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ST. MARY’S HONOR CENTER V. HICKS:
QUESTIONING THE BASIC ASSUMPTION

Deborah A. Calloway*

[T]he prima facie case "raises an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."¹

[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.²

In enacting Title VII, Congress was primarily concerned with bringing an end to disparate treatment, the most basic form of discrimination. Indeed, since its passage nearly two decades ago, Title VII has played a vital role in enabling victims of disparate treatment to seek redress. Because direct evidence of discrimination rarely is available, Title VII's success in rooting out disparate treatment has been due, in large measure, to methods of proof based on the assumption that, ab-

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The ideas in this Article came to light during the writing and editing of the third edition of CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW (3d ed. 1994). I want to acknowledge the significant impact that two of my co-authors, Professor Michael Zimmer and Professor Charles Sullivan of Seton Hall School of Law, have had on the thoughts that ultimately became this Article. At the University of Connecticut, I am grateful to Professor Tanina Rostain for discussing Hicks with me and for her helpful comments and to Professor Jon Bauer for keeping me updated on the latest developments. Finally, if Jennifer Barrett, Editor-in-Chief of the Connecticut Law Review, had not suggested that I write an article on Hicks and then pressed me with deadlines, my commitments to Little, Brown & Co. would surely have consigned this Article (along with others contemplated but never written) to the eternal flame of the "back burner."

sent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination. Throughout the history of Title VII, this basic assumption has served as a cornerstone of disparate treatment actions.

Recently, however, the Supreme Court has questioned this basic assumption. With its decision in *Saint Mary's Honor Center v. Hicks*, the Court joined academics, judges, and a growing segment of the American population that has come to believe that discrimination no longer exists. Under this view, the failure of African Americans, women, and other groups protected by Title VII to achieve equal employment opportunities results not from discrimination, but rather from inadequate motivation or deficient personal and work skills. When the Supreme Court in *Hicks* refused to recognize a presumption of discrimination based on a prima facie case and a discredited nondiscriminatory explanation, the Court both questioned the continued prevalence of discrimination and invited lower court judges and juries to do the same. Unfortunately, lower courts already have launched an attack on the concept of discrimination, searching for alternative explanations for disparate treatment of protected groups. Juries, drawn from a society that believes discrimination has been eliminated, may also view alleged discrimination with skepticism.

In this Article, I chronicle the continued prevalence of virulent discrimination in our society, discrimination that is completely at odds with the erroneous belief that discrimination is either diminishing or eradicated. Given the continued operation of discrimination, the basic assumption remains valid—absent explanation, different treatment of protected group individuals is the result of discrimination. I argue that abandoning this basic assumption is inconsistent with reality and unduly burdens plaintiffs seeking redress under Title VII because it allows judges and juries to act on their unfounded and inaccurate assumptions about discrimination. Title VII requires plaintiffs to prove that they were victims of discrimination, but in a world in which discrimination is commonplace and often subtle, the absence of any other credible explanation should satisfy that burden. I conclude by urging Congress to amend Title VII to overrule *Hicks* and send a message to the Supreme Court and lower courts that they underestimate Title VII's commitment to eradicating intentional discrimination.

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I. THE OPINION IN HICKS

Melvin Hicks, an African American, was discharged from his job as a shift commander at St. Mary’s Honor Center correctional facility, allegedly because of numerous deficiencies in his job performance, including threatening his immediate supervisor, John Powell, during a heated altercation. 4 Hicks was employed for six years as a correctional officer at Saint Mary’s Honor Center, a correctional facility operated by the Missouri Department of Corrections and Human Resources (“MDCHR”). Throughout most of Hicks’ tenure at the facility, he was rated by his superiors as competent and was never disciplined. In 1980, he was promoted to the supervisory position of shift commander.

In 1983, as a consequence of an investigation into the management of Saint Mary’s by MDCHR, several staff changes took place at the facility. These changes included hiring Steve Long as superintendent and John Powell as Hicks’ immediate supervisor. Both Long and Powell are white. Soon after Long and Powell were hired, the successful relationship between Hicks and the management of Saint Mary’s began to deteriorate. In 1984, Hicks became the subject of a series of disciplinary actions stemming from alleged violations of institutional rules by his subordinates as well as a brawl between inmates under his supervision. As a result of these incidents, Hicks was demoted. None of the other employees involved, however, were disciplined. 5

Hicks learned of his demotion at a meeting attended by both Powell and Long. After the meeting, Powell ordered Hicks to turn over his shift commander manual. After Hicks refused, “the two men exchanged heated words. [Hicks] then indicated that he would ‘step outside’ with Powell.” 6 When Powell sought disciplinary action against Hicks based on this exchange, a disciplinary board recommended a three-day suspension. Long, however, advocated for termination, and Hicks was fired on June 7, 1984. 7

Throughout Hicks’ tenure as shift supervisor, he reported numerous violations of institutional rules to Powell, many of which were egregious. These reports were largely ignored. For example, Hicks recommended that one of his subordinates be disciplined for insubordination due to the subordinate’s use of profane words toward Hicks after re-

5. Id. at 489.
6. Id.
7. Id.
ceving a poor service rating. Powell dismissed the recommendations, concluding that "[the subordinate] was 'merely venting frustration.'"8 Hicks also reported officers who allowed guns into the facility; officers who permitted inmates to obtain unauthorized work passes; officers who left the front desk unattended; and an officer who took a set of facility keys home. None of these employees were disciplined. All of them were white.9

The Supreme Court described the trial court's decision rejecting Hicks' discrimination claim:

The District court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. It nonetheless held that respondent had failed to carry his ultimate burden of proving that his race was the determining factor in petitioners' decision first to demote and then to dismiss him. In short, the District court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."10

The Supreme Court affirmed the district court's decision with a detailed and extensive opinion interpreting and applying the Court's earlier precedents. The dissent provided an equally lengthy and detailed counter-argument. Stripping away the extensive legal verbiage and parsing of precedent, however, the Court's holding in Hicks may be stated briefly: When a plaintiff has established a prima facie case of discrimination in violation of Title VII11 and the defendant has met its burden of articulating a legitimate nondiscriminatory reason ("LNDR") for its conduct, the presumption created by the prima facie case loses its force and the judge (or jury) may find discrimination, but is not required to do so as a matter of law—even if the plaintiff proves that the defen-

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8. Id. at 490.
9. Id.
dant was not, in fact, motivated by the asserted nondiscriminatory reason.

Because the Court remanded the case for a determination whether the district court's finding of no discrimination was clearly erroneous, it remains possible that discrimination must be found as a matter of law when the asserted LNDR is proven to be false and there is no other evidence suggesting an absence of discrimination. A fair reading of the case, however, suggests that once the employer articulates a nondiscriminatory reason, the trier of fact no longer is required to find discrimination—whether or not the employer's alleged reason is true and whether or not any additional evidence is presented.¹²

Is this holding consistent with the language of Title VII? Title VII's prohibition against discrimination rivals the United States Constitution in its brevity and ambiguity. Employers are prohibited from "discriminating against" employees "because of" their membership in an enumerated protected group.¹³ In previous individual disparate treatment cases, the Court has concluded that in establishing a violation, the plaintiff bears the burden of demonstrating that the employer's action was based on the plaintiff's race, color, religion, sex, or national origin.¹⁴ The 1991 Civil Rights Act amended Title VII to provide that the statute is violated if the employee's membership in a group protected by Title VII was one "motivating factor" for the employer's decision. The 1991

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¹³ Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1970 ed. & Supp. V), provides:
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

VII was one "motivating factor" for the employer's decision. The 1991 amendments confirm that it is the employee's burden to "demonstrate" this motivating factor. Only then is liability established and the burden shifted to the employer to limit remedies by demonstrating that the same decision would have been reached even absent the prohibited motivation. Hicks, therefore, is fully consistent with both prior case law and the amended statute insofar as the Court allocated to Hicks the burden of establishing that his employer was motivated, at least in part, by his race.

Hicks also is consistent with Federal Rule of Evidence 301 which describes the relationship between presumptions and burdens of proof:

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.\footnote{FED. R. EVID. 310.}

The question raised by Hicks, however, is not merely who bears the burden of proving discriminatory intent, but rather what evidence is sufficient to meet the burden of persuasion imposed on the plaintiff. In Burdine, the Court held that discriminatory intent can be inferred if the employee establishes a prima facie case by proving that she is a member of a class protected by Title VII who applied and was rejected for an available position for which she was qualified. The Court went on to explain the theory behind the prima facie case:

The prima facie case serves an important function in the litiga-
tion: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection . . . . the prima facie case "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." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.19

Hicks does not purport to challenge the evidentiary impact of establishing a prima facie case.20 Nonetheless, Hicks questions the validity of the assumption articulated in Furnco and cited with approval in Burdine that "impermissible factors" or discrimination are "more likely than not" the explanation for an employer's adverse treatment of a qualified member of a protected classification in the absence of an alternative explanation. The Court, in Hicks, held that merely disproving the defendant's proffered nondiscriminatory reason for acting is insufficient to meet the plaintiff's burden of proving discrimination. As the Court characterized the evidence presented in Hicks, there was more on the record than merely the prima facie case and the employer's discredited explanation that Hicks had violated rules and verbally abused his supervisor. The Court explained the district court's finding of no discrimination:

Various considerations led it to this conclusion, including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent, that respondent's black subordinates who actually committed the violations were not

20. In Hicks, the Court stated:
At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law.
Hicks, 113 S. Ct. at 2748.
disciplined, and that "the number of black employees at St. Mary's remained constant."\(^{21}\)

St. Mary's treatment of similarly situated black employees may well suggest that its adverse treatment of Hicks was not based on race. Similarly, if the "constant" number of black employees at St. Mary's Honor Center exceeded or was representative of the percentage of qualified black employees in the relevant labor market, this fact could undermine Hicks' attempt to establish discriminatory intent. But why is the race of the disciplinary board members relevant?

The Court returned to this issue in its effort to paint the dissent's statement of prevailing law\(^{22}\) as unreasonable:

Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under \textit{McDonnell Douglas}, the plaintiff has a prima facie case, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be incorrect, they must assess damages against the company, whether or not they believe the company was guilty of racial discrimination. The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence."\(^{23}\)

\(^{21}\) \textit{id.} at 2748 n.2.

\(^{22}\) The dissent would have held that a plaintiff who establishes a prima facie case of discrimination and discredits the employer's proffered nondiscriminatory reason has met the plaintiff's burden of persuasion that the employer acted with a discriminatory intent. \textit{id.} at 2756 (Souter, J., dissenting).

\(^{23}\) \textit{id.} at 2750-51.
The Court criticized the dissent’s approach because this “utterly compelling evidence that discrimination was not the reason will then be excluded from the jury’s consideration.”

While the Court in this passage seems in part to be disturbed by the unquestioned reality that, under Title VII, an employer may be held liable for the acts of its supervisors, the Court seems to be most outraged that the dissent’s approach would deprive the court or jury from considering the “compelling evidence” that the employer’s workforce includes a disproportionate number of individuals of the same race as the plaintiff and that the decision maker “was of the same minority group as the plaintiff.”

What is so “compelling” about this evidence? Consider the racial make-up of the employer’s workforce. While such evidence may suggest a lack of discriminatory intent, it will not suffice by itself to overcome a prima facie case of discrimination. The racial make-up of the workforce is not a nondiscriminatory or neutral reason for firing the plaintiff. It is not a “reason” at all. In addition, even if the employer’s workforce is, for example, ninety percent female, this fact does not preclude discrimination in the employer’s decision not to hire or promote a female: The decision maker in this instance may not be the same as the decision maker who hired the other female employees; the employer’s female workers may all hold nonsupervisory positions while this employee is applying for a supervisory position; or the employer may have decided that there are too many females in this workplace and that no additional females will be hired. This evidence is compelling only if you question the basic assumption that, absent a nondiscriminatory explanation, it is more likely than not that adverse treatment of a woman or a member of a minority group is the result of discrimination.

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24. Id. at 2751 n.5.

25. Section 701(b) defines the term “employer” to include an employer’s agents. The Supreme Court has indicated that an employer’s liability for the actions of its supervisors should be resolved by applying common law agency principals. Courts have had some difficulty determining how agency principals apply in the context of hostile environment sexual harassment cases when harassing supervisors act to satisfy their own needs, rather than their employer’s interests. On the other hand, when a supervisor who has the authority to hire and fire on behalf of her employer exercises that authority in a discriminatory manner, there is little question that these actions are within the scope of the supervisor’s employment and that the employer is liable. See Michael J. Zimmer, Charles A. Sullivan, Richard F. Richards & Deborah A. Calloway, Cases and Materials on Employment Law (3d ed. 1994).

26. In Espinosa v. Farah Mfg., 414 U.S. 86 (1973), the fact that “more than 96% of the
What about evidence that the decision maker is from the same minority group as the plaintiff? Again, this evidence does not constitute a nondiscriminatory reason that will, if true, overcome a prima facie case. The race or gender of the decision maker is not a "reason" at all. Further, membership in the same group as the plaintiff is not inconsistent with discriminatory intent. For example, cases in which affirmative action is challenged under Title VII often involve decision makers who are of the same race or gender as the plaintiff. Again, this evidence is compelling evidence of nondiscriminatory intent only if you question the basic assumption inherent in the prima facie case: absent explanation it is more likely than not that adverse treatment of a woman or minority group member is the result of discrimination.

Consider also the application of *Hicks* to a case in which the only evidence on record is the plaintiff's prima facie case and the defendant's discredited reason. For example, suppose the plaintiff, a female, presents a prima facie case of discrimination by establishing that she applied for an entry level job, was rejected, and the position remained open. The defendant testifies that he didn't hire the plaintiff because she is blond. The plaintiff has brown hair and presents evidence that her hair was the same color on the day she applied for the position. Under *Hicks*:

> If . . . the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant . . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's "production" . . . having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race . . . . [R]ejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[no] additional proof of discrimination is *required.*"

employees" at Farah were of the same protected classification as the plaintiff defeated the plaintiff's argument that the employer's legitimate nondiscriminatory reason for not hiring her was a pretext for discrimination. In *Espinoza*, however, the Court noted that "statistics such as these do not automatically shield an employer from a charge of unlawful discrimination . . . ." *Id.* at 93.
But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle... that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."27

While the Court clearly was correct in imposing the ultimate burden of persuasion on the plaintiff, the import of the quoted passage is that presenting a prima facie case and discrediting the defendant's proffered nondiscriminatory reason for acting is not necessarily sufficient to carry that burden. While the Court may have been contemplating the situation in which other evidence has been presented at trial, the decision leaves open the possibility that even when there is no additional evidence on the record, the court (or jury) may decline to find discriminatory intent.

If this is what Hicks stands for, then Hicks questions the validity of the basic assumption that discrimination is "more likely than not" the explanation for an employer's adverse treatment of a qualified member of a protected classification in the absence of an alternative explanation. Otherwise, adverse treatment (prima facie case) taken together with the absence of an alternative explanation (discrediting the employer's reason) should be sufficient evidence to meet the plaintiff's burden of showing that discrimination is demonstrated by a preponderance of the evidence.

It is possible, of course, that this is not what the Court intended to hold in Hicks. The Court's ultimate decision to remand the case for a determination whether the district court's finding was clearly erroneous may suggest that the trier of fact must have additional evidence on the record other than the prima facie case and the discredited nondiscriminatory reason in order to conclude that the plaintiff has failed to prove discriminatory intent. But even if this is a reasonable interpretation of the case, Hicks nonetheless questions the basic assumption by citing the racial make-up of the employer's workplace and the race of the decision makers as compelling evidence of nondiscrimination.

In short, Hicks indicates that the Court does not truly believe that the prima facie case creates an inference of discrimination. Although it has not overruled McDonnell Douglas and Burdine, it has seriously questioned the underlying assumption on which the prima facie case is based: that discrimination exists in this society and that absent some

27. Hicks, 113 S. Ct. at 2749.
other explanation, discrimination is the likely explanation for the ad-
verse treatment regularly experienced by women and members of mi-
nority groups. *McDonnell Douglas* and *Burdine* did not distinguish
between employers of the same race as the plaintiff and employers of a
different race. The prima facie case requires only that the plaintiff es-
establish that she is a member of a protected group.

II. IMPLICATIONS

*Hicks* does not necessarily change anything about establishing liabil-
ity in an individual disparate treatment case. Many litigators and judges
prior to *Hicks* read *Burdine* to mean that the plaintiff could meet his
burden of persuasion by disproving the employer's articulated nondis-
criminatory reason. After *Hicks*, trial courts and juries remain free to
find discrimination based on a prima facie case together with the suc-
sessful discrediting of the employer's alleged nondiscriminatory reason.
The difference is that this result no longer is required as a matter of
law. Plaintiffs' lawyers will be well advised to do more than merely
undermine the employer's reason, but even before *Hicks*, any additional
evidence of discrimination that was available was likely to be presented
to buttress the plaintiff's attempt to establish pretext.

*Hicks* makes a difference only if judges and juries accept the
Court's invitation to question the basic assumption and search for mo-
tives other than discrimination to explain the employer's actions. The
presumption attached to the prima facie case deprives juries and judges
of that opportunity. It represents a legal judgment that when a member
of a group protected by Title VII demonstrates that, although qualified,
she was the subject of an adverse employment decision, the plaintiff
has met her burden of proving discrimination. After *Hicks*, the same
evidence that establishes a prima facie case may now be judged insuf-
sicient by the judge or jury because they do not believe that women
and minorities are more likely than not to be subject to arbitrary and
discriminatory decisions by employers. And because factual decisions
are subject to a clearly erroneous standard of review, their conclusions
will be reversed only if no reasonable juror could find otherwise. The
impact of *Hicks* depends, therefore, on what reasonable judges, juries,
and members of this culture believe about the existence of discrimi-
nation in the workplace and perhaps in society in general.

III. QUESTIONING THE BASIC ASSUMPTION

*Hicks* is significant, not for its narrow legal holding, but for the
attitude underlying that holding. The majority and dissent argue about
parsing precedent and legal niceties such as the meaning of a rebuttable presumption and allocating burdens of proof. But this case is not about who bears the burden of proof. Instead, this case is about what evidence is sufficient to meet the plaintiff's burden of persuasion on discriminatory intent. What evidence makes it "more likely than not" that the defendant discriminated? The answer to this question depends on one's beliefs about the prevalence of discrimination. Whether a reasonable person (or judge) will be convinced that discrimination has been shown depends on whether he believes that discrimination is a logical inference in the absence of some other explanation for adverse conduct. The district court and the majority of the Supreme Court in Hicks reached their result, not because it was required by any formal legal rules, but rather because they just plain do not believe in that basic assumption. Unfortunately, the district court and the majority in Hicks are not alone. Hicks represents the most recent and perhaps the most prominent in a series of attacks on the basic assumption launched by legal academics, commentators, and lower court judges.

A. Academic Questions

Professor Richard Epstein, in his book Forbidden Grounds: The Case Against Employment Discrimination Laws, argues that in a free market economy, discrimination is rare and unlikely. Epstein first points out that employers who base employment decisions on their belief that members of a particular group tend to be more qualified than members of another group may be rational in their discriminatory choices if their belief is statistically accurate. For example, an employer who correctly believes that women as a group are weaker would, over time, win by hiring only men. But, Epstein argues, employers will be dissuaded from relying on group characteristics because they ordinarily will be able to do better by searching for the best qualified members of each group:

[B]oth employers and employees have strong, if imperfect, incentives to beat the statistical averages by engaging in search. A decision not to trade with a given person cannot be made lightly . . . . [P]eople who decide that they do not want to

29. Id.
trade with or hire certain people because of race, sex, or age are making a decision that has more than just external costs. They bear a large part of the costs themselves, for their decision will surely limit their own opportunities for advancement and success, even as it leaves others free to pursue alternate opportunities. The greater the class of persons who are regarded as off-limits, and the more irrational the preferences, the more the decision will hurt the people who make it, and the more numerous the options it will open to rival traders.\(^{30}\)

Professor Epstein then goes on to attack a number of studies which purport to demonstrate that race and gender discrimination exist in both employment and consumer markets.\(^{31}\) Epstein is not alone in suggesting that discrimination is unlikely in an unregulated free market. In the early 1960s, some economists opposed civil rights legislation on the ground that it is unnecessary and counterproductive because unregulated capitalism provides the best defense against discrimination.\(^{32}\)

Economic analysts are not alone in their attack on the notion that discrimination explains the adverse treatment of minority group members and females. Professor Kingsley R. Browne questions the basic assumption underlying the prima facie case in systemic disparate treatment cases.\(^{33}\) Browne notes that in a systemic case based on inference, the plaintiff establishes a prima facie case by showing statistically significant disparities between the percentage of minority group members in the employer’s workforce and the percentage in the relevant labor market. As the Supreme Court explained in *International Brotherhood of Teamsters v. United States*, “absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.”\(^{34}\) Conversely, absent discrimination, a substantial disparity is so unlikely that it creates a prima facie case that discrimination has occurred.

Professor Browne argues that the statistical prima facie case de-

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30. *Id.* at 41-42.
31. *Id.* at 47-60.
pends on what he calls the "Central Assumption" that people of different races, genders, and ethnicity all possess the same interests and abilities. This assumption is a necessary prerequisite to the assumption that the workforce of the employer who does not discriminate will be "more or less representative" of the population from which that workforce is drawn. Browne asserts that it is unfair to impose on employers the burden of rebutting a statistically based prima facie case of discrimination because the disparity may well result from differing interests and abilities, not from discrimination.

Like Epstein and the majority in *Hicks*, Browne does not believe that adverse treatment of minorities and females is more likely than not to be the result of discrimination by employers. While Epstein argues that employers have economic disincentives to discriminate against qualified women and people of color, Browne goes further and explains why, in the absence of discrimination, minorities and women are underrepresented in the workplace. According to Browne, their inability to compete may result from their lack of interest and ability rather than from discrimination. It is unfair to infer discrimination from statistical disparities because the "Central Assumption" that all groups are equally interested and qualified and that statistical disparities more likely than not suggest discrimination is just not true.

B. Judicial Skepticism

The notion that it is differences among the protected groups, rather than discrimination, that explains disparities in the workplace also has been accepted by some courts, especially the Seventh Circuit. In *EEOC v. Sears, Roebuck & Co.*, the EEOC challenged Sears' hiring and promotion practices, alleging that Sears engaged in systemic disparate treatment on the basis of gender, resulting in a concentration of women in lower paying sales jobs in which they were compensated on an hourly basis. Men, in contrast, were concentrated in higher paying sales jobs in which compensation was based on commissions. The EEOC presented evidence of significant gender disparities in Sears' workforce. Although women accounted for sixty-one percent of the applicants for sales jobs at Sears, only twenty-seven percent of the newly hired commissioned sales staff was female. In contrast, seventy-five percent of the hourly sales force were women.

35. 839 F.2d 302 (7th Cir. 1988).
The Seventh Circuit in *Sears* agreed with the district court's conclusion that these statistics did not prove discrimination. Sears had responded to the EEOC's statistical case by presenting evidence designed to show that women were underrepresented, not because Sears discriminated, but rather because the female applicants were not interested in commissioned sales jobs and because they were not as qualified as the men. The Seventh Circuit described Sears' evidence:

The [district] court found that “[t]he most credible and convincing evidence offered at trial regarding women's interest in commission sales at Sears was the detailed, uncontradicted testimony of numerous men and women who were Sears store managers, personnel managers and other officials, regarding their efforts to recruit women into commission sales.” These witnesses testified . . . that women were generally more interested in product lines like clothing, jewelry, and cosmetics that were usually sold on a noncommission basis, than they were in product lines involving commission selling like automotives, roofing, and furnaces. The contrary applied to men. Women were also less interested in outside sales which often required night calls on customers than were men, with the exception of selling custom draperies. Various reasons for women's lack of interest in commission selling included a fear or dislike of what they perceived as cut-throat competition, and increased pressure and risk associated with commission sales. Noncommission selling, on the other hand, was associated with more social contact and friendship, less pressure and less risk. This evidence was confirmed by a study of national surveys and polls from the mid-1930's through 1983 regarding the changing status of women in American society, from which a Sears' expert made conclusions regarding women's interest in commission selling; morale surveys of Sears employees, which the court found “demonstrate[] that noncommission saleswomen were generally happier with their present jobs at Sears, and were much less likely that their male counterparts to be interested in other positions, such as commission sales”; a job interest survey taken at Sears in 1976; a survey taken in 1982 of commission and noncommission salespeople at Sears regarding their attitudes, interests, and the personal beliefs and lifestyles of the employees, which the court concluded showed that noncommission salesmen were “far more interested” in commission sales than were noncommission sales-
women . . . and national labor force data.\textsuperscript{36}

The EEOC presented an expert witness who testified that there are "no significant differences between women and men regarding interests and career aspirations."\textsuperscript{37} The Seventh Circuit found no error in the district court's conclusion that this evidence was "not credible, persuasive or probative." Agreeing with the district court, the appellate court observed:

These expert witnesses used small samples of women who had taken traditional jobs when opportunities arose. Larger samples would have been more persuasive. In addition as the court found "[n]one of these witnesses had any specific knowledge of Sears." . . . [T]he district court did not clearly err in finding that women were not as interested in commission sales positions as were men.\textsuperscript{38}

Sears also presented evidence that female applicants were less qualified than male applicants. The court concluded that "on average, female applicants in the 'sales' pool were younger, less educated, less likely to have commission sales experience, and less likely than male applicants to have prior work experience with the products sold on commission at Sears."\textsuperscript{39}

Perhaps the most distressing aspect of the Sears opinion and Professor Browne's rejection of the assumption that discrimination explains disparities in the workplace is that both Professor Browne and the Seventh Circuit use stereotypes about women and racial minorities to rebut the inference of discrimination. In this view, women and minorities are underrepresented in the workplace, not because they are the subjects of discrimination, but because they are lazy, not interested, unaggressive, or unqualified.\textsuperscript{40} It is true that it would be difficult to disagree that

\textsuperscript{36} Id. at 320-21 (quoting EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1306, 1310 (N.D. Ill. 1986)).

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 321-22 (quoting Sears, 628 F. Supp. at 1314).

\textsuperscript{39} Id. at 322 (quoting Sears, 628 F. Supp. at 1315).

\textsuperscript{40} The Seventh Circuit's tendency to ascribe workplace disparities to some explanation other than discrimination is apparent in another case in which the court considered the legality of an employer's reliance on word of mouth recruiting to secure a workforce. See EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991). In Miniature Lamp Works, the court rejected the disparate impact challenge against the company's word of mouth recruiting on a variety of grounds, but in the process, the court made the following observation:

The trial court ignored Miniature's lack of a fluency requirement when considering
members of the groups protected by Title VII are different from each other in ways that are relevant to their employability. Consider Professor Douglas A. Laycock’s remarks in *Statistical Proof and Theories of Discrimination*:

[Teamsters] explicitly assumes that but for discrimination, the employer’s work force would in the long run mirror the racial composition of the labor force from which it was hired. That conclusion requires the further implicit assumption that the black and white populations are substantially the same in all relevant ways, so that any differences in result are attributable to discrimination.

Some variation of that assumption is critical to all statistical evidence of disparate treatment. It is a powerful and implausible assumption: the two populations are assumed to be substantially the same in their distribution of skills, aptitudes, and job preferences. Two hundred and fifty years of slavery, nearly a century of Jim Crow, and a generation of less virulent discrimination are assumed to have had no effect; the black and white populations are assumed to be substantially the same. All the differential socialization of little girls that feminists justifiably complain about is assumed to have had no effect; the male and female populations are assumed to be substantially the same. With respect to comparing men and women, it is not even necessary to cite the impact of discrimination and socialization to demonstrate differences. Women, on average, are physically shorter and weaker than men and, insofar as height and strength are job prerequisites, women operate

the relative attractiveness of its jobs to different ethnic groups. Several Miniature employees testified at trial that Miniature’s position was one of only a few jobs open to them because of their limited English fluency (these witnesses testified through an interpreter). Common sense dictates that a nondiscriminatory employer with no English fluency requirement will receive a disproportionate amount of applications from non-English speaking persons.

Id. at 302-03. By asserting that a larger percentage of Hispanics and Asians (non-English speakers) would be interested in Miniature’s jobs due to their limited options, the employer seemed to be attacking the assumption that a nondiscriminatory selection device will select employees in proportion to their representation in the qualified labor market. Miniature did not seek to narrow the labor market based on qualifications, but rather on disparate interest among the different groups. While a higher or lower level of interest theoretically rebuts at least part of the inference of discrimination arising out of disparities in the employer’s workforce, is it possible to quantify the impact of differing interests among protected groups?

41. LAW & CONTEMP. PROBS., Autumn 1986, at 97, 98.
QUESTIONING THE BASIC ASSUMPTION

at a disadvantage.

But what do these differences have to do with the inference of discrimination arising out of substantial underrepresentation of women and minorities in the workplace? A well-drafted statistical study compares the percentage of protected group members in the employer’s workforce with the percentage of qualified protected group members in the relevant labor market. Therefore, if women, for example, are less qualified on average than men, they will constitute less than fifty percent of the relevant labor market. The issue in Sears, however, primarily concerned whether women were less interested than men in the commissioned sales jobs. In order for this, or any other, evidence of group differences to be relevant to defeating an inference of discrimination arising from statistical disparities, the evidence must be credible and must account for all of the disparity between the relevant labor market and the employer’s workforce. Unless the evidence of group differences explains all of the disparity, unexplained differences between the representation of women in the workforce and in the relevant labor market remain, giving rise to an inference of discrimination.

Putting aside the credibility issue for the moment, consider the evidence presented in Sears. Even if the testimony in Sears is credible that, on average, women prefer less challenging part-time positions that do not require travel outside of the store, does this difference account for all of the underrepresentation of women in commissioned sales jobs? If female preferences and qualifications account for only a portion of the disparity, what accounts for the rest? Assuming that the remaining disparity is statistically significant, the premise established in

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42. Measurable group differences are relevant in disparate impact cases. Using a neutral employment criterion, such as height or strength, which has a disparate impact on members of a protected group, such as women, violates Title VII unless the employer can demonstrate that the criterion is job related and consistent with business necessity. This Article is confined, however, to the question of proving intentional discrimination through inferences.

43. Consider Judge Cudahy’s remarks dissenting from the Seventh Circuit’s opinion in Sears:

Perhaps the most questionable aspect of the majority opinion is its acceptance of women’s alleged low interest and qualifications for commission selling as a complete explanation for the huge statistical disparities favoring men. The adoption by the district court and by the majority of Sears’ analysis of these arguments strikes me as extremely uncritical. Sears has indeed presented varied evidence that these gender-based differences exist, both in our society as a whole and in its particular labor pool. But it remains a virtually insuperable task to overcome the weight of the statistical evidence marshaled by the EEOC or the skepticism that courts ought to show toward defenses to Title VII actions that rely on unquantifiable traits ascribed to protected groups.

Teamsters should apply—absent discrimination, the workforce should mirror the population from which it is drawn. Sixty-one percent of the applicants for Sears' sales positions were females. Only twenty-seven percent of the newly hired commissioned sales personnel were females. If Sears had established that only twenty-seven percent of the applicants were female and interested, Sears would have accounted for all of the disparity. But, what if forty percent of the applicants were “interested” and qualified females? What accounts for the remaining disparity? The court’s opinion does not present Sears’ evidence in terms of numbers. Women are characterized as “generally” less interested in commissioned sales jobs. How is it possible for this unquantified evidence to explain all of the disparity and therefore rebut the inference of discrimination raised by the EEOC’s statistical case? The trial court in Sears acknowledged the unquantified nature of the evidence:

Neither Ms. Brudney nor Dr. Rosenberg [Sears’ expert witnesses] contend that all women have these tendencies or preferences, and the court has not drawn any such inference from their testimony. They have merely attempted to describe the overall tendencies of many women. EEOC presented witnesses with contrary views, whose testimony is discussed below. Suffice it to say at this point that few sweeping generalities can be accurately made about women (or men) overall in the workplace or society. The court continually throughout trial exhorted witnesses to quantify their generalizations by estimating some percentage of women with the interests or views being discussed. Few witnesses were able to do so. The court therefore gave little weight to much of the testimony generalizing about women in the workforce from the actions of a few. However, the testimony of Ms. Brudney, although not based on a scientific study, reflected actual views of women at Sears, and was corroborated by the testimony of credible Sears’ witnesses . . . . The testimony of Dr. Rosenberg was also consistent with the experience of Sears’ managers and other personnel, and with other evidence discussed below, and has also accordingly been given some weight by the court.44

The court’s decision to reject the inference of discrimination is reminiscent of the decision in Hicks. Once Sears provided rebuttal evidence,
the court dismissed the inference raised by the statistics and proceeded as though it never existed even though Sears' evidence did not necessarily explain all of the disparity. The court's eager rejection of the inference suggests that it must not fully embrace the basic assumption that absent explanation, significant disparities in the workforce indicate discrimination.

There is, however, an even more disturbing aspect of Sears. The court's willingness to credit Sears' evidence suggests that both Sears and the court hold stereotypical views about the characteristics of female employees and provides further evidence that the court does not believe in the existence of discrimination in the workplace.\(^45\) The Seventh Circuit seems eager to explain away the disparity without attributing it to discrimination. Evidence that disparities are the result of characteristics of the alleged victims of discrimination, rather than the conduct of the employer, must be credible in order to rebut the inference of discrimination arising from the disparities. Is the evidence in Sears credible?

For example, the court was not so bold as to suggest that women in society generally dislike commission sales, and yet the court concluded that women at Sears were not interested in the commission sales positions despite their higher pay.\(^46\) Even assuming that the court's conclusion about women at Sears is correct, doesn't this necessarily raise the question why the women at Sears differ from the general population of women? Wouldn't it be reasonable to conclude that Sears must in some way discourage applications from women who would prefer commissioned sales jobs or that Sears describes those jobs in ways that suggest that they are "male" jobs? In fact, the court found that Sears' original Retail Testing Manual "describe[d] a commission salesperson as a man who is 'active,' 'has a lot of drive,' possesses

\(^{45}\) I am not alone in this view. Judge Cudahy, dissenting from the Seventh Circuit opinion, made the following remarks:

> Women, as described by Sears, the district court and the majority, exhibit the very same stereotypical qualities for which they have been assigned low-status positions throughout history . . . .

> These conclusions, it seems to me, are of a piece with the position that women are by nature happier cooking, doing the laundry and chauffeuring the children to softball games than arguing appeals or selling stocks. The stereotype of women as less greedy and daring than men is one that the sex discrimination laws were intended to address. It is disturbing that this sort of thinking is accepted so uncritically by the district court and by the majority.

> Id. at 361 (Cudahy, J., dissenting).

\(^{46}\) Sears, 628 F. Supp. at 1308 n.43.
'considerable physical vigor,' 'likes work which requires physical energy,' etc. References to males were eliminated in the 1960s. The present version is otherwise substantially similar in content to the original version.'

Sears' testing included questions designed to assess the applicants' "vigor," which the EEOC alleged were likely to weed out or discourage women: "Questions asked include: 'Do you have a low pitched voice?' 'Do you swear often?' 'Have you ever done any hunting?' 'Have you played on a football team?'" The trial court dismissed any concerns about the testing questions on the ground that, under Sears' affirmative action plan, women were scored differently than men. But couldn't questions like these suggest to women that management viewed commissioned sales jobs as male preserves?

If the women hired by Sears actually differ from the general population, isn't it likely that Sears has done something discriminatory to cause this situation? Perhaps Sears only hired women who tended to prefer hourly sales jobs. Evidence concerning the interests of applicants to Sears was derived, at least in part, by surveys conducted on individuals already employed by Sears in hourly sales positions. Is it logical to assume that Sears' current hourly employees and the applicants for employment at Sears share the same interests? Perhaps the interests of rejected applicants were different from those who were accepted, or perhaps the women's experiences at Sears caused them to lose interest in the higher paying commissioned sales positions. The court's unquestioning reliance on Sears' evidence regarding the interests of its employees fails to consider the company's possible responsibility for the limited ambitions of its own female employees.

In another part of the trial court's opinion, the court chided the EEOC's statistical expert for failing to account in his statistical analysis for all factors relevant to an applicant's qualifications to work in commissioned sales:

47. Id. at 1300.
48. Id. at 1300 n.29.
49. Judge Cudahy, dissenting from the Seventh Circuit's opinion, commented: "Huge statistical disparities in participation in various commission selling jobs are ascribed to differences in interest. Yet there is scarcely any recognition of the employer's role in shaping the interests of applicants." Sears, 839 F.2d at 361 (Cudahy, J., dissenting).
50. See Sears, 628 F. Supp. at 1312 n.36 ("Although the surveys and testimony discussed above relate primarily to the interests of women already employed by Sears, the court finds that this evidence also provides a good indication of the interest of women applying for sales positions at Sears.").
Other important factors not controlled for in EEOC’s analysis are those characteristics which could be determined only from an interview, not from the written application. These include physical appearance, assertiveness, the ability to communicate, friendliness, and economic motivation. Dr. Siskin admitted that these are factors identified by Sears managers as desirable for commission salespersons. However, no adjustment is made for these factors in his analyses.\(^5\)

Earlier in the opinion, the court described the interview process as a series of open-ended questions and noted that:

No formal instruction was provided regarding the qualities to look for in commission sales candidates. Interviewers were expected to learn the desirable characteristics for commission salespersons from observation of those persons presently selling on commission, and from managers’ guidance as to the types of individuals who had been successful in the past.\(^5\)

The EEOC expressed concern about the subjective nature of the interview process and the opportunity it provided for interviewers to discriminate on the basis of gender. Although the court was unpersuaded, isn’t it possible that the subjective interview process resulted in a skewed workforce comprised predominantly of passive women who prefer hourly sales jobs? The court’s rejection of the EEOC’s concerns on this matter again suggests a tendency to reject the assumption that discrimination explains disparities in the workplace absent an explanation to the contrary. How can an interview process be nondiscriminatory when it is wholly subjective and interviewers are expected to hire more sales personnel like those who have been successful in the past (i.e. men)? And how can the interview process be nondiscriminatory when Sears’ description of the commissioned sales job suggests stereotypically male characteristics?

The trial court in Sears went on to credit “evidence of differences in the general interests and attitudes of men and women in American society over the past 50 years.”\(^5\) However, the court simultaneously rejected general population and historical evidence presented by the EEOC that minimized the differences between men and women with

\(^5\) Id. at 1303.
\(^5\) Id. at 1300.
\(^5\) Id. at 1308.
respect to work interests and aspirations on the ground that "[n]one of [the EEOC's] witnesses had any specific knowledge of Sears, or provided any specific evidence to contradict the strong evidence presented by Sears of the actual differences between the interests of men and women in commission sales positions at Sears."\(^{54}\)

Finally, the trial court's opinion in Sears evidences a tendency to dismiss the EEOC's evidence of discrimination on the basis of inadequacies in the development and analysis of the data while at the same time crediting Sears' testimony regarding the career interests of women, even when the court recognized that the data was deficient in some way.\(^{55}\)

In short, the Sears opinion questions the basic assumption that, absent explanation, statistical disparities in the workforce prove discrimination. First, the court allows unquantified evidence of female differences to rebut the entire disparity. Second, the court reaches to reject the inference of discrimination and find evidence of female differences credible, dismissing the possibility that Sears' discriminatory conduct may have caused these differences and ignoring defects in Sears' evidence and analysis. I am not persuaded. I fully recognize that as a professional female who has consistently chosen high-paying and challenging career opportunities, I am inclined to manipulate evidence to fit my view that discrimination, rather than female characteristics, explains the underrepresentation of women in many areas of the economy, including the commissioned sales positions at Sears. That fact, however, only underscores my point that the sufficiency of evidence of discrimination is substantially dependent on the outlook of the trier of fact. Judges and juries who view women and racial minorities in traditionally stereotypical ways and who are skeptical of the impact of discrimination on the employment opportunities of these groups will be unlikely to infer dis-

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\(^{54}\) Id. at 1314.

\(^{55}\) Compare id. at 1310 (crediting a study hurriedly conducted in anticipation of litigation: "[T]he court finds that, although [Sears'] survey was not taken using ideal methods, none of the problems cited by [EEOC] are significant enough to affect the essential validity of the results"); and id. at 1312 n.56 ("Although the surveys and testimony discussed above relate primarily to the interests of women already employed by Sears, the court finds that this evidence also provides a good indication of the interest of women applying for sales positions at Sears."); and id. at 1323 ("The court recognizes that, by normalizing scores, Sears may have undervalued the interest of some female applicants in these product lines. Bearing this in mind, however, the court finds that the results of Sears' analysis do provide probative evidence of relative lack of interest."); with id. at 1316 ("Since EEOC did not properly control for interest or qualifications, EEOC never compared these two groups. Without meaningful underlying comparisons in its unadjusted and adjusted analyses, EEOC's values prove nothing.").
crimination in the absence of clearly defined standards and presumptions which mandate a finding of discrimination when adverse treatment or statistical disparities have not been explained.

Consider further that after Hicks, Sears probably would not be reversed on appeal even if the trial court rejected Sears' explanation for the disparities! In a systemic case, statistical disparities create a prima facie case of discrimination, shifting the burden to the employer to produce rebuttal evidence. After Hicks, it seems reasonable to conclude that once the employer produces evidence which, if true, would rebut the prima facie case, the judge is then free to weigh all the evidence and reach a conclusion regarding the presence or absence of discrimination without being constrained by the presumption created by the prima facie case.

The trend away from recognizing discrimination as the explanation for workplace disparities takes another form in cases in which employers rely on subjective standards of evaluation to explain disparate treatment of women or members of other groups protected by anti-discrimination laws. In early Title VII cases, courts tended to suspect discrimination when employers explained disparate treatment of minority group members by reference to subjective standards of evaluating candidates for employment or promotion in blue collar jobs.56 Courts reasoned that subjective evaluations might not qualify as legitimate nondiscriminatory reasons because they could mask discrimination based on subconscious stereotypes and prejudices. Studies have confirmed that identical work products may be evaluated differently depending on whether attributed to a male or a female.57 Nonetheless, courts reviewing employers' decisions in professional contexts have long recognized the business necessity of relying on subjective evaluations and have therefore tended to defer to the employer's subjective judgment.58

56. See, e.g., Harris v. Birmingham Bd. of Educ., 712 F.2d 1377 (11th Cir. 1983) (holding that statistical evidence, use of subjective hiring standards, and history of past racial discrimination are enough to compel finding of discrimination); Watson v. National Linen Serv., 656 F.2d 877 (11th Cir. 1982) (failure to establish fixed or reasonably objective standards and procedures for hiring is a discriminatory practice); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974) (employer discriminated against black employees by using a promotion process that lacked clearly ascertainable job standards); EEOC v. H.S. Camp & Sons, Inc., 542 F. Supp. 411 (M.D. Fla. 1982) (subjective promotion process taken together with underrepresentation of minorities and women in supervisory positions establishes a strong case of discrimination).


58. See, e.g., Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980) (determinations about such matters as teaching ability and research scholarship are subjective and should
More recently, Justice O'Connor's opinion in *Watson v. Fort Worth Bank and Trust* rejected the notion that subjective employment criteria raise an inference of discriminatory intent:

It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs.

Although the Court recognized that subjective criteria may be used in a discriminatory fashion, *Watson* nonetheless permits employers to rely on subjective standards to rebut a prima facie case of individual disparate treatment. In *Sears*, the court went even further and discounted evidence of systemic disparate treatment partially on the ground that the statistical model failed to incorporate factors the employer looked for in the interview process. Thus, the plaintiff's prima facie case was suspect because it failed to incorporate factors which themselves may incorporate "subconscious stereotypes and prejudices." In short, reasons which themselves may be a proxy or a mask for discrimination are permitted to rebut an inference of discrimination.

*Hicks* relies on a similarly suspect "nondiscriminatory" reason. The district court in *Hicks* found that although Hicks had proven "the existence of a crusade to terminate him, he [had] not proven that the crusade was racially rather than personally motivated." In other words, Hicks' supervisors just didn't like him. But doesn't that beg the question? Why didn't they like him? When a black man is not liked, absent evidence that he possesses undesirable characteristics peculiar to him,
isn't it more likely than not that the source of the dislike is his race? While discrimination is motivated by a variety of emotions and stereotypical assumptions, isn't hate one of the typical attributes of race discrimination? Some defendants have argued that a sexual harassment case should be rebutted by evidence that the defendant didn't harass women as a group, but rather had a particular attraction for the plaintiff—he harassed her because he liked her. But isn't sexual attraction to an individual of the opposite sex a fundamental attribute of hostile environment gender discrimination? Isn't it more likely than not (assuming that the harasser is not a homosexual) that he was attracted to her because of attributes that included her gender?

C. Societal Attitudes

The Supreme Court in *Hicks* questions the assumption that unexplained adverse treatment of minority group members more likely than not results from intentional discrimination. Professor Epstein argues that the market economy renders anti-discrimination laws unnecessary. Professor Browne and the *Sears* majority question the "Central Assumption" that all groups are equally interested and qualified and that statistical disparities more likely than not suggest discrimination. The subjective criteria cases characterize as "nondiscriminatory" criteria and reasons which themselves may be discriminatory. Some academics and judges don't seem to believe that discrimination exists. If this attitude is widely shared, *Hicks* will make it substantially more difficult for plaintiffs to prove discrimination.

However, the 1991 amendments to Title VII provide for jury trials to resolve allegations of discrimination in violation of Title VII. The impact of *Hicks* on future disparate treatment cases, therefore, will depend not only on the attitudes of judges, but also on the attitudes of juries drawn from the general population. What does the general public believe about discrimination? Opinion polls indicate that white Americans tend to believe either that discrimination in employment is a thing of the past or that affirmative action plans mean that minority group members actually have an advantage in the workplace:

64. See Babcock v. Frank, 729 F. Supp. 279 (S.D.N.Y. 1990) (defendant argued that harassment did not violate Title VII because it was based on a prior sexual relationship, not on gender), compl. dismissed, 783 F. Supp. 800 (S.D.N.Y. 1992); cf. DeCintio v. Westchester County Medical Ctr., 807 F.2d 304, 308 (2d Cir. 1986) (plaintiffs "were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour.").
"It could be the whole notion of equal opportunity has changed," said Patrick Gilbert of the International Research Corp., a Chicago company that has just completed a two-year survey measuring attitudes of 28,573 employees of 12 major corporations. "Many now think equal opportunity does not mean affirmative action. There is a general reaction among (whites) that too much accommodation has been made." . . . In a 1990 survey of 1,362 people . . . about 64 percent of the respondents said it was very likely or somewhat likely that a white person won't get a job or promotion while an equally or less qualified black person does. Only 34 percent said it was not very likely.

Other more recent polls . . . also have shown hardening attitudes toward affirmative action. A December [1991] Washington Post-ABC News national poll of 1,000 people indicated, for example, that 66 percent of the respondents were worried to some degree that affirmative action may have gone too far to give some blacks unfair advantages over whites. Thirty-two percent said they were worried not at all. 65

Another 1990 survey reported that while whites no longer fear that they will be disadvantaged by affirmative action, they believe that discrimination in employment does not exist:

Asked to consider a situation in which a black and white person of equal intelligence and skill applied for the same job, a plurality of whites in 1978 feared reverse discrimination - they said the black would get the job; today the dominant answer is that both would have an equal chance. 66

Even blacks believe that discrimination in the workplace is on the decline:

The shift in outlook among blacks is . . . dramatic: Only a third now think [an equally qualified] white person would have the better chance of being hired, down from half. Four in 10 blacks - twice as many as 12 years ago - say both candidates

would have an equal chance.\textsuperscript{67}

Reports in the media also sometimes suggest that discrimination has substantially disappeared:

No longer is there the virulent anti-Catholicism that pervaded much of America, even at the time of John F. Kennedy's campaign for president. Diminished, but not gone, is the personal and institutional racism that afflicted blacks for centuries, whose undoing necessitated a social revolution that is still in progress. Buried in history are the Franco-, Hispano-, and Germano-phobias about attempts to undermine or destroy the country. Meliorism rather than retrogression characterizes American intergroup relations.\textsuperscript{68}

If discrimination in employment has substantially decreased since Title VII was enacted, then perhaps it is appropriate for judges and juries to view claims of individual or systemic disparate treatment with skepticism. Other evidence suggests, however, that reports of the death of discrimination and stereotypical attitudes are greatly exaggerated. If that is the case, Hicks has done a great injustice by inviting lower courts and juries to question the basic assumption that, absent explanation, adverse treatment of women and minority group members is more likely than not discriminatory.

IV. THE BASIC ASSUMPTION AND THE REAL WORLD: DISCRIMINATION PERSISTS

It is unnecessary to look any further than the materials already discussed to find evidence that stereotypical attitudes persist. While it is true that anti-discrimination laws prohibit discriminatory conduct, not prejudice or stereotypes, much discriminatory conduct is based on stereotypical attitudes about the characteristics and qualifications of women and minorities.

Consider first Justice Scalia's opinion in Hicks in which the champion of color blind thinking provides us with evidence that none of us are immune from stereotyping. Remember that in his opinion in Hicks, Justice Scalia stated that when a decision maker is the same race as the plaintiff, this is compelling evidence that the challenged adverse action

\textsuperscript{67} Id.

\textsuperscript{68} Philip Perlmutter, The Ebbing of Ethnic Bias, CHRISTIAN SCI. MONITOR, March 22, 1989, at 19.
was not the result of discrimination. Given Justice Scalia's insistence on color blind thinking in affirmative action cases, his color conscious remarks in Hicks might be amusing except that they provide an invitation to lower court judges and juries to rebut the inference of discrimination by drawing stereotypical conclusions about the thought processes of employers based on their race. In short, judges are being invited to discriminate in order to infer the absence of discrimination. The inference of discrimination arising out of the prima facie case is based on the identity of the victim, not on the identity of the employer. Inferring discrimination on the basis of the race or gender of the employer is the essence of discrimination—treating similarly situated individuals differently based on their race or gender.

Professor Epstein also holds stereotypical views about race and gender. After arguing that a free market system discourages discrimination, Epstein contends that some discrimination is rational and efficient and therefore desirable. His argument depends in part on the stereotypical assumption that individuals of the same race or gender share interests and therefore are likely to work more harmoniously together:

>[A]ssume for the moment that all workers have identical preferences on all matters relevant to the employment relation. If the question is whether or not they wish to have music piped into a common work area, they all want music. If the question is what kind of music they wish to hear, the answer is classical—indeed, mostly Mozart. If the question is how loud, the agreement is perfect down to the exact decibel. In this employment utopia, decisions of collective governance are easy to make. The employer who satisfies preferences of any single worker knows that he or she has satisfied the preferences of the entire work force. It takes little effort and little money to achieve the highest level of group satisfaction . . . .

The situation is quite different once it is assumed that there is no employee homogeneity in taste within the workplace . . . . [A]s the tastes within the group start to diverge, it becomes harder to reach a decision that works for the common good. If half the workers crave classical music but loath rock, and half like rock but disdain classical music, it is very difficult to decide whether music shall be played in the workplace at all, and if so what kind. The wider the variation in taste, the more troublesome these collective decisions are . . . .
The increase in harmony of tastes and preferences thus works in the long-run interest of all members. To the extent, therefore, that individual tastes are grouped by race, by sex, by age, by national origin—and to some extent they are—then there is a necessary conflict between the commands of any antidiscrimination law and the smooth operation of the firm. Firms whose members have diverse and clashing views may well find it more difficult to make collective decisions than firms with a closer agreement over tastes....

... [V]oluntary sorting can reduce the costs of making and enforcing group decisions. It remains to be noted that this sorting often takes place on racial, ethnic, religious, or sexual lines.... [For example,] workers may prefer to sort themselves out by language.... Indeed, it seems quite possible that there are variations within the English language that make communication easier between blacks and other blacks than between blacks and whites....

The commonality of preferences may extend beyond language to other features of collective life: the music played in the workplace, the food that is brought in for lunch, the holidays on which the business is closed down, the banter around the coffeepot, the places chosen for firm outings, and a thousand other small details that contribute to the efficiency of the firm.69

The appropriate first reaction to Professor Epstein's argument is sympathy for someone whose "employment utopia" is a place that is populated entirely with individuals who have identical characteristics and interests. The second reaction could be amusement at Epstein's euphemism for discrimination ("voluntary sorting") except that discrimination is abhorrent no matter how you describe it. The third reaction ought to be astonishment that someone so educated and privileged could entertain such narrow-minded views and stereotypical notions about the relationship between group membership and interests, habits and beliefs. But that is exactly why Professor Epstein's views and those of Justice Scalia mean so much. Even educated and otherwise decent individuals hold unfounded stereotypical views about race and gender. Of course Title VII prohibits acting on one's prejudices rather than the prejudices themselves. The Supreme Court, however, has recognized

69. Epstein, supra note 28, at 61-68.
that stereotyping is direct evidence of discrimination, and stereotyping frequently motivates discriminatory conduct. If Justice Scalia and Professor Epstein were alone in their views, aggressive application of the anti-discrimination laws would perhaps be unnecessary. Unfortunately, negative stereotyping is practiced by many Americans.

A recent survey of young Americans, aged fifteen to twenty-five, revealed persistent stereotypical attitudes on race: “Across racial lines, young Americans are deeply pessimistic about their future and, as the economy worsens, tend to believe the worst about other races, according to new national study . . . .” Consider some of the key findings reported from the 190-page study:

Many whites still cling to ugly stereotypes and, in interviews, characterized minorities as lazy, welfare-dependent criminals.

The best-educated young blacks were among the most cynical about white America’s commitment to the elimination of prejudice . . . .

One of the most divisive issues . . . was the question of who most often gets the short end of the stick in scholarships, employment and promotions. Regardless of race, the majority of youths questioned see themselves as victims of discrimination . . . .

About half of the whites surveyed believe they lose out to minorities because of special considerations. And more than half of the Hispanics and 68 percent of the blacks surveyed believe they are denied opportunities because of racial prejudice.

Because this study questioned young people, it is particularly troubling. Although this group has enjoyed more extensive interracial contact than older Americans, most of the youth who were questioned apparently have not learned to extend positive feelings about individuals of other races to the group as a whole. According to Susan Fiske, a psychology professor at the University of Massachusetts who specializes

71. Cynthia Durcanin, Young People Paint Bleak Picture of U.S. Race Relations, Survey Says, ATLANTA J. & CONST., March 17, 1992, at A4 (discussing the results of a survey conducted by Peter D. Hart Research Associates, which questioned 295 blacks, 709 whites, 122 Hispanics, and 44 “others,” including Asians. The survey had a margin of error of plus or minus four percentage points.).
72. Id.
in the study of stereotypes, "[y]ou can't just put people together in a room or at school and expect them to break down their stereotypes . . . . People are more complicated than that."\textsuperscript{73}

Other national opinion polls have concluded that even though whites support equal employment opportunity in the abstract, they view blacks as a group negatively. For example, sixty-two percent of whites consider blacks to be less hard working than whites.\textsuperscript{74} Negative and stereotypical attitudes are not limited to African Americans.

Many Americans appear to [hold a] negative view of Latinos. In 1990, the National Opinion Research Center reported that, compared to Jews, Blacks, Asians, southern whites and whites in general, Americans perceive Latinos as second only to Blacks as being lazy and living off welfare rather than being self-supporting, and see Latinos as the least patriotic of all these groups.\textsuperscript{75}

Other studies have demonstrated that, although many whites believe that affirmative action has provided hiring advantages to racial minorities, in reality, discrimination continues to create arbitrary barriers to equal employment opportunity for blacks. In 1991, the Urban Institute published the results of a study in which researchers randomly selected newspaper advertisements for job vacancies and then sent matched pairs of black and white "auditors" to apply for the jobs:

The hiring audits were conducted by [ten] pairs of full-time, paid auditors, [five] pairs in each of the two audit sites. Careful recruitment, matching and training of auditors was integral to the success of the study. The auditors, one black and one white, were carefully matched to control for all "job relevant" characteristics. Specifically, these were experience, education, age, and physical strength and size. Audit partners were made identical in a defined set of job qualifications and trained so that other attributes—demeanor, openness, articulateness, and energy level—were as similar as possible. Race was the only important difference between the two members of each audit team.\textsuperscript{76}

\textsuperscript{73} Id.
\textsuperscript{76} \textit{Margaret A. Turner et al., Opportunities Denied, Opportunities Diminished:}
The results of this study confirmed the persistence of racial discrimination:

A total of 476 hiring audits were conducted in the metropolitan areas of Washington, D.C., and Chicago during the summer of 1990. In one out of five audits, the white applicant was able to advance farther through the hiring process than his equally qualified black counterpart. In other words, the white was able to either submit an application, receive a formal interview, or be offered a job when the black was not. Overall, in one out of seven, or 15 percent, of the audits, the white was offered a job although his equally qualified black partner was not.

In contrast, black auditors advanced farther than their white counterparts on only 7 percent of the audits, and the black auditors received job offers whereas their white partners did not in 5 percent of the audits. In sum, if equally qualified black and white candidates are competing for a job, differential treatment, when it occurs, is three times more likely to favor the white applicant than the black.\(^7\)

The Institute reported that these results are “significant at the 99 percent confidence level.”\(^8\) Because the results were based on positions advertised in newspapers rather than in employment agencies where there are more opportunities for discrimination,\(^7\) the authors of the report speculated that their results underrepresented the problem of discrimination. The authors believed that the study also may have underreported discrimination because

all of the auditors participating in this study were actually college students who were overqualified for the positions for which

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\(^7\) DISCRIMINATION IN HIRING 24-25 (1991).
\(^8\) Id. at 62-63.
\(^7\) Id. at 66 n.2.
\(^7\) For example, four New York employment agencies recently were charged with using code words to discriminate on the basis of age and race:
Personnel counselors at the agencies typically used code words like “six” to indicate a black applicant, “half-six” to describe male Hispanic applicants, and several other catch phrases to describe other applicants. Older applicants were classified by one agency with the phrase, “too much mileage.” In some cases, employers conveyed the message to the agencies that white applicants were preferred with classifications like “all-American,” “front-office appearance,” “mom and applepie” and “corporate image.”
See also U.S. Official Accuses 2 Companies of Bias, N.Y. Times, June 1, 1989, at A16.
they applied; they were articulate and poised, spoke and dressed conventionally, and posed as having prior job experience. One would expect both blacks and whites with these characteristics to appear as exceptionally attractive candidates to prospective employers. In particular, the qualifications of the black auditors were substantially higher than those of the average black applicant for entry-level jobs.83

In another study of discrimination against Hispanics in Chicago and San Diego, the Institute found similar results.81

Unfortunately, discrimination on the basis of gender and race in this country is not limited to holding stereotypical attitudes and acting on them in denying employment opportunities. The ugliest evidence of continued discriminatory attitudes in this country comes in the form of actual and threatened racially and sexually motivated violence. A sense of the dimensions of the problem can be derived by merely searching the NEXIS file of current materials for the terms “racial violence” or “skinheads” and having the search stop because more than 1000 entries will be retrieved. Narrowing the search further yields nearly 900 articles. Perusing them gives a sense of just how much bigotry and racial violence exists in this country.

In 1982, Vincent Chin, a Chinese-American draughtsman, out celebrating on the eve of his wedding, “was murdered by two out-of-work white car factory workers from Detroit, who blamed the Japanese for their ills.”82 In December 1990, the Los Angeles Times reported a “rash of . . . violence against Japanese in the United States,” including a cross-burning at a Japanese school in Tennessee, pickets waving signs saying “Jap Go Home” in front of a Nissan auto plant, “[w]hite supremacists beat[ing] up Japanese students in Colorado,” and patrons at a California bar roughing up three Japanese women while yelling, “Speak English.”83 More recently, in May 1993,

Yoshihiro Hattori, 16, a Japanese exchange student in Louisiana . . . was killed with a .44 Magnum when he stopped at the wrong house looking for a Halloween party to which he had

80. TURNER, supra note 76, at 63.
81. Id. at 63-64.
been invited. What has shocked the Japanese . . . was the quick acquittal of the homeowner, Rodney Peairs, by a Baton Rouge jury, which found it was not a crime to kill someone who comes to the door without even asking a question.\textsuperscript{84}

In New York, "[o]n May 28, 1986, at 4 A.M. in Coney Island, four white men, using a knife and bat, killed Samuel Spencer 3d, an unarmed 19-year-old black man."\textsuperscript{85} Spencer's killers were convicted of murder. In a subsequent civil suit, a jury found that the attack had been racially motivated.\textsuperscript{86} Later in 1986, in another racist attack "in the Howard Beach section of New York . . . a bunch of young white men chased a black man, Michael Griffith, onto a highway, where he was struck by a car and killed."\textsuperscript{87} On August 23, 1989, Usef Hawkins, a young black man going to visit a white girl in the Bensonhurst area of New York was "lynched by a white gang" in a racially motivated attack.\textsuperscript{88} In 1991, Yankel Rosenbaum, a Hasidic scholar, was stabbed to death in racial violence in the Crown Heights section of Brooklyn, New York.\textsuperscript{89}

In Los Angeles in April 1992, Reginald Denny, a white truck driver, was beaten in a racially motivated attack following the verdict acquitting four white police officers of using excessive force in the beating of black motorist Rodney King a year earlier.\textsuperscript{90} In Connecticut in October 1993, swastikas and anti-Jewish threats and epithets were spray-painted on synagogues and a school and on the home of the Jewish candidate for mayor of West Hartford. In addition, racist graffiti was found on an AME Zion church in Manchester.\textsuperscript{91} In October 1993, a fight in which three white teenagers were stabbed in Charlestown, Massachusetts "touched off a week of racial unrest that included a cross burning and a Molotov cocktail left outside a Hispanic resident's

\textsuperscript{86} \textit{Id.}
\textsuperscript{90} To Hell and Back, PEOPLE MAG., Dec. 28, 1992 at 135-36; Cohen, \textit{ supra note 87}, at A17.
In September 1993, "[a] Florida jury convicted two white drifter[s] . . . of abducting Christopher Wilson, a black man from Brooklyn, robbing him and setting him on fire . . . . The assailants showered him with racial epithets and laughed as he burned." On July 25, 1993, the Sacramento Bee listed forty-six news items reported nationwide during the month of June 1993 that related to discriminatory hate or violence.

While these apparently spontaneous racial attacks are distressing, the growth of organizations whose purpose is to spread racial hate and promote violence against racial minorities is even more frightening:

Representatives of three national watchdog organizations [have] said the number of white supremacist groups in the country is rising. Such groups are active in 40 states, compared with 12 states just five years ago, said Barbara Bergen of the Anti-Defamation League in Los Angeles.

Of the 25,000 or so people who belong to white supremacist organizations in the United States, only about 200 are believed to be active in California.

"On the face of it, those numbers might not seem very impressive," Bergen said. "But we cannot underestimate the propensity for violence of these groups."

Since 1988, she said, 22 killings around the country have been attributed to skinhead gangs.

On October 7, 1993, three members of the Ku Klux Klan were indicted for participating in a racially motivated attack on a black couple in South Bend, Indiana. The indictment stated that

on the night of April 17, 1992, after discussing their hatred of African-Americans, the four men attempted to break into the home of Michael McDaniels and Angela Blackwell, an African-American couple in South Bend. According to the indictment, the four yelled racial slurs and threats at the couple and an infant in their care, kicked and beat on the door of the

couple's residence, and broke a window. The indictment further state[d] that during the assault, the four had in their possession a sawed-off shotgun which was fired at the door of the couple's home.96

In August 1993, federal authorities reported that an outbreak of racial violence on the West Coast appeared to be part of a white supremacist plot to begin a race war:

Federal authorities believe recent bomb attacks against Jews, gays and blacks in California and Washington state may be part of a white supremacist campaign to incite racial violence on the West Coast. The FBI and the Bureau of Alcohol, Tobacco and Firearms are stepping up investigations of white supremacist groups in California, Oregon, Washington and Florida, officials say.

Law-enforcement officials are looking into whether a recent wave of attacks along the Pacific Coast was connected to an alleged plot broken up by authorities last month to bomb a prominent Los Angeles African-American church and machine-gun its congregation. U.S. Atty. Mike Yamaguchi said federal agents investigating the July 20 bombing of a NAACP office in Tacoma, Wash., found documents suggesting white supremacist groups have embarked on a racial terror campaign.

“We believe there was a larger conspiracy to incite riots, racial tension and terrorism up and down the West Coast,” Yamaguchi said Thursday in San Jose, Calif.

Besides the Tacoma attack, white supremacists are believed responsible for the July 20 bombing of a gay bar in Seattle and the firebombings of an NAACP office and a Jewish temple in Sacramento later that month. No one was injured in any of the attacks.

Suspected groups preach a doctrine of racial purity and hatred similar to that of Jonathan Haynes, the California man charged with murdering Wilmette plastic surgeon Martin Sullivan last week . . .

No arrests have been made in the Sacramento and Seattle bombings. Eight reputed white supremacists were arrested in the

alleged Los Angeles plot last month . . . .

Authorities said the firebombing was part of a larger plot to attack Jewish synagogues and agencies, black institutions, U.S. military installations, gay gathering places and radio and television stations.

In addition, the alleged plot targeted for assassination black rap music stars Ice-T and Ice Cube, officials said. Authorities are trying to determine whether the attacks involve known white supremacy organizations, specifically the American Front, based in Portland, Ore.; the White Aryan Resistance, based in San Diego; and the Church of the Creator, based in Niceville, Fla. The groups have denied any role in the incidents.

"We're finding there are a lot of these people around," said one federal investigator, referring to skinheads and other white supremacists. "Whether they're coordinating their activities may be a different matter." . . .

"This is a national problem," said Rick Smith, spokesman for the FBI in San Francisco. "This isn't just rhetoric. There are people out there doing things."

The foregoing report of discriminatory attitudes and stereotyping, discrimination in the workplace, and incidents of racial and ethnic violence in America is hardly complete. It is merely a representative sample of surveys, studies, and incidents that have taken place in the past few years. It does not address the problem of police brutality against racial minorities. Nor does it document domestic violence, rape, and sexual harassment against women. In addition, it fails to chronicle the subtle and persistent forms of discrimination encountered by women and minority group members in their day-to-day existence. Even recog-
nizing that attitudes do not necessarily result in conduct, and that many individuals who participate in racial and ethnic violence are unlikely to be in positions of authority that allow them to engage in employment discrimination, the attitudes and behavior chronicled here provide evidence of a society in which discrimination is endemic. Rejecting the basic assumption that unexplained adverse conduct towards women and minorities is the result of discrimination denies the continued existence of discrimination itself. Denying the continued existence of discrimination is analogous to denying, in the 1950s, that the separate schools maintained for black children were unequal, or denying, today, that the Holocaust ever occurred.

V. ANALYSIS AND CONCLUSION

The Supreme Court in *Hicks*, academics, judges, and the general public are questioning whether, after nearly thirty years of anti-discrimination legislation, discrimination persists. They are questioning the basic assumption that absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination. If they were right it would be cause for celebration. Unfortunately, although the condition of women and minorities in the United States has improved, and a significant majority of the public claims to believe in equal employment opportunity, the overwhelming evidence indicates that discrimination persists, and the basic assumption continues to warrant judicial acceptance.

Fully recognizing that race- and gender-based violence is the work of a twisted minority of the population, we all need to face the truth that every American holds and regularly acts upon stereotypical assumptions based on group membership. When a woman walks down the street at night and sees a young man approaching her she becomes uncomfortable and concerned for her safety. She judges him, not on his individual characteristics, but on his age and his gender. When a police officer sees a white man driving in a predominantly black or Hispanic city neighborhood, he wonders whether the individual is seeking to purchase sex or drugs. He judges the man, not by his individual characteristics, but by his race and gender. When a construction foreman takes an application from a female seeking work, he wonders if she will be strong enough and skilled enough to succeed. He judges her, not by her individual characteristics, but by her gender. The examples could go on and on. Every one of us can think of a time when we have judged someone and acted on the basis of their group membership, not their individual characteristics. That is what discrimination is all about.
Congress enacted Title VII in order to provide a statutory basis on which victims of discrimination could seek redress. Congress has amended Title VII on a regular basis to further strengthen its prohibitions and to prevent the Supreme Court's narrow reading of the statute from undermining its purpose. The ink is barely dry on the 1991 Civil Rights Act, which amended Title VII to reverse the Court’s attempt to limit the application of disparate impact liability.9 With Hicks, the Court has launched an attack on the most basic form of discrimination—disparate treatment. Disparate treatment provided the primary motivation for the original enactment of Title VII and other anti-discrimination legislation.

Hicks' restriction on the impact of the prima facie case and its questioning of the basic assumption, while consistent with the letter of the law, is clearly at odds with its purpose. A presumption is a judicially or legislatively created mechanism for predetermining the sufficiency of evidence to support a factual or legal conclusion. It saves time and legal resources, but it also can serve the purpose of forcing a correct decision that courts and juries are likely not to reach because of their personal prejudices and biases. Inferring discrimination is just such a situation and warrants exactly that treatment. Discrimination is rampant, but judges, academics and laypersons alike either underestimate its prevalence or believe that their group and not other groups are victimized. Under these circumstances, in a world in which most people are smart enough to avoid providing direct evidence of discriminatory intent, it is critical for the law to define a prima facie case which creates a presumption of discrimination absent evidence to the contrary.

The Hicks opinion is legal jargon that dances around the basic issue. The prima facie case itself alters the burden of proof in exactly the same way that Justice Scalia said the burden of proof would be altered if the Court ruled in favor of Hicks. Three elements of the prima facie case require the plaintiff to disprove potential legitimate nondiscriminatory reasons. In a case alleging discriminatory failure to hire, the plaintiff must prove that he or she applied for a position. Failure to apply would provide the employer with a legitimate nondiscriminatory reason for not hiring the plaintiff. Next, the plaintiff must prove that he or she was qualified for the position. If the plaintiff did not possess the minimum qualifications for the job, that would give the

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employer another legitimate nondiscriminatory reason for not hiring him or her. Third, the plaintiff must prove that the position remained open. If the position was eliminated after it was advertised, that would constitute a legitimate nondiscriminatory reason for not hiring the plaintiff. In short, if the plaintiff meets the burden of disproving these three legitimate nondiscriminatory reasons, the plaintiff is entitled to judgment in his or her favor, absent some other explanation by the defendant. In Hicks, the plaintiff disproved the legitimate nondiscriminatory reason articulated by the defendant. There is absolutely no reason why the Court could not have defined the prima facie case and the operation of presumptions in disparate treatment cases to provide that disproving the defendant’s articulated nondiscriminatory reason, together with proving a prima facie case, creates a presumption that discrimination has occurred. Nothing in the law of evidence or Title VII stands in the way of reaching this result.

Failing to define proof of discrimination in this way denies the prevalence of discrimination in this society and unfairly burdens plaintiffs seeking to prove discrimination by inference. Defining proof of discrimination in this way does not unfairly burden employers. All they are required to do is articulate a nondiscriminatory reason for their conduct with respect to the defendant. They are not required to prove that they were, in fact, motivated by the proffered reason. Title VII was enacted out of concern for the victims of discrimination. Hicks, while consistent with the precise wording of Title VII, places too high a barrier in the way of plaintiffs seeking redress because, although discrimination continues to persist in this society, belief in its continued existence is eroding.

Congress’s central concern in enacting Title VII was to bring an end to intentional discrimination. Congress should ensure the continued vitality of Title VII as an attack on intentional discrimination by amending Title VII (again) to tell the Court (again) that it misunderstands Title VII’s commitment to eradicate discrimination. Congress should amend Title VII to create a statutory presumption mandating an inference of discrimination whenever the plaintiff both establishes a prima facie case and proves by the preponderance of the evidence that the nondiscriminatory reason proffered by the employer did not motivate the employer’s adverse conduct with respect to the employee.