the claimed discriminatory conduct played "some part,"[214] or was "a factor,"[215] "a determining factor,"[216] "a pretext,"[217] or "a substantial or motivating factor."[218] Moreover, the courts seem to recognize that the application of any of these standards can yield a different outcome on the ultimate determination of discrimination.[219]

These various causation standards are in effect simply different guises for articulating a modified standard that is akin to the "but for" or a "substantial factor" rule adopted in tort cases.[220]

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212. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). For this reason, the distinction between "ultimate facts" and conclusions of law is occasionally hazy. *See* United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948) (suggesting that even under clearly erroneous review less deference is given to findings on "mixed questions of law and fact").

213. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

214. *See, e.g.*, Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979).

215. *See, e.g.*, Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1971) (impermissible criteria need not be sole factor).

216. *See, e.g.*, Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 960 (8th Cir. 1978) (plaintiff must "show that age was a determining factor"); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299, 1322 (E.D. Mich. 1976) (age must be a "determining factor" rather than "a factor").

217. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

218. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416-17 (1979); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977) (first amendment violation); Sherkow v. Wisconsin, 630 F.2d 498, 502 (7th Cir. 1980) (Equal Employment Opportunity Act, 42 U.S.C. § 2000e-2 violation); Garcia v. Gloor, 609 F.2d 156, 160 (5th Cir. 1980) (violation of Title VII if forbidden reason is a "significant factor" in employment decision); Corley v. Jackson Police Dep't, 566 F.2d 994, 998-99 (5th Cir. 1978) (Title VII violated if impermissible factor "significant" in making decision, even if permissible factor could have justified decision).

219. A leading case that is often cited for these distinctions is Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

220. *See* W. PROSSER, *supra* note 81, § 41. In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), the Supreme Court refused to draw distinct lines of causation: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Id.* at 277.

This basic precept of tort law holds that "[t]he defendant's conduct is not a cause of the event, if the event would have occurred without it."[221] Suppose, for example, that a hypothetical plaintiff has only two years of college education, is over fifty years old, and has a criminal record for draft resistance. He applies for a job and is rejected by a hypothetical defendant. The plaintiff then brings an action under the Age Discrimination in Employment Act,[222] claiming that he was denied employment because of his age. The defendant's evidence at trial shows that there is in fact a company policy against hiring anyone over fifty years of age, but that even if the plaintiff had been younger than this, he still would not have been employed because of the defendant's policy against hiring draft resisters. Under these facts, age clearly was "a factor" that was considered, but it was not a factor that "made a difference." The same result can be expressed in other terms: Age was not the "but for" cause of the defendant's refusal to hire the plaintiff and, therefore, was not a "determinative factor" in that refusal.

Altering this same hypothetical somewhat, suppose that plaintiff is over fifty years old and has only two years of college education, but no criminal record. The same hypothetical defendant now testifies that had the plaintiff been under fifty years of age with two years of college he would have been hired. The factfinder thus concludes that the plaintiff's age "made a difference." Once again, the same conclusion can be expressed by stating that age was a "but for" or "determining factor" in the defendant's decision. Thus, variations of this hypothetical demonstrate that in any situation in which an impermissible discriminatory factor is "a motivating factor" or "a substantial factor," it would be a "but for" factor as well.[223]

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221. The cause-in-fact determination, like that of proximate cause, is often a question for the factfinder and calls for a common sense inquiry into physical causation. W. PROSSER, *supra* note 81, § 41, at 237.

222. 29 U.S.C. §§ 622-634 (1976 & Supp. III 1979).

223. Two tests have emerged in tort law. One is the "but for" test, in which the factfinder asks whether the plaintiff would have been injured if the defendant had not acted wrongfully. If the answer is "yes," then the "but for" cause in fact is not present; if the answer is "no," then it is present. In some civil rights actions, the Supreme Court has used a "but for" test to determine the causal relationship between plaintiff's *damages* and defendant's conduct. *E.g.*, Carey v. Phiphus, 435 U.S. 247 (1978). The other test, which arose in large measure because of the difficulties with the "but for" test, is the "substantial factor" test. This test was used recently by the Supreme Court in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), in which the question was whether plaintiff's conduct, which was protected under the first amendment, played a "substantial part" in defendant's decision not to renew plaintiff's contract. *Accord*, Givhan v. Western Line Consol.

The "but for" rule of causation makes a distinction between "a factor" and "a factor that makes a difference." In the first hypothetical, age clearly was a factor that was considered, but it was not a factor that made a critical difference in the defendant's conduct. If relief were granted every time age was considered, the effect might go well beyond the remedial intent of the Act, since relief arguably would be awarded to claimants who never had an opportunity for the job at any age. While such a broad construction would provide a strong deterrent against age discrimination, it probably would exceed the prohibition that Congress envisioned. In the second hypothetical, however, which illustrates the use of the "but for" test, a plaintiff in a discrimination case would be entitled to recover *only* if the defendant considered an impermissible criterion in its decisionmaking, *and* that consideration made a difference in denying the plaintiff the opportunity that the law sought to provide. Consistent application of this "but for" rule, therefore, would facilitate the development of a workable rule on hurdens of proof allocation.[224]

The discrimination cases have emphasized that invidious discrimination can—and usually does—stem from "archaic general-

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School Dist., 439 U.S. 410, 415-16 (1979). *See generally* Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause in Fact*, 46 TEX. L. REV. 423 (1968). The Court in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), appears to accept the "but for" test in discrimination disparate treatment cases. In explaining the "pretext" concept, the Court noted that

> [T]he use of the term "pretext" . . . does not mean, of course, that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies . . . . [N]o more is required to be shown than that race was a "but for" cause.

Id. at 282 n.10. The citation in *McDonald* to Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), suggests that this "but for" test may be applicable to disparate impact cases as well.

224. Some judges have argued tbat an important analytical distinction should be drawn between a determination of causation based on a "pretext" and a determination based upon tbe "but for" test. In NLRB v. Charles Batchelder Co., 646 F.2d 33 (2d Cir. 1981), for example, Judge Newman stated in his concurring opinion tbat

> [s]imply stated, "pretext" analysis asks, "What happened?" "But for" analysis asks "What would have happened?" When we say an asserted ground is a pretext, we mean that we do not believe the employer when he says that he relied upon that ground in taking the challenged action. When we say an employer has not sustained his burden under the "but for" test, we mean tbat he has not proven tbat he would have actcd the same way if only the valid ground had existed. Of course, "but for" analysis asks the hypothetical question as to what would have happened in order to reach a conclusion as to the legal significance of what did happen, but the fact that both approaches answer tbe same ultimate legal question should not obscure the different factual inquiries each pursues.

Id. at 42 (footnote omitted).

izations" about members of a protected class and their place in society.[225] This type of discrimination may not be a product of an invidious animus toward blacks or women, for example, but it may be a genuine—though misplaced—solicitude. Thus, the search for a discriminatory intent should not halt simply upon a demonstrated absence of manifest discrimination. The requirement of discriminatory intent, if it is to be meaningful, must incorporate something less than "intent to harm" members of protected classes. Although it is reasonable under this analysis to require that plaintiffs demonstrate the causal relationship under the "but for" test, it goes too far to suggest that plaintiffs must show that the defendant's conduct would not have had a discriminatory application but for the defendant's desire to achieve a harmful result.

C. Burdens of Pleading, Production of Evidence and Persuasion

1. Plaintiff Should Have the Burden of Pleading a Discrimination Claim

Since the federal courts have the ultimate responsibility for enforcing federal laws that prohibit discrimination, the manner and details of pleading in discrimination cases are governed by the Federal Rules of Civil Procedure. Rule 8 of the federal rules sets forth the standard for all pleadings. Therefore, under the framework proposed by this Article, the plaintiff would have the burden of pleading a discrimination claim under rule 8(a). According to rule 8(a), a complaint must provide (1) a jurisdictional statement, (2) a statement of the claim, and (3) a demand for judgment. Rule 8(a) thus establishes the pleading burden for plaintiffs in discrimination cases, and failure to comply with the rule will result in the dismissal of the complaint unless the defect can be cured by an amendment. This penalty has been imposed most often in discrimination cases when the jurisdictional grounds have been defective.[226]

2. Defendant Should Have the Burden of Pleading All Statutory Exceptions and Judicially Created Defenses

Specific statutory defenses in discrimination statutes have

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225. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-96 (1978) (Marshall, J., concurring in part).

226. *See, e.g.*, United Air Lines, Inc., v. Evans, 431 U.S. 553 (1977); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

been characterized as affirmative defenses[227] that are governed by the pleading requirements in rule 8(c) of the federal rules. The rationale behind this characterization rests on the policy consideration that the burdens of pleading and proving an exception should be placed upon the defendant when dealing with humanitarian remedial statutes that serve important public purposes.[228]

There is little or no discussion in the cases of who has the burden of pleading the judicially created defenses of business necessity and a legitimate, nondiscriminatory reason.[229] Since it is now well recognized that proof on either of these defenses can defeat plaintiffs' claims,[230] either the courts or the legislatures should formulate a rule that, operating in conformity with the federal rules, would impose upon one of the parties the burden of notifying the court that either of these defenses is an element that must be considered. Case law indicates that the burden of pleading on these defenses should be placed upon the defendant. In *Griggs v. Duke Power Co.*,[231] for example, the Supreme Court was confronted with a business necessity defense. The Court stated that "Congress has placed on the [defendant] the burden of showing that any given requirement must have a manifest relationship to the employment in question."[232] "The touchstone is business necessity."[233] The Court did not specify which of the "burdens" it was speaking about, but it seems clear—and some lower courts have so held—that it was referring to the burden of persuasion.[234]

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227. County of Washington v. Gunther, 101 S. Ct. 2242, 2247-49 (1981) (Equal Pay Act and Title VII). *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Myers v. Gilman Paper Co., 25 Fair Empl. Prac. Cas. 468, 470 (S.D. Ga. 1981). *See also* Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Federal courts, however, commonly construct affirmative defenses without express statutory authority. *See, e.g.*, Sorrells v. United States, 287 U.S. 435 (1932) (entrapment); Davis v. United States, 160 U.S. 469 (1895) (insanity); Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1268 (5th Cir. 1980); Vuyanich v. Republic Nat'l Bank, No. CA-3-6982-G (N.D. Tex. Aug. 4, 1981).

228. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).

229. *Cf.* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17, 717 n.31 (1978) (suggesting that a cost defense must be asserted as an affirmative defense in a Title VII sex discrimination case, even though cost is not a specific statutory defense); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (suggesting that costs are proper affirmative defenses in religious discrimination cases).

230. *See generally* Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979); Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977).

231. 401 U.S. 424 (1971).

232. *Id.* at 432.

233. *Id.* at 431.

234. *See* cases cited notes 167-69 *supra;* Vuyanich v. Republic Nat'l Bank, No. CA-3-6982-G, slip op. at 7 (N.D. Tex. Aug. 4, 1981). It is a fundamental principle that the burden of proof on an affirmative defense rests upon the party who asserts it. The burden remains

If Congress has in fact imposed upon the defendant the burden of persuasion on business necessity, then this defense should be treated as an affirmative defense under rule 8(c), and the defendant should be required to plead it.

Similarly, the Court's recent decision in *Gomez v. Toledo*[235] supports a rule that would impose upon the defendant the burden of pleading the defense of a legitimate, nondiscriminatory reason. *Gomez* was an action based upon section 1983 of the United States Code, which provides a remedy to persons whose federal rights—constitutional or statutory—have been infringed upon by a defendant acting under color of state law.[236] Section 1983 on its face is silent on the question of immunity for states, municipalities, or any other class of local or state defendants. Common-law immunities, however—for example, those protecting legislators and judges—were well established by the time the civil rights statutes of the Reconstruction era were enacted. The Supreme Court has held that Congress would have explicitly abolished these immunities in the enactment of section 1983 had it intended to eliminate them.[237] As a result, the immunity defenses—both absolute and qualified—are now well-established defenses in constitutional and statutory claims arising under section 1983.[238]

In *Gomez* the Supreme Court addressed the pleading burden of the qualified immunity defense and held that a section 1983 defendant has the burden of pleading qualified immunity; correspondingly, a section 1983 plaintiff need not allege bad faith in order to state a claim for relief.[239] Plaintiff in *Gomez* sued a police superintendent for damages and alleged a violation of procedural due process in his discharge from employment. Granting defendant's motion to dismiss for failure to state a claim for relief, the district court concluded that the plaintiff was "required to plead as part of his claim, that, in committing the act alleged, [defendant] was motivated by bad faith."[240] The court of appeals affirmed.

The Supreme Court resolved a conflict among the circuits and reversed, holding that the qualified immunity doctrine is an affirm-

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with that party until the termination of the action. Lilienthal's Tobacco v. United States, 97 U.S. 237 (1878).

235. 446 U.S. 635 (1980).

236. 42 U.S.C. § 1983 (1976).

237. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

238. *See generally* Kattan, *Knocking on* Wood: *Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977).

239. 446 U.S. at 639-40.

240. *Id.* at 637.

ative defense and thus is not relevant to the existence of a prima facie case under section 1983.[241] The Court emphasized two important factors to support the proposition that a legitimate, nondiscriminatory defense should be treated as an affirmative defense. First, neither the language nor the legislative history of section 1983 indicates that a plaintiff must allege bad faith to state a claim under the statute. Second, whether a qualified immunity exists in a particular case "depends on facts peculiarly within the knowledge and control of the defendant," which a plaintiff ordinarily cannot be expected to know.[242] The Court observed that the second factor is especially true of the subjective part of the immunity doctrine.[243]

One of the main purposes of the federal pleading rules is to notify the factfinder of the issues in a case. Rules 8(b) and (d) of the Federal Rules of Civil Procedure are intended to inform the plaintiff and the court not ouly of those allegations in the complaint that are admitted and thus will not be an issue at trial, but also of those allegations that will be issues at trial. New matters that are not alleged in the complaint are not controlled by rules 8(b) and (d); these allegations, which are in the nature of avoidance and confession, are controlled by rule 8(c).[244] If the burden to notify the court of the absence of any grounds that could defeat plaintiff's entitlement to relief were placed upon the plaintiff, then he would be required under the legitimate, nondiscriminatory reason doctrine to anticipate, plead, and controvert *every* possible reason that the defendant could raise. If a defendant does not intend for his response to the complaint to conform to the notice theory of pleading envisioned by rules 8(b) and (c), the fairness considerations upon which the *Gomez* Court relied dictate that plaintiffs in discrimination cases should not have to anticipate any number of potential defenses that defendants might assert under the loosely defined doctrine of a legitimate, nondiscriminatory reason.[245]

A more fundamental principle is also implicit in *Gomez*. As Justice Rehnquist pointed out in his concurring opinion, the

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241. *Id.* at 640.

242. *Id.* at 639-41.

243. *Id.* at 641. The subjective component of the immunity doctrines concerns the defendant's "good faith" on the issue of the presence or absence of malicious intent. Baker v. Norman, 651 F.2d 1107, 1121-22 (5th Cir. 1981).

244. *See* C. WRIGHT & A. MILLER, *supra* note 33, § 1261.

245. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 350 (1971) (purpose of rule 8(c) is to give the opposing party notice and a chance to argue against the defense); FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948).

Court's decision in *Gomez* addressed only the burden of pleading issue.[246] Nevertheless, the Court's reasoning in this case just as persuasively supports the proposition that the burden of producing evidence, and—more importantly—the burden of persuasion, should be allocated to the defendant in a section 1983 action.

3. A Prima Facie Case Should Establish A Rebuttable Presumption of Discrimination

It is well settled that the plaintiff in a discrimination case has the initial burden of producing evidence sufficient to establish the elements of a prima facie violation. It is not clear, however, whether a prima facie showing establishes an inference or a presumption of discrimination. As we have seen, the courts, including the Supreme Court, have applied both designations to prima facie cases.[247] This indecision has served only to create confusion. To dissipate the confusion, courts should adhere to the principle that a prima facie case establishes a presumption of discrimination. Although the Court recently followed this principle in *Burdine*, it nevertheless continued to use the terms "presumption" and "inference" in a rather confusing fashion.[248]

A number of courts and commentators have suggested that the characterization of the prima facie case as a presumption should be limited to the establishment of a rebuttable presumption of law, which operates independently of any logical factual inference that might also exist.[249] The rationale for this presumption analysis has a long history in discrimination cases, even under theories in which intentional discrimination must be shown. Thus, in *Keyes v. School District No. 1*,[250] a school desegregation case brought under the equal protection clause, the Supreme Court stated that

> [a] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a *presumption* that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.[251]

In *Village of Arlington Heights v. Metropolitan Housing Develop-*

246. 446 U.S. at 642.
247. *See* note 135 *supra* and accompanying text.
248. 101 S. Ct. 1089 (1981). *See* Cleary, *supra* note 30, at 7.
249. *See, e.g.*, Hecht & Pinzler, *supra* note 64, at 528.
250. 413 U.S. 189 (1973).
251. *Id.* at 208 (emphasis added).

ment Corp.[252] the Supreme Court also adopted a rebuttable presumption analysis of a prima facie case in a section 1983 action.

The rationale for the proposition that a prima facie case creates a rebuttable presumption of discrimination is more fully explained in Supreme Court cases that deal with the statutory theories of disparate impact and disparate treatment. In *International Brotherhood of Teamsters v. United States,*[253] a disparate treatment case brought under Title VII, the Court explained the nature of the prima facie case as follows:

> The holding in [Franks v. Bowman Transportation Company, 424 U.S. 747, 772-773 (1976)] that proof of a discriminatory pattern and practice creates a *rebuttable presumption* in favor of individual relief is consistent with the manner in which presumptions are created generally. *Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof.* These factors were present in *Franks.* . . . [T]he employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process.[254]

Although the Court in *Teamsters* adopted this rationale after a violation had already been found, and the discussion was addressed to the burden of proof in the relief phase of litigation, the Court's reasoning is equally applicable to the determination of liability.

A prima facie case under the disparate impact theory is often based at least in part upon statistical evidence. The use of statistics is usually justified under both the probability theory[255] and policy considerations.[256] In approving the use of statistics in discrimination cases, for example, the Court in *Teamsters* explained that statistical evidence of racial or ethnic imbalance is probative solely because the imbalance, if unexplained, is often a "telltale sign of purposeful discrimination."[257] Similarly, in *Hazelwood School District v. United States*[258] the Court noted that "gross statistical disparities . . . alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."[259]

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252. 429 U.S. 252 (1977).
253. 431 U.S. 324 (1977).
254. *Id.* at 359 n.45 (citations omitted) (emphasis added).
255. *See* Castaneda v. Partida, 430 U.S. 482 (1976).
256. *Id.*
257. 431 U.S. at 339-40 n.20.
258. 433 U.S. 299 (1977).
259. *Id.* at 307-08.

The characterization of a prima facie case as a presumption under the disparate impact theory can be justified by the social policy of having legal consequences flow from the effects of specific conduct, and it finds support in the legislative history. Thus, in the amendments to the Equal Credit Opportunity Act,[260] for example, Congress specifically endorsed the disparate impact test as a guide to the allocation of the burdens of proof in discrimination cases. The Senate report on the amendments stated that

> [t]he prohibitions against discrimination on the basis of race, color, religion or national origin are unqualified. In the Committee's view, these characteristics are totally unrelated to creditworthiness and cannot be considered by any creditor. In determining the existence of discrimination on these grounds . . . courts and agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial construction of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company* . . . and *Albemarle Paper Company v. Moody* . . . are intended to serve as guides in the application of the Act, especially with respect to the allocations of burdens of proof.[261]

Courts have focused on similar considerations of probability and legislative and judicial policy in support of the characterization of a prima facie case as a presumption under the disparate treatment theory of discrimination. The Court in *Teamsters*, for example, stressed the necessity of demonstrating a discriminatory motive in disparate treatment cases. The Court stated that "[u]ndoubtedly[,] disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."[262] Furthermore, in *Furnco*, a more recent case than *Teamsters*, the Court offered a probability-based rationale in support of a presumption characterization:

> A prima facie case under [the disparate treatment theory] raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . *And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.* Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the [defendant's] actions, it is more likely than not the [defendant], who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.[263]

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260. 15 U.S.C. § 1691 (1976).

261. S. REP. No. 589, 94th Cong., 2d Sess. 4-5 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 403, 406 (citations omitted).

262. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

263. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted) (emphasis added).

Although the Court in *Furnco* characterized the prima facie case as an "inference," the rationale it offered clearly is based on one of the well-recognized justifications for creating a presumption.[264]

A major problem in properly characterizing a prima facie case is that the terms "inference" and "presumption" have been used interchangeably to describe too many phenomena and to perform too many tasks. Another problem exists in determining how much evidence is necessary to meet the burden that an inference or presumption imposes upon the party against whom it operates. Characterizing a prima facie case as a rebuttable presumption would help to clarify this "chaos" if the courts would recognize that a presumption analysis could facilitate the disposition of discrimination cases in three possible situations.[265]

The first situation occurs when there is no dispute about the basic facts, and no rebuttal evidence has been submitted to show the nonexistence of the presumed fact of discrimination. Absent judicial notice or an admission by the defendant, the credibility of the plaintiff's evidence or testimony is a question for the factfinder. Accordingly, the judge or jury, as factfinder, *must* find the presumed fact to be true if it finds the basic facts to be true. Indeed, the courts have held that a prima facie case requires such a result.[266] Thus, in discrimination cases in which the plaintiff has presented evidence sufficient to constitute a prima facie case that supports one of the theories of discrimination, and the defendant has neither attacked the evidentiary foundation nor offered any independent evidence of justification, the court must find that the

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264. *See* notes 63-70 *supra* and accompanying text.

265. *See* Hecht & Pinzler, *supra* note 64. The Supreme Court has held that allocating the burden of proof in civil cases does not raise constitutional questions. *See* Lavine v. Milne, 424 U.S. 577 (1976). Moreover, there is no constitutional doctrine that restricts the burden-shifting effect of presumptions in civil cases to a shift in the hurden of producing evidence. There is, however, some inconsistency between two early Supreme Court cases about whether there is a constitutional limitation on the use of presumptions in civil cases. In Mobile, Jackson & K. C. R.R. v. Turnipseed, 219 U.S. 35 (1910), the Court upheld a Mississippi statute which provided that proof of an injury resulting from the running of trains was prima facie evidence of the railroad's negligence. In Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929), on the other hand, in which petitioners challenged a Georgia statute that imposed liahility upon a railroad for damage caused by its trains unless the railroad could prove that its agents had exercised due care, the Court held that the statute violated due process because it had no rational basis. One court noted, however, that the two cases are readily distinguishable on their facts, and that due process analysis has fundamentally changed since the Court rendered these two decisions in the early 1900s. *See* 56 F.R.D. 183, 208-09 (1972) (discussion of the Advisory Committee's deliberations on the Federal Rules of Evidence).

266. Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1094 (1981).

plaintiff has established a right to relief.[267]

The second situation occurs in a case in which the basic facts are in dispute, and the defendant fails to introduce evidence to show the nonexistence of the presumed fact. The factfinder's function under these circumstances is to make a finding of the basic facts. If the factfinder concludes that the basic facts are true, he must then find that the presumed fact exists. If, on the other hand, the factfinder determines that the basic facts are not true, then it cannot make a finding of the presumed fact.[268] Thus, in a discrimination case in which the plaintiff relies upon the disparate treatment theory, for example, and there is a factual dispute about whether the plaintiff applied for the job, whether he was qualified, or whether the defendant was seeking applicants with the plaintiff's qualifications, the factfinder must rule for the plaintiff if it finds that the basic elements of a prima facie case exist. If one of the elements of a prima facie case is not established, however, then the factfinder must rule for the defendant.[269]

The last situation comprises those cases in which the basic facts that give rise to the presumed fact are established, but the defendant introduces evidence to prove the nonexistence of the presumed fact. The overwhelming majority of discrimination cases falls into this third category, and it is in these cases that the allocation of the burdens of proof is most confusing. The adoption of a rule that would treat both statutory exceptions and judicially created defenses as affirmative defenses, and which would hold that a prima facie case creates a presumption rather than an inference, would help resolve the conflict that occurs in this category of cases when evidence is introduced to rebut the presumed fact.[270] Even under this rule, however, there would remain the question of the operational effect of the presumption and the quantum of evidence that a defendant must produce to rebut it.

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267. Thus, when the defendant offers no justification to rebut a prima facie case, the plaintiff should prevail. *See* Taylor v. Philips Indus., 593 F.2d 783, 786 (7th Cir. 1979). One court has held that a prima facie case in discrimination litigation is established by the amount of evidence necessary to convince the factfinder that there has been disparate treatment. *See* Henry v. Ford Motor Co., 553 F.2d 46, 48 (8th Cir. 1977). The proposal suggested by this Article specifically rejects a *res ipsa loquitur* approach to a prima facie case in discrimination cases.

268. *See* Hecht & Pinzler, *supra* note 64, at 548.

269. *See, e.g.*, Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979) (per curiam); Sime v. Trustees of Cal. State Univ. & Colleges, 526 F.2d 1112 (9th Cir. 1975).

270. *See* Wright Line, 251 N.L.R.B. No. 150, 1980 NLRB Dec. ¶ 17,356 (Aug. 27, 1980); notes 330-34 *infra* and accompanying text.

4. The Burden of Producing Evidence and the Burden of Persuasion

Perhaps the most critical question in allocating the burdens of proof in discrimination cases is how to allocate the burden of producing evidence and the burden of persuasion for each element of the case. The resolution of this question depends in substantial part on the outcome of two other related issues: The allocation of the basic elements of a case between the plaintiff and the defendant and the designation of the prima facie case as an inference or a presumption. The first issue has been considered under the proposed rule that statutory exceptions and judicially created defenses should be treated as affirmative defenses, which in turn would impose upon a defendant all three burdens—pleading, production of evidence, and persuasion. This proposed rule presents yet another question, namely, whether a rule that imposes the burdens of producing evidence and persuasion upon the defendant is consistent with rule 301 of the Federal Rules of Evidence. Rule 301 provides that a presumption shifts the burden of production, but that it does not shift the burden of persuasion.

Few courts that have characterized the plaintiff's prima facie case as a presumption—either in the constitutional or statutory cases—have discussed the applicability of rule 301.[271] The Supreme Court in *Burdine* omitted any discussion of the rule. Indeed, the only case to date that discusses the applicability of rule 301 in discrimination cases is *United States v. City of Chicago*,[272] which dealt with a claim of disparate impact discrimination. Defendants argned that the *Griggs* rule, which imposed upon the defendants the burden of persuasion on the business necessity defense, had been altered by the subsequent enactment of rule 301. Therefore, the defendants maintained that they could only be charged with the burden of going forward with the evidence. The court rejected this argument on the ground that the *Griggs* rule was adopted pursuant to an "act of Congress" and was thus

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271. Rule 301 of the Federal Rules of Evidence provides that

> [i]n all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

The Federal Rules of Evidence were signed into law in 1975, as the Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified at 28 U.S.C., FED. R. EVID. 301).

272. 411 F. Supp. 218, 231-33 (N.D. Ill. 1976), *aff'd in part, rev'd in part on other grounds*, 549 F.2d 415 (7th Cir. 1977).

outside the mandate of rule 301. The reasoning in *City of Chicago* is consistent with other court decisions that impose the burden of proof upon the party who claims the protection of a statutory exception.[273]

A more important question, however, is whether the *City of Chicago* rationale supports a rule that would impose upon the defendant the burden of persuasion on the judicially created defense of a legitimate, nondiscriminatory reason. For a number of reasons, this question should be answered in the affirmative. First, courts have recognized that the disparate impact and disparate treatment theories are alternative approaches to determinations of discrimination.[274] Therefore, it makes little sense to create a presumption/inference dichotomy between these two modes of analysis, which the courts seem to have done. The same policy, probability, and fairness considerations apply to a prima facie case under both theories.[275] Moreover, the Supreme Court has recognized that disparate treatment discrimination is "the most obvious evil Congress had in mind" when it enacted discrimination legislation.[276] Thus, it can be argned that the legitimate, nondiscriminatory reason defense in disparate treatment cases is as much an "act of Congress" as was the judicially developed business necessity defense in the disparate impact case of *City of Chicago*. Consequently, the former defense should also be outside the mandate of rule 301.

A second reason why the burden of persuasion on the defenses of business necessity and a legitimate, nondiscriminatory reason should be imposed upon the defendant is that there is a functional problem with rule 301. Neither rule 301 nor any of the other federal rules of evidence defines, lists, or illustrates the function of presumptions. Rather, the rule simply assumes the existence of presumptions. In addition, the rule does not distinguish between presumptions created for procedural, probability, or policy reasons; it simply treats them all alike.[277] Because of this ambiguity, rule 301 has been the subject of considerable debate among courts and

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273. *See also* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669 (1979). The Court in *Wilson* held that 25 U.S.C. § 194, a 145 year old statute that created a presumption of title in favor of the Indians, shifted both the burden of producing evidence and the burden of persuasion to adverse claimants once the Indian plaintiffs made out a prima facie case of prior title.

274. *See, e.g.*, Wright v. National Archives & Records Serv., 609 F.2d 702, 710-11 (4th Cir. 1979); note 100 *supra*.

275. *See* notes 249-64 *supra*.

276. Teamsters v. United States, 431 U.S. 324, 334 n.15 (1977).

277. *See* Hecht and Pinzler, *supra* note 64, at 554-55.

commentators over which theory of presumptions should be read into the rule.[278]

Most of the debate has centered around two theories, one identified with James Bradley Thayer—the so-called Thayerian theory[279]—and the other with Professor Morgan—the so-called Morgan theory.[280] Thayer's theory generally is described as the "bursting bubble" theory,[281] although some commentators have questioned whether this is an apt term for the doctrine.[282] Under the Thayerian theory, the sole effect of a presumption is to shift the burden to the opponent to produce evidence contrary to the presumed fact. If the opponent produces evidence of this nature, the proponent's bubble—which has grown in reliance upon the presumption—bursts; the presumption is dispelled; and the factfinder is required to disregard whatever role the presumption may have had in the trial.[283]

The Morgan theory, on the other hand, posits that a presumption shifts both the burden of production and the burden of persuasion. Under Morgan's approach, jury instructions, for example, would simply be addressed to the burden of persuasion on the existence of the presumed fact. Thus, in an age discrimination case the jury would be told that if the plaintiff established a prima facie case, a presumption would arise that the defendant considered the impermissible criterion of age in its decisionmaking. The jury then would be instructed that the defendant had the burden of persua-

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278. *See* Ladd, *Presumptions in Civil Actions*, 1977 ARIZ. ST. L.J. 275; Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281 (1977). *See also* Mendez, *supra* note 4, at 1151-61; text accompanying notes 275-89.

279. J. THAYER, *supra* note 11, at 313-52. *See also* Hecht and Pinzler, *supra* note 64; Laughlin, *supra* note 64.

280. E. Morgan, *Foreword*, in MODEL CODE OF EVIDENCE 56-57 (1942); Morgan, *supra* note 64; Morgan, *Observations*, *supra* note 64.

281. *See* Memorandum of Professor Edward W. Cleary (October 31, 1974), *reproduced in* 1 J. WEINSTEIN, WEINSTEIN'S EVIDENCE, at 301-10 (1980) [hereinafter cited as Memorandum].

282. Cleary, *supra* noto 30, at 17-18.

A strict "bursting bubble" theory has two relevant aspects. If the opponent introduces no evidence to contradict the presumed fact, the proponent is entitled to a directed verdict. If the proponent is relying solely upon the presumption in making his case and the opponent introduces evidence to contradict the presumed fact, then the presumption disappears, and the judge will direct a verdict in favor of the opponent. Usually, however, the basic facts underlying the presumption will yield a natural inference that will carry the case to the jury. Thus, a case in which there would be a directed verdict against a proponent of a "prickod bubble" would be rare. *See* Memorandum, *supra* note 281, at 301-10 to 301-12.

283. *See* Hecht & Pinzler, *supra* note 64, at 531-33.

sion on the nonexistence of its reliance upon the impermissible criterion.[284]

Although there is a long history behind the codification of rule 301 in the federal system,[285] a consensus has yet to emerge among either commentators or the federal judiciary on how to interpret this rule. Courts have relied primarily upon the treatment of the rule in *Weinstein's Evidence*[286] and *Moore's Federal Practice*.[287] Judge Weinstein assumes that rule 301 adopted the Thayerian theory, noting that the language of the rule makes it clear that only the burden of producing evidence is shifted.[288] Weinstein's interpretation holds to the view that, in order to dispel the effects of a presumption, the party against whom the presumption operates must present evidence sufficient for a reasonable factfinder to conclude that the contrary of the presumed fact is true. Under this analysis, the term "presumption" would never be mentioned to a jury,[289] although the court may point out that an inference is allowed to be drawn from the basic facts. Unless the court decides as a matter of law that the basic facts or the presumed fact either is or is not established, the question must go to the jury.[290]

The treatment of rule 301 presumptions in *Moore's Federal Practice* also assumes that the rule embodies Professor Thayer's theory.[291] Although *Moore's* treatment of this point is more implicit than explicit, there are some indications in the treatise which suggest that the basic facts—as distinguished from the presumed facts—may sometimes have an intrinsic probative value that is suf-

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284. C. McCORMICK, *supra* note 3, § 345; Morgan, *supra* note 63, at 281.

The cases suggest that the courts apply the Morgan view of presumptions to statutory defenses and the judicially developed doctrine of business necessity. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The Thayer view, on the other hand, is applied to the judicially created defense of a legitimate, nondiscriminatory reason. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). No rationale is suggested in the cases for this disparity in treatment.

285. *See, e.g.*, Proposed Rules of Evidence of the U.S. District Courts and Magistrates (West 1969), 46 F.R.D. 161, 212-14 (1969), 51 F.R.D. 315, 336 (1971), 56 F.R.D. 183, 208 (1973). References to the legislative history can be found in 1 J. WEINSTEIN, WEINSTEIN'S EVIDENCE 301-1 to 301-13 (1980).

286. *Id.* at 300-1 to 301-36.

287. 10 J. MOORE, MOORE'S FEDERAL PRACTICE §§ 301.01-.31 (2d ed. 1979).

288. "[T]he pure Thayer rule was adopted." 1 J. WEINSTEIN, *supra* note 285, at 301-12.

289. *Id.* ¶ 301[02], at 301-28.

290. *Id.* at 301-30.

291. 10 J. MOORE, *supra* note 287, §§ 301.01-.31. The authors state that "Congress adopted an unsullied Thayer theory." *Id.* § 301.01[1], at III-6.

ficient to carry the case to the jury.[292] Thus, in situations in which the party against whom the presumption operates produces no evidence, the authors embrace the result described in the federal conference report: "[T]he court will instruct the [factfinder] that if it finds the basic facts, it may presume the existence of the presumed fact."[293]

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292. *Id.* §§ 301.01-.31. The authors' view of Thayer's theory is most fully stated in *id.* §§ 301.04[2], at III-19.

293. H.R. REP. No. 1597, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. CODE & AD. NEWS 7098, 7099. Two other major works also offer a treatment of this subject: 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE (1977); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE (1977). Wright and Graham's treatment of rule 301 does not assume that the rule adopts the Thayerian theory. C. WRIGHT & K. GRAHAM, *supra*, §§ 5121-5129. Their discussion seems to proceed on the assumption that Congress sought a theory intermediate between the Morgan and Thayer theories. *See id.* § 5121, at 546-47; § 5122, at 557; § 5126, at 606, 614. These authors seem to place considerable reliance upon the Congressional Conference Report, which discusses the version of rule 301 that ultimately was enacted. The Conference Report states that

> [t]he House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.
>
> Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

H.R. REP. No. 1597, 93d Cong., 2d Sess. 5, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7099.

Under yet another analysis, Louisell and Mueller treat rule 301 in two ways. On the one hand, they recognize that the rule can be read to adopt the Thayerian view. 1 D. LOUISELL & C. MUELLER, *supra*, § 70, at 566; *id.* § 69, at 555. On the other hand, they seek to find a "variant mode" under the rule by giving it what they consider to be a broader reading. *Id.* § 70, at 566, 574. Under this alternative interpretation, Louisell and Mueller reach a result similar to the one advocated by Wright and Graham, but they do so through a different analysis. *Id.* at 581. Ultimately, however, it appears that these authors are of the opinion that a narrower reading of rule 301 yields an unsatisfactory result because it does not give sufficient recognition to the procedural, probability, or policy reasons underlying the different presumptions. They suggest, for example, that if the presumption is based upon policy grounds, the factfinder, if it finds the basic facts to be true, should also find the presumed fact to be true, unless upon all the evidence it finds that the nonexistence of the presumed fact is at least as probable as its existence. If, however, the presumption is founded on procedural or probability grounds, then these authors would allow the presumption to be taken merely as strong evidence of the presumed fact. *Id.* at 574-75, 579.

The adoption of a rule in discrimination cases that treats all defenses as affirmative defenses would avoid the problem that is highlighted in the debate over rule 301. This proposal is not, however, aimed at escaping the application of rule 301; rather, it is consistent with the rule, since the latter is not relevant when the burden of persuasion on an element of a case is assigned to a party by substantive law considerations.

Imposing the burden of persuasion upon defendants in discrimination cases is consistent with the theory that underlies the prima facie case doctrine which the Supreme Court has adopted in discrimination cases. The prima facie doctrine in both constitutional and statutory cases requires, in effect, that if a plaintiff has met the threshold requirement of proof, then—absent explanation or justification—this showing justifies the imposition of liability upon the defendant.[294] Under this construction of the prima facie case, it is only reasonable and fair to impose upon a defendant the obligation—that is, the burden of persuasion—to demonstrate that his conduct was motivated by lawful reasons.[295]

5. Satisfying the Burden of Persuasion: A Uniform Preponderance of the Evidence Standard

The plaintiff in a discrimination case has the civil litigant's traditional burden of satisfying the factfinder that the defendant violated at least one of the plaintiff's legally protected rights. Satisfaction of this burden is measured by the "preponderance of the evidence" standard, which means that after the close of the evidence, the trier of fact must be persuaded that it is more likely than not that the decisionmaker impermissibly relied upon one of the prohibited criteria in making his allegedly unlawful determinations.[296] The defendant in a discrimination case, whether relying upon a statutory defense or the judicially created defense of business necessity, must also satisfy his burden of proof by meeting the preponderance of the evidence standard.[297] The question to be re-

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294. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981) (statutory case); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (constitutional case); Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04, 703 n.5 (8th Cir. 1980) (business necessity); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 591 (5th Cir. 1978) (employer has burden of persuasion on bona fide occupational qualification).

295. *See* Mt. Healtby City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

296. *See* F. JAMES & G. HAZARD, *supra* note 3, § 7.6.

297. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Congress imposed upon defendant the burden of proof on business necessity).

solved in this area is which standard should apply when a defendant asserts the defense of a legitimate, nondiscriminatory reason.

The "articulation" standard, which a majority of the Court adopted in *McDonnell Douglas*,[298] can be interpreted either as a rule on the burden that shifts to a defendant after the plaintiff establishes a prima facie case, or as a test for the quantum of proof that a defendant must present. Alternatively, the standard can be interpreted as doing both of these things. To the extent that *Burdine* is read to reduce the articulation standard solely to a burden-shifting rule—which it seems to do[299]—the proposals already set forth under the pleading and burden of persuasion subsections in this part of the Article are a more appropriate approach. If, however, the "articulation" rule, as explained in *Burdine*, establishes a standard for determining whether the burden of persuasion has been satisfied, then it introduces a measure that has never before been used in the lexicon of burdens of proof.[300] Under this interpretation, the "articulation" rule sets forth several variants of a standard that is far less demanding than the preponderance of the evidence standard. First, *Burdine* may suggest the reintroduction of the so-called scintilla of evidence rule, which the federal courts generally do not favor.[301] Second, the standard could suggest that a plaintiff who has made out a prima facie case still may not be entitled to prevail even though the defendant's evidence is noncredible.[302] Last, if *Burdine* is construed to incorporate the Thayerian theory of presumptions, which some commentators believe adopts rule 301 of the Federal Rules of Evidence, then the Court has failed completely to deal with the functional problem that this evidentiary rule raises.

The proposal which is suggested by this Article—that the pre-

298. *See* notes 126-29 *supra* and accompanying text.

299. *See* note 158 *supra* and accompanying text (*Burdine* analysis that defendant does not have the burden of persuasion).

300. *See* Morse, *supra* note 58.

301. The federal courts have rejected the scintilla rule repeatedly. Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333, 343 (1933); Maxey v. Freightliner Corp., 623 F.2d 395, 398 (5th Cir. 1980) (quoting Mann v. Bowman Transp., Inc., 300 F.2d 505, 510 (4th Cir. 1962)); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). The potential reach of reading *Burdine* and *Sweeney* to adopt the scintilla of evidence rule can be found in Lombard v. School Dist., 463 F. Supp. 566, 571 (W.D. Pa. 1978), in which the court held that defendant's statement to the effect that a man was selected over a woman because the man had more friends in high places satisfied the "articulation" standard.

302. It appears, however, that the federal courts require both plaintiffs and defendants to present credible evidence. *See, e.g.*, Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 372 (4th Cir. 1980); Smithers v. Bailor, 629 F.2d 892, 898 (3d Cir. 1980).

ponderance standard should control not only the plaintiff's ultimate burden but also the defendant's burden on affirmative defenses, rejects all possible interpretations of the *McDonnell Douglas/Burdine* "articulation" standard. The adoption of this proposed rule would mean, simply, that for either party to prevail, his evidence in support of the elements on which he has the burden of persuasion must outweigh the evidence of his opponent.

6. The Pretext Stage of Proof Should be Eliminated

The courts have placed great emphasis on the so-called pretext stage,[303] which the Supreme Court devised in *McDonnell Douglas*, *Burdine*, and *Moody*. What a plaintiff does or does not do in the pretext stage is often critical to the outcome of the case. The Court apparently formulated the pretext stage in an attempt to insure that plaintiffs have a "full and fair opportunity"[304] to make the showing of causation that is necessary to establish liability. Thus, even if the defendant effectively rebuts the plaintiff's prima facie case through a showing of a statutory exception, business necessity, or a legitimate, nondiscriminatory reason, the plaintiff must be afforded an opportunity to show that the defendant's asserted justification was in fact merely a pretext for unlawful discrimination.[305]

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303. *See* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). *Compare* Robbins v. White-Wilson Medical Clinic, Inc., 642 F.2d 153 (5th Cir. 1981) (pretext shown) *with* Panlilio v. Dallas Ind. School Dist., 643 F.2d 315 (5th Cir. 1981) (pretext not shown).

304. Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1096 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). The "full and fair opportunity" theory also has doctrinal foundations in the federal habeas corpus cases. *See* Stone v. Powell, 428 U.S. 465 (1976). Justice Powell is the author of both the *Stone* and *Burdine* opinions. The Court in *Stone*, however, failed to provide guidelines for its "opportunity" test. A number of commentators have expressed serious concern over the potential effect that the opportunity test may have on state criminal defendants' access to the federal courts for review of alleged violations of their federal constitutional rights. *See, e.g.*, Greene, Stone v. Powell: *The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655 (1977); Neuberne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Comment, *The "Opportunity" Test of* Stone v. Powell: *Toward a Redefinition of Federal Habeas Corpus*, 23 VILL. L. REV. 1095 (1977-1978). *See generally* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). The Court in *Burdine* likewise did not provide guidelines for the "full and fair opportunity" test. The Court's failure to provide these guidelines is significant because the test may provide a method for limiting federal review of discrimination claims. *See* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 851-52 (1977).

305. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

The establishment of this new stage of litigation in discrimination cases is completely unnecessary. The defendant should be required to establish a statutory exception, business necessity, or a legitimate, nondiscriminatory reason. Any contention that the asserted defense was not pretextual or manufactured is inherent in the defendant's proof.[306] Thus, if a defendant has the burdens to plead, produce evidence, and persuade on affirmative defenses—which this proposal suggests that he should—then obviously he should be made to convince the trier of fact that his reasons were both legitimate and nondiscriminatory. If the term "legitimate" is defined as "genuine,"[307] then the defendant necessarily must satisfy the factfinder that his reasons were genuine and nondiscriminatory in order to prove a nonpretextual defense.[308] Apparently, however, the Court is not using "legitimate" correctly in the sense of "genuine," since if it were, the Court's new procedural arrangement would be rendered meaningless.[309] Perhaps even more important, this third step ultimately has the effect of placing a burden upon the plaintiff that—as suggested above—should be placed upon the defendant.

V. JUSTIFICATION FOR THE PROPOSED FRAMEWORK

The proposed allocation of the burdens of proof in discrimination cases can be reduced to three basic statements. First, the plaintiff has all three burdens on his prima facie case, and he must demonstrate his right to relief in accordance with the preponderance of evidence standard. Second, defendant has all three burdens

306. *See* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 28-29 (1978) (Stevens, J., dissenting).

307. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 948 (P. Gove ed. 1961).

308. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (when a defendant demonstrates business necessity, a plaintiff fails to satisfy his ultimate burden of proving discrimination).

309. The statement in *Burdine* that "defendant need not persuade the court that it was actually motivated by the [articulated] reasons," 101 S. Ct. at 1094, strongly suggests that the Court did use the term "legitimate" to mean "genuine." This statement implies that even though the defendant's legitimate, nondiscriminatory reason must be "clear and reasonably specific," *id.* at 1096, it need not be either the "real reason" or based upon credible evidence. *Id.* at 1095 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). *But see* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). In *Burnup & Sims, Inc.* the Supreme Court held that an employer violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), when he discharged two employees who were engaged in lawful activity, even though the employer did not have a wrongful motive. The Court stated that the employer's good faith was irrelevant because the employer's conduct would or might have a deterrent effect on other employees.

on all defenses—both statutory and judicially created. Last, when defendant asserts an affirmative defense and fails to meet any of these burdens, plaintiff is entitled to relief under the preponderance of the evidence rule—assuming, of course, that plaintiff has met the prima facie case requirement. There are cogent precedents and both procedural and substantive policy considerations that support this proposed framework. For purposes of analysis, these rationales can be grouped most conveniently into three categories. The first category is based upon the principle of *ejusdem generis*: Like rules should apply to cases of the same class. The second category is concerned with the constructive functions that the burdens of proof perform in the courtroom; they are directed toward a fair ordering of the process of proving discrimination in situations in which the intent element is or is not deemed to be critical. The last category reflects a public policy judgment about the degree of responsibility that should be placed upon defendants to promote the national policy against discrimination.

A. *Precedents:* Mt. Healthy *and* Wright Line

The proposals suggested by this Article build upon precedents for the allocation of the burdens of pleading, producing evidence, and persuasion that have been developed in analogous areas of the law. The decisions of the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*[310] and *Gomez v. Toledo*,[311] taken together, clearly support the proposed framework. In fact, it is difficult to harmonize the results in these two cases with *Burdine*, especially when all three are considered in light of the Court's holding in *Washington v. Davis*[312] that statutory prohibitions against discrimination require a "more probing judicial review" than similar claims based upon the Constitution.[313] Moreover, the Court's decision in *Mt. Healthy* has been the basis for the National Labor Relations Board's (NLRB) approach to discrimination cases arising under the National Labor Relations Act (NLRA),[314] which the NLRB has adopted in an effort to harmonize its decisions with those of the federal courts. The NLRA, in turn, has been the basic statutory scheme—directly or derivatively—upon which Congress has patterned most of the other stat-

310. 429 U.S. 274 (1977).
311. 446 U.S. 635 (1980).
312. 426 U.S. 229 (1976).
313. *Id.* at 247.
314. 29 U.S.C. § 158 (1976).

utory prohibitions against discrimination.[315]

The NLRA makes it an unfair labor practice for an employer to discriminate against its employees in the exercise of their rights under the Act. The Act does not state explicitly that an employer's intent is controlling on, or even relevant to, the determination whether an employer has engaged in discriminatory conduct. Thus, section 8(a)(3) of the Act, for example, broadly proscribes any employment practice that encourages or discourages union activity.[316] Nevertheless, it is clear that Congress did not intend for either the NLRB or the courts to give this provision its literal scope, since any decision on the terms or conditions of employment, or on union activities in general, necessarily would have the effect—however indirect—of encouraging or discouraging union activity.[317] Instead, Congress chose to preserve the employer's legitimate interest in an efficient and productive work force to the extent that its discriminatory employment practices are not intended to reward or penalize union activity.[318]

The NLRB and the courts have often differed on both the appropriate test of causation and the allocation of the burdens of proof in deciding discrimination cases under the NLRA.[319] A major part of the difficulty is attributable to the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*,[320] a case in which the Court formulated two theories of discrimination that parallel in substantial part the two theories which have been read into Title VII. *Great Dane Trailers* dealt with an employer's alleged violation of sections 8(a)(1) and (a)(3) of the NLRA.[321] The employer refused to pay striking employees vacation benefits that had accrued under a terminated collective bargaining agreement. At the

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315. *See* Lorillard v. Pons, 434 U.S. 575, 578 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974).

316. 29 U.S.C. § 158(a)(3) (1976).

317. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

318. *See, e.g.*, NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).

319. *See, e.g.*, Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977); DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of* Mt. Healtby Board of Education v. Doyle *Upon the NLRA*, 66 GEO. L.J. 1109 (1978).

320. 388 U.S. 26 (1967); *accord*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967); *see* Christensen & Svanoe, *supra* note 86, at 1312; DuRoss, *supra* note 319, at 1118; Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of* American Ship Building *and* Great Dane Trailers, 70 COLUM. L. REV. 81 (1970); Oberer, *The Scienter Factor in Sections 8(a)(1) & (3) of the Labor Act: Of Balancing, Hostile Motives, Dogs, & Tails*, 52 CORNELL L.Q. 491 (1967).

321. Ch. 120, § 8(a)(1), (a)(3), 61 Stat. 140-41 (1947) (current version at 29 U.S.C. § 158 (a)(1), (a)(3) (1976)).

same time, the employer announced that it would pay these benefits to striker replacements, returning strikers, and nonstrikers who worked during the walkout. The NLRB and the court of appeals agreed that discrimination between striking and nonstriking employees had been established. The court of appeals, however, ruled that the Board—acting on behalf of the employees—would not be entitled to relief unless it affirmatively proved that the employer had acted under an unlawful motivation either to discourage union membership or to interfere with the exercise of protected rights. The employer had made no effort to show any legitimate business purpose for its discriminatory action; the court of appeals, however, speculated that the motivation might have been to reduce expenses, to encourage longer tenure among present employees, or to discourage early leaves immediately before vacation periods. The court denied enforcement of the Board's decision in favor of the employees on the ground that these motives possibly were sufficient to overcome the inference that an improper motive was responsible for the employer's conduct.

The Supreme Court reversed and held that discrimination clearly had been shown in the section 8(a)(3) charge. According to the Court, the employer's conduct was "inherently destructive," and the employer thus should have the burden of justifying or characterizing its "actions as something different than they appear on their face."[322] Otherwise, the Court stated, "an unfair labor practice charge is made out."[323] The Supreme Court went even further, however, and said that even if the employer comes forward with counterexplanations for his conduct, "the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights . . . ."[324] The Court then announced the following two principles: (1) If it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed, and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations; and (2) if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," and the em-

322. 388 U.S. at 33 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963)).
323. *Id.* (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963)).
324. *Id.* at 33-34.

ployer comes forward with evidence of legitimate and substantial business justifications for his conduct, then the Board must prove an antiunion motivation to sustain its charge. In either situation, according to the Court, once the Board shows discriminatory conduct that could adversely affect the employee's rights, the burden is on the employer to establish that he was motivated by legitimate objectives, since proof of motivation is more accessible to him than to the plaintiff.[325]

Thus, the Board normally must make an affirmative showing that the employer's discriminatory conduct was motivated by an antiunion purpose to prove a violation of section 8(a)(3). When an employer's conduct is characterized as "inherently destructive," however, unlawful motivation is presumed to exist.[326] Therefore, the characterization of discriminatory conduct as either "inherently destructive" or having a "comparatively slight" adverse effect is critical, since this characterization determines which party will have the benefit of a presumption of lawful or unlawful motivation once the showing of a "legitimate and substantial business justification" has been made. "Inherently destructive" discriminatory conduct bears "its own indicia of intent" and thus frees the General Counsel from the difficult task of proving unlawful motivation.[327] Even if the employer establishes a "legitimate and substantial business justification" for "inherently destructive" conduct, the presumption of unlawful motivation remains, which leaves to the Board the delicate task of balancing conflicting legitimate interests in accordance with the policy of the Act.[328] Similarly, discriminatory conduct that has only a "comparatively slight" adverse effect on employee rights raises a presumption of unlawful motive. If that presumption is rebutted by a showing of "legitimate and substantial business justifications," however, the presumption of unlawful motive disappears; the conduct in question becomes prima facie lawful; and the burden shifts to the General Counsel to prove affirmatively that the employer acted under an unlawful motive.[329]

Recently, the Board attempted to harmonize its differences with the federal courts on the treatment of discrimination cases

325. *Id.* at 34.

326. *Id.* at 33 (citing American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Brown, 380 U.S. 278, 287 (1965)).

327. *Id.* at 33 (citing NLRB v. Erie Resistor Corp., 373 U.S. 221, 231 (1963)).

328. *Id.* at 33-34.

329. *Id.* at 34.

that arise under the NLRA. In *Wright Line*[330] the Board adopted not only the *Mt. Healthy* test for causation, but also the Court's allocation of the burdens of proof in deciding discrimination cases brought under the Act. *Wright Line* was a "mixed motive" case. On the one hand, the employer had a potentially legitimate reason to discharge an employee who breached a valid working rule; on the other hand, the employer also harbored a strong antiunion animus. The issue before the NLRB was whether the employee had been discharged because of his violation of a valid working rule or because of the employer's antiunion animus. Applying the *Mt. Healthy* rationale, the Board held that plaintiff General Counsel initially must establish a prima facie showing which is sufficient to support an inference that protected conduct was a motivating factor in the employer's decision. Once the General Counsel establishes a prima facie case, according to the NLRB, the burden shifts to the employer to prove by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[331] The Board, concerned that the application of *Mt. Healthy* might be read as shifting to the employer the ultimate burden of proving that his action did not constitute a violation, noted that

> this shifting of hurdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defeuse . . . to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.[332]

The courts of appeals generally have accepted the *Wright Line* approach to resolving the differences between the Board and the courts.[333] Thus, neither *Mt. Healthy* nor *Wright Line* purports to

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330. 251 N.L.R.B. No. 150, 1980 NLRB Dec. ¶ 17,356 (Aug. 27, 1980).

331. *Id.*, 1980 NLRB Dec. at 32,466. At least one court had suggested the *Mt. Healthy* approach prior to its adoption by the Board. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979).

332. 251 N.L.R.B. No. 150, 1980 NLRB Dec. ¶ 17,356, at 32,472 n.11. In arbitration proceedings under a collective bargaining agreement, the employer bears the burden of proof on the defense of just cause. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 621 (3d ed. 1973). *See also* Blumrosen, *supra* note 115.

The Board's characterization of the employer's business justification as "an affirmative defense" is supported by Gomez v. Toledo, 446 U.S. 635 (1980). *See* 251 N.L.R.B. No. 150, 1980 NLRB Dec. ¶ 17,356, at 32,472 n.11.

333. *See, e.g.*, NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981); NLRB v. Nevis Indus., Inc., 647 F.2d 905 (9th Cir. 1981); NLRB v. Charles Batehelder Co., 646 F.2d 33 (2d Cir. 1981); Statler Indus., Inc. v. NLRB, 644 F.2d 902 (1st Cir. 1981).

change the accepted rule that the plaintiff must bear the ultimate burden of establishing his right to relief.[334]

Much of the confusion on the burdens of proof allocation problem in discrimination cases parallels a similar development in the NLRA cases prior to *Wright Line*. The *Mt. Healthy* decision provided a rationale for the Board in *Wright Line* to adopt both a rule of causation and a burdens of proof allocation that should reduce the confusion and conflict which has been prevalent in the labor cases. *Mt. Healthy*, as interpreted by *Wright Line*, also provides a readily available rationale for the courts to do likewise in discrimination cases.

B. Procedural Justifications

Intent is rarely susceptible of direct proof; rather, it must be inferred from a totality of circumstances. The courts have recognized that the line between discriminatory intent and discriminatory impact is not as distinct as it appears to be at first glance.[335] Indeed, the difficulties of proving intent have led some commentators to advise either alternatives for or outright abandonment of the distinction between effects and intent in discrimination cases.[336] Justice Powell, in a lengthy and cogent concurring opinion in a school desegregation case, recognized the intractable problem of litigating the issue of intent when he pointed out that trial courts often come to disparate conclusions on similar sets of facts.[337] He considered the evidentiary problem presented by the intent requirement to be impossible for trial courts to resolve, particularly since the Supreme Court had failed to articulate clearly the kind of proof that is necessary to establish this element.[338]

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334. The General Counsel of the NLRB recently issued a memorandum on his interpretation of the *Wright Line* case, which stated that "[i]t is important to note that the employer must show that the decision *would* have been the same in the absence of protected activity. A showing that the employer *could* have come to the same conclusion will not be sufficient to establish the affirmative defense." Office of the General Counsel, Mem. 80-58, at 2 n.5 (Nov. 4, 1980) (emphasis in original).

335. Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring). *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J., plurality opinion).

336. *See, e.g.*, Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

337. Keyes v. School Dist. No. 1, 413 U.S. 189, 233 (1973) (Powell, J., concurring).

338. *Id.* at 232-33 (Powell, J., concurring). The Supreme Court's adoption of a broad presumption analysis in *Keyes* may well be a tacit acknowledgment of the difficulty inherent in proving intent.

Even if it were possible for the courts to clarify the issue, Justice Powell correctly noted that "wide and unpredictable differences of opinion among judges would be inevitable when dealing with an issue as slippery as 'intent' or 'purpose,' especially when related to hundreds of decisions made by school authorities under varying conditions."[339]

The cases suggest that under a "prima facie-inference-articulate" analysis, judges are reluctant to intrude into the realm of business, administrative, or other decisionmaking processes.[340] Thus, courts deliberately have avoided rigorous scrutiny of the motivations that prompt these decisions; at the same time, however, they have recognized that the decisionmaking process itself, however, may in reality be a "ready mechanism" for masking a discriminatory purpose.[341]

The difficulties and uncertainty surrounding an intent element are functions of the inferential mode of proof, as well as of the judicial reluctance to infer intent once faced with the issue. The evidentiary burden imposed upon a plaintiff by the "prima facie-inference-articulate" approach cannot be met if the evidence of defendant's intent betrays no pattern or practice with recognized discriminatory effects. When the discrimination is perpetrated by systemic and subtle practices that are embedded in institutional and organizational structures, the unlawful intent is carefully camouflaged by numerous purportedly objective variables. As one com-

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339. *Id.* at 233 (Powell, J., concurring).

340. For decisions holding particular subjective evaluations generally beyond the competence of individual judges, see Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) (professor's research and scholarship); Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980) (professor's professional stature); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir. 1978) (teaching ability), *cert. denied,* 439 U.S. 984 (1979). *See also* Davis v. Califano, 613 F.2d 957, 967 (D.C. Cir. 1979) (MacKinnon, J., dissenting); Friedman, *supra* note 4.

341. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 231 (5th Cir. 1974).

The Fifth Circuit has noted that once a defendant has offered an explanation or evidence after plaintiff has established a prima facie case,

> [T]he inquiry does not necessarily stop here. Courts must be extremely careful to determine that the reasons given for [its defense] are not simply a ruse for disguising true discrimination. Courts must . . . carefully scrutinize the [defendant's] explanations for its conduct once the aggrieved [plaintiff] has proved a prima facie case of discrimination. . . . [I]f the [defendant] in any way permits stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid.

Pond v. Braniff Airways, Inc., 500 F.2d 161, 166 (5th Cir. 1974); *accord,* Davis v. Califano, 613 F.2d 957, 965 (D.C. Cir. 1979); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), *vacated on other grounds,* 423 U.S. 809, *reinstated with modifications on other grounds,* 526 F.2d 722 (8th Cir. 1975).

mentator has noted, "[I]t is difficult enough to infer motive from an ambiguous act; it is harder still to infer it from a failure to act."[342]

While in a general sense it is true that the judicial system requires the plaintiff in a civil action to prove his claim by a preponderance of the evidence because of the notion of fundamental fairness—just as the prosecution must bear it in a criminal case—this notion is by no means universally or rigidly applied. Decisions on who should bear a particular burden of proof rest on the closely interrelated considerations of policy, fairness, and probability.[343] The adversary system has made adjustments, within reasonable limits, for the practical necessities of litigation, as well as for the principle that in some circumstances fairness and common sense dictate that the burden of proof should be placed upon defendants. Even in criminal cases, in which the prosecution's burden of proof is the most onerous—proof beyond a reasonable doubt, reinforced by the presumption of innocence—considerations of convenience and common sense cause the burden on some issues to be placed upon defendants. Thus, with the defenses of insanity, excuse or mitigation, self-defense, and alibi, a defendant may have the burden of proof.[344]

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342. Kaplan, *Segregation Litigation and the Schools—Part III: The Gary Litigation*, 59 NW. U.L. REV. 121, 139 (1964).

Professor Cleary has offered a perceptive analysis of how the law decides which elements of a case a plaintiff or a defendant must prove to prevail. Cleary, *supra* note 30. He argues that this decision rests on the closely interrelated considerations of policy, fairness, and probability. Professor Cleary thus contends that the concept of the prima facie case of a legal wrong is a construct based on experience—which is of two kinds. First, there is the experience with the world of everyday events that give rise to disputes over claims of rights. This experience is the origin of society's expectations about people's capacities, limitations, and propensities; therefore, it is also the origin of the substantive rules that we need society to make for itself. Second, there is the experience with the legal controversy itself—particularly the litigation. From this legal experience, people learn what points are likely to be difficult to resolve in disputes of various kinds, as well as the points upon which the outcome is likely to depend.

343. *See* note 38 *supra*.

344. The issue whether the burden of proof should be placed upon defendants in criminal cases on defenses such as excuse, mitigation, self-defense, and alibi has received extensive treatment in the literature because of some landmark Supreme Court cases. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977) (state need not disprove beyond a reasonable doubt every element that constitutes an affirmative defense); Mullaney v. Wilbur, 421 U.S. 684 (1975) (state must prove beyond a reasonable doubt every element of a crime); Leland v. Oregon, 343 U.S. 790 (1952) (due diligence is an affirmative defense, not an element of a crime, and a statute that requires defendant to prove the defense by a preponderance of the evidence is not unconstitutional). *See also* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979); Under-

As particular circumstances arise that require evaluation of the ordinary allocation of the burden of proof, courts do not hesitate to place the burden where it should lie to prevent injustice. The landmark case of *Summers v. Tice*,[345] for example, is an instance in which a court effectuated a social policy through a procedural rule. Plaintiff, while hunting for quail on the open range with the two defendants, was struck in the right eye by birdshots from the gunshot of one of the defendants. Both defendants had fired in plaintiff's direction at essentially the same time; both had twelve gauge shotguns using seven and a half size shot; and, under the circumstances, both were negligent. In affirming the judgment against both defendants, the California Supreme Court unanimously based its conclusion upon the theory that, under these circumstances, the burden of proof shifted to the defendants—that it rested with each one of them "to absolve himself if he can."[346] Other courts have applied this principle in other situations, although they have not always characterized it as such.[347]

The allocation of the burdens of proof suggested in this Article is consistent with the considerations of policy, fairness, and probability that courts have relied upon in other kinds of cases. The proposed framework provides a generally more efficient and equitable method for deciding discrimination cases. First, the proposal requires the plaintiff to produce a specified quantum of evidence to establish a prima facie case under one of the substantive theories of discrimination.[348] The approach then requires rigorous judicial scrutiny under the affirmative defense doctrine of the justification that a defendant offers to explain his conduct. Although the courts have attempted to formulate objectively the quantum of

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wood, *supra* note 9; Note, *Affirmative Defenses and Due Process: The Constitutionality of Placing a Burden of Persuasion on a Criminal Defendant*, 54 GEO. L.J. 871 (1976).

345. 33 Cal. 2d 80, 199 P.2d 1 (1948).

346. *Id.* at 88, 199 P.2d at 5. *See also* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

347. *Cf.* Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981) (employer not entitled to contribution from union even though union was a party to a collective bargaining agreement found to be discriminatory). *See generally* Dworkin, *supra* note 38.

348. Despite the three-step order of proof suggested in *McDonnell Douglas* and *Furnco*, a plaintiff still must make a complete presentation at the initial stage of litigation or risk dismissal. For decisions which hold that a court need not examine alleged discriminatory conduct unless the plaintiff establishes a prima facie case, see Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979) (per curiam); Sime v. Trustees of the Cal. State Univ. & Colleges, 526 F.2d 1112 (9th Cir. 1975); Peters v. Jefferson Chem. Co., 516 F.2d 447 (5th Cir. 1975).

proof necessary to establish a prima facie case under the disparate impact and disparate treatment theories in the statutory discrimination cases, they have been unable to reach a consensus. They also have made similar efforts to establish consistent standards for the defense of business necessity.

To treat a prima facie case as a presumption is preferable to treating it as an inference because the former arrangement firmly fixes the quantum of evidence necessary to establish a prima facie case and provides a workable standard for the factfinder. These objectives are markedly lacking under the inference approach, and courts frequently have noted that the decision to draw the inference is a discretionary matter.[349] Because an inference analysis leaves the ultimate finding of discrimination—and the determination of intent—entirely to the factfinder, findings of discrimination and intent inevitably are subject to severely limited and ineffective appellate review.[350] The presumption approach to the prima facie case, on the other hand, allows for a more objective standard of review and diminishes the possibility that trial courts will reach unpredictable and widely divergent results.

Characterizing a prima facie case as a presumption pinpoints the threshold at which the burdens of proof shift to the defendant to plead, produce evidence, and persuade. It also helps ensure that all relevant evidence is presented to the factfinder. Once the plaintiff has presented to the court the threshold of evidence necessary to establish a prima facie case on the issue of intent, for example, the difficulty of producing further evidence to rebut an erroneous presumption justifies requiring the defendant to prove that the intent to discriminate was not among the considerations which motivated his conduct. Courts have long acknowledged the policy that the burden of proof should be placed upon the party who presumably has the peculiar means of access to the evidence necessary to prove a disputed fact.[351] A defendant who relies upon a statutory defense or a judicially created defense is certainly in a better position to disclose the motivation guiding his decision than a plaintiff who has suffered the effect of that decision. The proposed framework thus is an attempt to distribute the burden of proof equitably between opposing parties.

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349. *See* note 133 *supra.*

350. *See* authorities cited note 208 *supra.*

351. *See* Gomez v. Toledo, 446 U.S. 635 (1980).

C. Policy Justifications

The laws that prohibit discrimination are based in substantial part upon the proposition that decisions about members of a protected class are affected to varying degrees by assumptions and stereotypes that are unrelated to ability.[352] Thus, a danger exists that when a decisionmaker is confronted with a member of a protected class, his determination will not be based upon an unbiased economic self-interest. The remedial antidiscrimination statutes provide a further reason to suspect that decisions which disadvantage individuals within any of the protected classes may be based upon prohibited criteria.[353]

On more than one occasion, the Supreme Court has noted that those individuals to whom the discrimination laws apply have an important role to play in effectuating the national policy against discrimination, and that the courts also play a critical role by providing appropriate standards to ensure that these individuals do not shun their duty. In *Albemarle Paper Co. v. Moody*,[354] for example, the Court stated,

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[355]

On another occasion, the Court noted that "the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority,' is certainly no less than in

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352. *See* Fiss, *supra* note 5, at 241.

353. In commenting on discrimination prohibited under Title VII, Judge Tuttle noted that

> [r]acial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered hy a combination of a strict construction of the statute and a battle with semantics.

Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970) (citation omitted).

354. 422 U.S. 405 (1975).

355. *Id.* at 417-18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

other areas of public policy interests."[356]

The proposed framework suggested by this Article for the allocation of burdens of proof furthers the national policy against discrimination. It requires those subject to regulation to examine and evaluate their policies and practices in the interest of avoiding both intended and unintended discriminatory consequences that might be embedded in their institutional and organizational practices. Each time that a decisionmaker makes a determination about a member of a protected class, he must recognize the potential legal consequences that might follow if a lawsuit is brought against him.[357] Under the proposal that is suggested, the defendant would face the prospect of having to legitimate his decision by a preponderance of the evidence.

While neither the laws that prohibit discrimination nor their legislative histories expressly provide for preferential treatment of protected class members, this concept is implicit in the enactment of laws prohibiting discrimination[358] and provides greater justification for the framework proposed by this Article. When a protected class member suffers an adverse determination at the hands of a decisionmaker, an impermissible criterion indirectly may have been a factor, even if the decisionmaker arguably made his determination on a facially neutral criterion, since the criterion may well reflect present effects of past discrimination.

The conflict over the most efficient procedure for proving the existence of a fact reflects a fundamental disagreement over the ultimate substantive issue of what constitutes discrimination. At the heart of this dispute is a policy judgment on the degree of responsibility that the defendants should bear for the present effects of past societal discrimination. This dispute also is reflected in the causation principle; it can be characterized as a fight over "blame" and "responsibility." "Blame" connotes individual culpability for illicit motivations that are not decisive factors for imposing liability. "Responsibility"—or the lack thereof—on the other hand, implies that a legal obligation has been breached.[359] The proposed

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356. Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1976) (footnote omitted).

357. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975) (establishing the duty to know the settled law as an element of the qualified immunity defense in actions under 42 U.S.C. § 1983).

358. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Belton, *supra* note 2.

359. *See generally* Black, *Civil Rights in Times of Economic Stress—Jurisprudential and Philosophic Aspects*, 1976 U. ILL. L.F. 559, 565.

framework imposes obligations upon defendants to conduct their businesses in a manner that mitigates the societal problems of discrimination, or, at the very least, to refrain from engaging in a decisionmaking process that perpetuates its evils.[360] Allocating the burdens in the manner suggested by this Article imposes upon the plaintiff the obligation to evaluate critically a claim of discrimination under the prima facie case doctrine;[361] it also imposes upon the defendant the obligation to make socially responsible decisions.[362]

VI. CONCLUSION

The foregoing discussion has analyzed the mechanisms for making a determination of discrimination from a procedural perspective. It has developed a framework of rules that may assist the courts in allocating the burdens of pleading, producing evidence, and persuasion—in accordance with basic principles of policy, fairness, and probability. The complexity of the decisionmaking process in American society and its industrial organization preclude an easy answer to the resolution of discrimination claims. Nevertheless, if the broad national policy against discrimination is to be promoted, feasible methods must be formulated for making this determination.

360. *See id.* at 565-71.

361. The penalty imposed upon plaintiffs who bring frivolous lawsuits is an award of attorneys fees, in addition to costs. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

362. *See generally* Belton, *supra* note 2.