The Price of Equal Opportunity: The Efficiency of Title VII after Hicks

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NOTES

THE PRICE OF EQUAL OPPORTUNITY: THE EFFICIENCY OF TITLE VII AFTER HICKS

I. INTRODUCTION

A. The Hicks Decision

On June 25, 1993, the Supreme Court handed down its decision in St. Mary's Honor Center v. Hicks. In a five-to-four decision written by Justice Scalia, the Court ruled that in employment discrimination suits brought under Title VII of the Civil Rights Act of 1964 (Title VII) the plaintiff does not automatically prevail by showing that the employer's proffered reason for the adverse employment decision is a pretext. Instead, the plaintiff must show that the actual reason behind the decision was an illegitimate one, such as discrimination based on race. This rule has been called

3. Hicks, 113 S. Ct. at 2748-51. The pretextual showing is part of the framework the Court established for Title VII cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). According to the McDonnell Douglas framework, the plaintiff must first present a prima facie case, then the defendant must put forth a legitimate, non-discriminatory reason for the adverse employment decision. Id. at 802-03. See also infra notes 115-20 and accompanying text. Once the defendant has offered such a reason, the plaintiff has an opportunity to show that the reason is pretextual. McDonnell Douglas, 411 U.S. at 804; see also infra notes 121-23 and accompanying text. This framework has come to be known as the disparate treatment theory of Title VII. See infra note 124 and accompanying text. Hicks addresses what happens after the plaintiff has succeeded in demonstrating pretext. Hicks, 113 S. Ct. at 2747.
4. Hicks, 113 S. Ct. at 2749. Another way of stating the holding is that the proffered
Despite Justice Scalia's protestations to the contrary, the immediate reaction was that the Court had worked a major change in the procedural framework of Title VII cases. Liberal civil rights lawyers complained that the new ruling would make it much harder to win Title VII cases. Isabelle Katz Pinzler, director of the Women's Rights Project of the American Civil Liberties Union (ACLU) in New York argued "[t]his is going to make it next to impossible for discrimination complaints to win." Charles Oldham, who argued for the plaintiff in *Hicks*, agreed, asserting that the decision would "make it five or ten times harder to prove discrimination." Similarly, Thomas Henderson from the Lawyers' Committee for Civil Rights Under Law claimed that "[i]t makes it much harder for plaintiffs to prove employment discrimination." Even more conservative lawyers who agreed with the decision did not doubt that it represented a significant shift in the law. This Note examines the considerations that prompted the Court to make this change.

The Court did not decide *Hicks* in a vacuum. The Court has wrestled with the proper allocation of burdens of pleading, production, and proof in Title VII cases since at least 1973. In that reason must be shown to be a pretext for illegal discrimination. *Id.*


6. See *Hicks*, 113 S. Ct. at 2750 (stating that "[o]nly one unfamiliar with our case-law will be upset by the dissent's alarum that we are today setting aside 'settled precedent.'").

7. See, e.g., *Overburdened*, NEWSDAY, July 1, 1993, at 54 (stating that "[t]he Supreme Court has overturned established civil rights law to make it more difficult, if not downright impossible, for employees to win bias suits"); *When Lying Pays*, ST. LOUIS POST-DISPATCH, June 29, 1993, at 2C (stating that "the Supreme Court overturned . . . well-crafted precedent"). For similar reactions from the legal community, see infra notes 9-12 and accompanying text.

8. See infra notes 9-11 and accompanying text.


12. See id. (quoting Mark Levin of the Landmark Legal Foundation as saying "this case will . . . decrease the number of frivolous claims because now they'll be put to the test"); Savage, supra note 9, at 14 (quoting Mona C. Zeilberg from the U.S. Chamber of Commerce as saying "it will have an important impact").

13. See generally Robert Belton, *Burdens of Pleading and Proof in Discrimination
year, the Court decided the seminal case of *McDonnell Douglas Corp. v. Green*,¹⁴ which was its first attempt to allocate burdens of proof in disparate treatment Title VII cases. Since then, the Court has often subtly shifted those burdens, almost always making it harder for the plaintiff to prevail.¹⁵ *Hicks*, therefore, can more appropriately be viewed as the most recent example of this trend than as an isolated case. At the same time, a large body of literature has sprung up questioning the economic efficiency of Title VII.¹⁶ In general, the economic approach to law argues that discrimination will disappear of its own accord in a truly competitive marketplace; therefore, attempts to interfere with the market should be carefully circumscribed.¹⁷ Even those who believe that Title VII is (or can be) efficient agree that it will be most effective (and cost-effective) if we recognize the efficiency implications of the law.¹⁸ Furthermore, as society and the economy slowly move to eliminate discrimination, Title VII will also have to evolve to remain efficient in the changing circumstances.¹⁹ However, there has been surprisingly little work done on the efficiency implications of the procedural burden allocations in Title VII cases.²⁰

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¹⁴. 411 U.S. 792, 802-04 (1973) (holding that the plaintiff must first establish a prima facie case, then the defendant must articulate a legitimate reason for the action, and then the plaintiff can show the proffered reason to be a pretext). Once again, this framework is for disparate treatment, not disparate impact cases. See infra notes 124-25 and accompanying text.

¹⁵. See Maxwell O. Chibundu, Delinking Disproportionality from Discrimination: Procedural Burdens as Proxy for Substantive Visions, 23 N.M. L. Rev. 87, 94-95 (1993) (arguing that the Court has consistently retreated from the original, broad, remedial conception of Title VII with which it started).


¹⁷. Id. at 1420-23; Richard A. Posner, The Efficiency and the Efficacy of Title VII, 136 U. Pa. L. Rev. 513, 513-14 (1987); see also infra note 75 and accompanying text.

¹⁸. See Donohue, *Is Title VII Efficient?, supra* note 16, at 1430-31 (arguing that Title VII may be efficient and that its actual efficiency is an empirical question which has not yet been answered).


²⁰. But see id. (arguing that the economics of discrimination require a disparate impact approach).
B. Title VII and Efficiency Concerns

The Court, in interpreting Title VII, has been influenced, either consciously or subconsciously, by efficiency considerations. As a result, the changes in the allocation of burdens over time can be seen as attempts to keep Title VII efficient; Hicks is only the most recent symptom. The Court in Hicks, however, has failed in its attempt to maintain Title VII's efficiency because it has underestimated the pervasiveness of discrimination in American society. The law that results, therefore, does not allocate the burdens of proof properly. To demonstrate this, Part II of this Note will examine the various economic theories of discrimination and the policy implications for each; Part III will develop an economic history of the Court's decisions in Title VII disparate treatment cases, concluding with the Hicks case; and Part IV will chart a more efficient course for the future. By fusing economic theory with the "antidiscrimination norm," we can hope to achieve a just, race-blind economy in the most efficient manner.

II. BACKGROUND: THE ECONOMICS OF DISCRIMINATION

A. Theories of Discrimination

In the most basic model of the labor market, economists generally assume that no discrimination exists, for it is not rational to prefer one employee over another merely because of race. Obviously, however, this model does not reflect the real world. In order to conform neoclassical economic theory to observed reality, economists have posited two types of theories for the prevalence of racial discrimination: taste-based discrimination and statistical discrimination.

21. See infra notes 237-55 and accompanying text.
22. RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 2 (1992). Epstein uses this phrase to refer to the general consensus in contemporary American society that racial discrimination is wrong. Id.
24. While most of the economic theory has addressed itself to the problem of racial discrimination, the principles are equally applicable (with some modifications) to gender, age, or disability discrimination. See EPSTEIN, supra note 22, at 267-392, 441-79, 480-94. See also John J. Donohue, III, Prohibiting Sex Discrimination in the Workplace: An Economic Perspective, 56 U. CHI. L. REV. 1337, 1347-56 (1989) (applying economic theories to sex discrimination). As a result, this Note will focus on the economics of race dis-
discrimination. 25

1. Taste-Based Discrimination

Taste-based discrimination was first introduced into the neo-classical economic model by Gary S. Becker. 26 In this model, employers have a "taste for discrimination," such as preferring to hire whites over blacks. 27 In general, economists have identified three possible sources of this preference. 28 First, the employers themselves are bigots and do not like associating with blacks; consequently, hiring a black employee may impose a psychic cost on them which is not imposed when they hire a white. 29 Second, the other (white) employees are bigots who prefer not to work with blacks; and, as a result, hiring a black may either induce other employees to quit or make them less productive. 30 Once again, a cost may be imposed on an employer who hires a black worker which is not imposed if a white worker is hired. Third, the employer's customers may be bigots and want to avoid dealing with black employees; thus, if the employer hires blacks, some customers may take their business elsewhere. 31 This may impose an additional cost on the employer who hires black labor. Any one of these three sources of discrimination may make the cost of
hiring a black worker greater than the cost of hiring an equally qualified white worker.

In this situation, fewer black workers will be hired than in a perfectly functioning labor market, i.e., one without any discrimination.32 In addition, black workers’ average wage will be lower than white workers’ average wage.33 A simple explanation is that the higher cost of black labor created by discrimination is equivalent to a tax on black labor. When any good is taxed, the demand for that good drops as people switch to substitute goods or do without. In this case, white workers would be the substitute goods. Therefore, the level of black employment will fall. As it does, the suppliers of black labor, i.e. blacks, will be forced to lower the price of their labor in order to find employment, and the wage rate will fall. Therefore, any otherwise rational employer who is a bigot, or who has bigoted employees or customers, will hire fewer blacks than he or she otherwise would and will pay them less than similar white workers.

Simply because employers might believe themselves to be “rational” in choosing to discriminate, however, does not mean that such discrimination is efficient as a whole. In fact, there is general agreement that racial discrimination imposes efficiency costs on the economy as a whole.34 If an employer discriminates, it is apt to turn down well-qualified black job applicants (burdened with the high costs of discrimination) in favor of less-qualified whites. As a result, the firm will be less productive than if it hired the “best person for the job,” who in this case is black. Multiply this effect across all the firms in the country, and the economy will clearly not produce goods at optimal efficiency. In addition, the rejected black employees will have to move down the employment ladder to find jobs, i.e., find work for which they are over-qualified. Thus, they will not be using their talents and education to the fullest, and they will be underutilized as a resource. Once again,

32. Donohue, Is Title VII Efficient?, supra note 16, at 1418.
33. Id.
34. See John J. Donohue, III, Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner, 136 U. PA. L. REV. 523, 524 (1987) [hereinafter Donohue, Further Thoughts] (comparing the efficiency costs of discrimination with the costs of trying to legislatively speed its elimination); Posner, supra note 17, at 514 (stating that nondiscriminating employers will have lower labor costs than discriminating ones). But see Epstein, supra note 22, at 60-78 (arguing that rational discrimination may actually minimize firms’ internal transaction costs by creating a homogeneous workplace and, therefore, be efficient for society).
racial discrimination is not economically efficient.

The good news is that economic theory suggests this inefficient discriminatory behavior will partially, but not entirely, be driven out by market forces. First, the market should drive out employers who are bigots. Bigots will either employ some blacks at a lower wage or not employ blacks at all. If they choose to employ blacks at the lower wage, they still will have to absorb some of the psychic costs associated with dealing with blacks, i.e., the (reduced) black wage plus the psychic costs is greater than the going white wage. A non-discriminatory employer will not have to absorb any cost except the wage cost. Therefore, the unbigated employer will have lower costs and produce more efficiently. As a result, the unbigated employers could drive out the bigoted ones with lower prices. Even if there were no unbigated employers, the flow of capital would drive out bigotry. Unbigated people could make a profit by buying out bigoted employers and running the firm more efficiently simply by not discriminating.

Alternatively, if bigoted employers do not employ blacks, they will not be hiring the best workers, since they will prefer inferior white workers to qualified black ones. Just as above, they will not be operating efficiently and will be driven out by the same mechanisms that drove out those bigoted employers who did hire blacks. Therefore, bigoted employers will be driven out or at least forced

35. See Strauss, supra note 19, at 1632. The ensuing discussion draws heavily on Strauss’ quite extensive review of the literature on the subject.
36. See supra notes 32-33 and accompanying text.
37. This can be illustrated simply. Assume that the going wage is $10/hour. Further assume that the psychic cost to the employer has a monetary equivalent of $2/hour. Therefore, for the employer to be fully compensated for hiring blacks, the black wage would have to fall to $8/hour. In order for this to happen, the supply of black labor would have to be perfectly inelastic. That is, no more blacks would choose leisure over work at $8/hour than would at $10/hour. Such an inelastic labor supply is highly counterintuitive, and certainly, no economist has ever found a perfectly inelastic labor supply in any empirical study. See Ehrenberg & Smith, supra note 23, at 30 (discussing how the supply of labor decreases when wages fall). Therefore, the black wage would fall but would not fall to $8/hour. The difference between $8/hour and the actual wage would be the cost absorbed by the employer. At this point, the reader may argue that discriminators are better off since they are paying a lower wage for the same work. While this is true in strictly monetary terms, it is not true in the broadest sense. Remember, the cause of the wage disparity is the $2/hour psychic cost absorbed by the employer. When this is added to the monetary wage for blacks, the total cost is greater than $10/hour. If the employer’s response to this is a refusal to hire blacks, it will be shown below how that decision will also be punished by the market. See infra note 39 and accompanying text.
38. Strauss, supra note 19, at 1633.
to behave as if they were not bigoted. 39

While discrimination will be driven out, 40 it is not clear that it will be driven out immediately. Unlike the market for wheat, the labor market does not clear instantly, so some discrimination will persist for a time. 41 Therefore, the market will not always be operating at an efficient point. 42

The market has a more difficult time driving out discrimination by bigoted co-workers. 43 As noted above, an employer with bigoted employees has additional costs if a black is hired. 44 Therefore, in the short run it may be efficient simply not to hire blacks. In this situation, however, other employers would have an incentive to hire only blacks. Theoretically, a purely segregated workforce would result with all-black and all-white firms. 45 Obviously, while blacks and whites in a perfectly competitive market would earn equal wages, we would not approve of such a segregated economy. In addition, given the relative starting positions of blacks and whites in the economy, it is not hard to imagine that there would be a substantial wage differential between whites and

39. It has, however, been argued that some discriminatory firms may persist. Donohue, *Is Title VII Efficient?*, supra note 16, at 1422 n.31. Donohue cites several articles to support this proposition. The most interesting arguments are found in Matthew S. Goldberg, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. ECON. 307, 318 (1982) (arguing that discrimination can persist if it is motivated by favoritism toward whites instead of animus toward minorities), and Richard R. Nelson & Sidney G. Winter, *An Evolutionary Theory of Economic Change* 139-54 (1982) (arguing that firms which fail to maximize profit may not always be driven from the market). While these theories are interesting, this debate is beyond the scope of this Note. For present purposes, the only relevant consideration is that the market may need help in driving out discrimination; these arguments only buttress that point. *See infra* notes 70-84 and accompanying text.

40. It seems counterintuitive to argue that employer-based discrimination will be driven out since it has persisted for such a long time. Several arguments can be made in response, however. First, remaining discrimination can be a result of one of the other sources. *See supra* notes 30-31 and accompanying text; *infra* notes 59-69 and accompanying text. Second, there may be imperfections in the market which prevent discriminators from being flushed out. Strauss, *supra* note 19, at 1634. Finally, for a long time the market was not allowed to function due to Jim Crow laws and other artificial restraints imposed by the government. Epstein, *supra* note 22, at 245-54; Strauss, *supra* note 19, at 1634.


42. Donohue, *Further Thoughts*, *supra* note 34, at 528 (asserting that once the benefits exceed the costs of discrimination, discriminators will be flushed from the system by market forces).


44. *See supra* note 30 and accompanying text.

blacks. Alternatively, as above, the firms could hire blacks despite the bigoted co-workers but simply pay them less to offset the additional cost they impose.

In the long run, however, employee-based discrimination should be forced out. Firms which only hire whites will not have the best employees and will have to look harder for employees since they can only use one race. In addition, they will not have the benefits that minority workers bring to a firm such as different skills and the ability to sell to minority communities. Therefore, firms which do not have bigoted workers will have lower costs and will operate more efficiently. As a result, firms will search for unbigoted workers, and potential workers will reduce or eliminate their prejudices to become more desirable to employers thereby eliminating this source of discrimination.

Unfortunately, this solution will occur in the long term. In the short term, high information costs will hinder the functioning of the market. For example, an employer who hires a black worker and observes a decline in productivity will have difficulty determining the source of the decline and, due to prejudice, will more likely blame the new black worker than the existing white ones. Therefore, this discrimination will persist in the short run, and the economy will not operate efficiently.

Unlike employer- or employee-based discrimination, consumer-driven discrimination may persist in a free market. Under Becker’s model, such discrimination would disappear or become pointless. If the majority of consumers are nondiscriminatory, then nondiscriminatory firms would have no additional costs since they could find plenty of buyers for their wares even though they employed blacks. At the same time, discriminating firms would have high-

46. Strauss, supra note 19, at 1635-36. The argument is twofold. First, in such a situation, there is apt to be consumer bigotry, and since whites have more purchasing power, white workers will do better. Second, since whites have a disproportionate share of society’s capital, they are in a better position to invest in firms which hire white workers than blacks are able to invest in firms which hire blacks.

47. Id. at 1636 (citing Becker, supra note 26, at 58; Kenneth Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS 3, 6, 10-13 (1973)).

48. Strauss, supra note 19, at 1636.

49. Id. at 1636-37.

50. Id. at 1637.

51. Id.

52. Becker, supra note 26, at 74-76 (asserting that balancing of tastes among all consumers results in little or no effect overall).

53. This argument follows from Strauss, supra note 19, at 1638.
er costs, since they would have to search for only white employees, and they would therefore have higher prices. As a result, only the bigoted consumers would buy from them. The search for these few consumers will be expensive and time-consuming, further raising their prices and making it harder for them to make sales. Obviously, the market will tend to drive this out.

The argument is not so clear if there are an insufficient number of nondiscriminatory consumers, however. In that case, firms which cater to discriminators will not lose many customers due to their higher costs and will not have to search very hard for customers. Therefore, they will not be driven out. Instead, the market will become segregated, like the market with bigoted employees, with some employers using minority labor to sell to minorities and others using whites to sell to whites. Obviously, this is not a state of affairs we should encourage.

Indeed, it is not clear that separate but equal would be the result. As long as there are bigoted consumers, then firms which hire minorities run the risk of losing business to firms which do not. If the risk is great enough, it is more profitable simply to hire whites than to buck the trend by hiring blacks. Therefore, there will be no market push to eliminate this kind of discrimination.

In sum, most taste-based discrimination should be driven out by a perfectly-functioning free market. However, that will take time, and it is quite likely that some discrimination will persist indefinitely. As a result, the market cannot be relied on to remove all discrimination without some intervention.

2. Statistical Discrimination

The second type of discrimination which may interfere with the labor market is statistical discrimination. Statistical discrimin-
nation occurs when race is used as a proxy for costly information. In other words, due to the sordid history of race relations in the United States, whites are generally better qualified for jobs than blacks. For example, they are likely to be better educated, be more productive, and are less likely to have criminal convictions. Therefore, an employer faced with a white applicant and a black applicant may believe the white to be more qualified. If information were free, the employer could find out all the relevant facts and make the efficient decision by hiring the most qualified person, black or white. Information, however, is expensive to obtain. Therefore, it may be efficient for employers to simply hire whites and run the risk that they are hiring the less qualified worker because of the amount saved in information costs. Obviously, minorities are apt to suffer greatly as a result of statistical discrimination.

This sort of discrimination may be efficient for employers, but it is inefficient for the economy as a whole. This is because it discourages investment in human capital through education and training. There is no incentive, for example, for blacks to pour resources and effort into education if they are going to be judged only on being black. In other words, blacks do not reap the full benefits of education and training. It merely improves the overall status of their race and not their status as individuals; therefore, they tend to underinvest. This can create a vicious, self-fulfilling prophecy where blacks are discriminated against due to low productivity, so they underinvest, so they have low productivity, so they are discriminated against, and the cycle continues.

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may result in discrimination); Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 AM. ECON. REV. 659, 659 (1972) (arguing that discrimination exists due to a lack of information).

60. See Strauss, supra note 19, at 1622. As noted earlier, supra note 25, Strauss provides the best review of the literature, so his work will be cited most often. This literature is quite extensive but is beyond the scope of the Note.

61. See infra notes 134, 188-92 and accompanying text. Once again, this should not be seen as an endorsement of statistical discrimination as morally defensible. As Phelps has said, "[d]iscrimination is no less damaging to its victims for being statistical. And it is no less important for social policy to counter." Phelps, supra note 59, at 661. Furthermore, statistical discrimination is bad for the economy as well as its victims. See infra notes 63-65 and accompanying text.

62. See infra notes 134, 188-92 and accompanying text.

63. Donohue, Further Thoughts, supra note 34, at 532.

64. Id. at 532-33.

65. Strauss, supra note 19, at 1640. Alternatively, some writers have suggested that statistical discrimination is societally efficient, at least in the short-run, because the infor-
Regardless of whether statistical discrimination is efficient for the economy as a whole, it is extremely difficult for the market to drive out, especially in the short run. If it is efficient for each firm, because the costs of occasionally hiring the less-qualified worker are lower than the costs of obtaining information, the firms have no incentive to stop discriminating. However, in the long run, it may be driven out. Employers have an incentive to find more accurate sources of information, which will be better determinants of productivity than race. Therefore, they will rely on race less often. However, if the vicious circle sets in, then race may be a good determinant of productivity and the market will not drive discriminators out.

B. Role of Title VII

Whatever the theoretical reasons for the existence of employment discrimination, there is little question that it exists in the real world. As a result, Congress adopted Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination based on "race, color, religion, sex, or national origin." By imposing costs on discriminators, such as the costs of litigation, settling claims, and paying out judgments, Title VII makes discrimination much less attractive economically and would therefore tend to discourage it. While this is certainly in keeping with the antidiscrimination norm, it is not clear whether such a blanket prohibition is economically efficient.

At this point, the reader may argue that the efficiency (or lack thereof) of Title VII is irrelevant since the goal of Title VII, eliminating discrimination, outweighs any potential efficiency losses. There are several responses to this argument, however. First, since a utopian, perfectly-functioning market has no discrimination, such a market should be the goal of any law combating discrimination.

66. Strauss, supra note 19, at 1643.
67. Id. at 1640.
68. See supra note 65 and accompanying text.
69. Strauss, supra note 19, at 1643.
70. See infra notes 126-34, 177-92, 237-55 and accompanying text (documenting the prevalence of discrimination).
72. Id. § 2000e-2(a)(1).
73. Epstein calls this the "antidiscrimination norm." See supra note 22.
In other words, a perfect market without discrimination is better than an imperfect market without discrimination. If efficiency and lack of discrimination are not mutually exclusive, we should try to achieve both. Second, in order to maintain a consensus in favor of Title VII, we want to minimize its costs. While society may be willing to pay a considerable amount to eliminate discrimination, there is probably some price at which society will prefer discrimination. Therefore, we should keep Title VII as efficient as possible. Finally, even once we have adopted Title VII, we are better off as a society if we can maximize its gains and minimize its costs. As a result, even those willing to pay a very high price to eradicate discrimination must consider the efficiency ramifications of Title VII.

In considering the efficiency of Title VII, the general consensus among law and economics theorists is that since the market will tend to eliminate discrimination, Title VII is superfluous. As a result, the costs that it imposes, such as litigation costs, administrative costs, and the cost of hiring potentially underqualified minorities to avoid litigation, generate no benefits. Therefore, the argument goes, it is grossly inefficient and should be abolished.

Professor Donohue has argued, however, that Title VII may be an efficient weapon to use against taste-based discrimination. He argues that while the market will generally, although not always, push toward the efficient non-discriminatory result, it will not do so quickly enough. Impediments in the market will delay the elimination of discrimination, therefore, the economy will not be operating efficiently. Title VII, by imposing high costs on discriminators, reduces their profits, forcing them either to leave the mar-

74. For example, if we had to spend one year’s gross national product (GNP) (i.e., everyone would be unemployed for a year) to eliminate discrimination, the “anti-discrimination norm” might evaporate.

75. See generally Epstein, supra note 22, at 9 (stating that “[c]ompetitive markets with free entry offer better and more certain protection against invidious discrimination than any anti-discrimination law”); Milton Friedman, Capitalism and Freedom 108-18 (1962) (arguing that discrimination is less prevalent in areas with the greatest freedom of competition); Posner, supra note 17, at 514 (arguing that competition will decrease discrimination in the workplace).

76. See Donohue, Is Title VII Efficient?, supra note 16, at 1426-31 (arguing that Title VII may lead to an efficient result).

77. Id. at 1423-31.
ket 78 or to stop discriminating. 79 In other words, Title VII forces the labor market to function efficiently more quickly, without waiting for a market transformation. 80 This reduces the efficiency losses from discrimination. Logically, if this gain outweighs the costs associated with Title VII (including administrative costs, adjustment costs for firms, litigation), then Title VII is efficient. 81

78. Id. at 1426. This is because the assets of discriminators will be bought at a bargain by someone who will use them more efficiently, i.e., someone will not discriminate.

79. Id.


81. Id. at 1426-27. In response, Posner makes three arguments. First, he notes that Donohue failed to take into account the costs of administering Title VII, pointing out that there were 9,000 cases brought to court in the year ending in June 1986, plus countless others not brought to court. Posner, supra note 17, at 514. Arguably, these costs could make Title VII inefficient by outweighing the gains from reduced discrimination.

Second, Posner, in analogizing anti-discrimination measures to a law requiring the adoption of new maritime technology, contends that the market will always move at the efficient speed to correct discrimination, and any attempt to interfere will lead to efficiency losses. Id. at 515. In addition, Posner argues that some discrimination is statistical and should not be eliminated since it may be efficient. Id. at 516 & n.16. (The potential efficiency of statistical discrimination is discussed supra at notes 62-64 and accompanying text.) Prohibiting it may increase the costs of Title VII.

Third, Posner suggests that Title VII may not actually move us closer to the non-discriminatory utopia. See Posner, supra note 17, at 517. He points out that Title VII prohibits paying blacks and whites differently, which is easy to enforce. Id. Assuming that blacks were generally paid less than whites before Title VII, the wage increase will make employers less likely to employ blacks. While discriminatory hiring is still illegal, it is harder to prevent than wage discrimination. In addition, Posner suggests that companies will relocate to white areas to avoid having to hire blacks. Id. at 519. In fact, the literature is sharply divided on whether Title VII has improved black employment. Cf. Epstein, supra note 22, at 242-66 (reviewing the literature and arguing that the only improvement was due to the elimination of Jim Crow laws); Donohue, Further Thoughts, supra note 34, at 534-36 (reading the literature to suggest that Title VII has improved employment prospects for blacks). Whether or not Title VII has actually had a salutary impact is beyond the scope of this Note and requires detailed and sophisticated empirical study.

This Note is concerned with establishing an efficient procedure for implementing Title VII.

Donohue has responded to each of these arguments in turn. See Donohue, Further Thoughts, supra note 34 (replying to Posner's article). First, employing a detailed model, he approximates all costs and benefits associated with Title VII, including administrative costs, and shows how Title VII still can result in a net gain. Id. at 524-25. Second, Posner's analogy to a new maritime technology is also flawed. Id. at 526-27. In that case, there is old equipment and other capital which must be replaced at great expense, so it may be efficient to get more use out of the still-serviceable old equipment. Id. However, in the employment discrimination context, the problem can be solved immediately by transferring the business from a bigot to a nondiscriminator. See supra note 38 and accompanying text. Therefore, the only cost of adapting to the new regime would be the transaction cost. Finally, Donohue reads the ambiguous data to suggest that Title VII has made some improvement in employment prospects for blacks and that Title VII, even if imperfect, will still drive discriminators from the market by increasing their costs.
Obviously, Title VII can play an important role in eliminating statistical discrimination as well. By making statistical discrimination illegal, Title VII will raise the costs of discriminating, so that obtaining the information becomes cheaper than discriminating and there is no longer any incentive to discriminate. While this imposes short-term costs on employers, it eliminates discrimination, thereby preventing underinvestment in human capital. As a result, the productivity gap between whites and blacks should narrow, and the reasons for statistical discrimination should disappear. Therefore, the economy will be more efficient in the long run. If the long run gains outweigh the short run losses, then Title VII will be efficient.

In sum, both taste-based and statistical discrimination may distort the functioning of the market, depressing the employment opportunities and wages of blacks. While market forces may drive out discrimination in the long run, they may not; and they will certainly need help in the short run. Title VII can provide this help and therefore can be efficient. However, once discrimination is driven out, there should be no need for Title VII, because market forces should prevent new discrimination. Therefore, Title VII should, like the dictatorship of the proletariat, wither away.

Presumably, discrimination will not be eliminated overnight; rather, it should gradually work its way out of the economy. Therefore, Title VII, if it is to remain an efficient tool in the fight against employment discrimination, must wither away slowly. In other words, we should have less and less need for Title VII. As a result, Title VII must change over time if it is to remain efficient.

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Donohue, *Further Thoughts*, supra note 34, at 534-37.

82. Donohue, *Further Thoughts*, supra note 34, at 529.

83. *Id.* at 533.

84. This can be illustrated quite simply. First, any employers who engage in taste-based discrimination in this state will immediately be put at a competitive disadvantage since they will not be employing the best people available. Similarly, employees who are bigoted will have difficulty getting jobs since there are no segregated workplaces, and consumers will have nowhere to go that is segregated. Second, as Strauss points out, once the workforce is integrated, there is little or no incentive to discriminate statistically. Strauss, *supra* note 19, at 1641-42. Having an integrated workforce is a great source of information so that information costs are no longer as high, and race can no longer function as a cheap proxy. *Id.* Therefore, once a non-discriminatory equilibrium has been reached, there is no incentive for anyone to resume discriminating.
C. Change in Title VII

This leads us to the question of how Title VII must change to remain efficient. As Epstein points out, any attempt to root out discrimination is subject to what economists call type I and type II errors.85 A type I error is a rejection of a true null hypothesis, commonly called a false positive.86 This would be a finding of discrimination where none existed.87 A type II error is the acceptance of a false null hypothesis, or a false negative.88 This would be a finding of no discrimination when it actually existed.89 There is always a tradeoff between type I and type II errors.90 In other words, any attempt to root out all discrimination will result in many incorrect judgments against nondiscriminatory employers, while an attempt to prevent overprosecution would let many legitimate cases of discrimination go unprosecuted. Furthermore, the tradeoff is almost never linear; i.e., the closer we get to the elimination of one type of error, the greater the sacrifices which have to be made on the other type for any more improvement.91 For example, reducing type I error from 10% to 5% might require an increase in type II error from 5% to 10%, while further reducing type I errors to 1% might result in an increase of type II errors to 25%.

In the Title VII context, eliminating either type of error would obviously not be efficient. Successfully rooting out all discrimination would greatly increase the costs of administering Title VII and the firms' cost of complying, possibly outweighing the gains from the elimination of discrimination. In addition, it might encourage employers to hire less-qualified blacks in order to avoid lawsuits. This would actually generate efficiency losses. Similarly, if the courts tried to ensure that there were no false findings, many real cases of discrimination would go untouched, and Title VII would not be efficiently reducing discrimination. Therefore, for Title VII to reach maximum efficiency, the courts enforcing it must strike the right balance between type I and type II errors.92

85. Epstein, supra note 22, at 222-25.
87. Epstein, supra note 22, at 223.
88. Freund, supra note 86, at 241.
89. Epstein, supra note 22, at 223.
90. Id.
91. Id.
92. Id. at 224.
Since, as argued above, the market should reduce discrimination over time, the appropriate balance should also shift. For example, the appropriate balance in 1965 would have probably put most of the burden on the employer, since it was likely that the employer was discriminating. Therefore, there is only a slight risk of a type I error (a false finding of discrimination) even with the burden shift, and we are more concerned with preventing type II errors. By 1993, however, when there is less discrimination in society, leaving all of the burden on the employer would probably result in a great number of type I errors, which would lead to inefficiency. To keep Title VII efficient, therefore, the courts should be subtly shifting the burdens of proof. In fact, that is precisely what the courts have been doing. In part III, we will examine the history of disparate treatment cases under Title VII to show this process, which has culminated with *Hicks*.

III. AN ECONOMIC HISTORY OF TITLE VII

A. The Statute: Silent on Proof

As noted above, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." However, the law is silent as to how potential plaintiffs are to prove such discrimination. While it has always been assumed that direct proof of racial discrimination ("we don't hire blacks here") is sufficient, such easy cases are rarely encountered. As a practical matter, forcing plaintiffs to prove racial animus directly would result in very few victories for the plaintiffs.

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93. See *supra* notes 35-57 (suggesting that taste-based discrimination should be partly, if not completely, eradicated), notes 63-69 (noting the difficulty of eliminating statistical discrimination) and accompanying text.
94. See *infra* notes 126-34 and accompanying text.
95. See *infra* notes 237-55 and accompanying text (discussing the relative status of blacks during the 1980's).
97. See id. §§ 2000e-2 to 2000e-17. The statute discusses enforcement by the Equal Employment Opportunity Commission and litigation of civil actions by the Attorney General but does not discuss the elements of an individual plaintiff's case.
99. See *Strauss, supra* note 19, at 1645 (arguing that employers are usually much too sophisticated to discriminate openly).
This state of affairs is inefficient. If direct proof of racial discrimination were required, bigoted employers would hide their discrimination, rather than change their ways. While we would not have many false findings of discrimination, we would let many real cases go without remedy. In other words, we would have many type II errors. Therefore, discrimination would not be driven out, so Title VII would not be efficient.

B. McDonnell Douglas: The Original Framework

Fortunately, the courts quickly came to the rescue. Drawing on old civil rights rulings, many lower courts ruled that once the plaintiff had made out a prima facie case of discrimination, the burden shifted to the defendant employer to show why the adverse employment decision was made. The courts tended to treat this prima facie case as an inference which could be drawn from circumstantial evidence, either by a showing that the minority was qualified but passed over for a nonminority, or that the firm had a statistical disparity in its hiring, or both.

The Supreme Court picked up on these threads in the seminal case of McDonnell Douglas Corp. v. Green, where it first laid out the order of proof and requisite burdens in Title VII cases. The plaintiff, Green, was “a long-time activist in the civil rights movement” who had been laid off from his position as a mechanic by McDonnell Douglas in 1964 (before the passage of Title VII) as part of “a general reduction in [the] work force.” He felt strongly that he had been laid off due to his race, and following
his dismissal he organized and participated in unlawful demonstrations against McDonnell Douglas for which he was arrested.\textsuperscript{108} After these demonstrations, and after the passage of Title VII, McDonnell Douglas advertised for mechanics; Green applied and was rejected.\textsuperscript{109} As a result, he filed a complaint with the Equal Employment Opportunity Commission, which eventually led to the lawsuit.\textsuperscript{110} Essentially, Green argued that he had been discriminated against on the basis of his race and because he took part in civil rights demonstrations.\textsuperscript{111}

As the Supreme Court noted, the lower courts had a great deal of difficulty trying to decide how to allocate the burdens of proof on the issue of racial discrimination,\textsuperscript{112} so the Court granted certiorari to settle the issue.\textsuperscript{113} The Court created a three-part procedure for adjudicating Title VII cases.\textsuperscript{114}

First, the plaintiff has the initial burden of producing a prima facie case.\textsuperscript{115} To establish a prima facie case, the plaintiff may show

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from [equally-qualified people].\textsuperscript{116}

This formulation was entirely new, and the Court neither cited to

\textsuperscript{108} Id. For example, Green parked his car in front of the plant gates during rush hour to tie up traffic. \textit{Id.}
\textsuperscript{109} \textit{Id.} at 795.
\textsuperscript{110} \textit{McDonnell Douglas}, 411 U.S. at 796-97.
\textsuperscript{111} \textit{Id.} at 797. The lower courts agreed with the defendant that the plaintiff's participation in the demonstrations was not protected, because the demonstrations were unlawful. \textit{Id.} In sum, the key issue was whether plaintiff was not hired because of his race, as he maintained, or due to his participation in the demonstrations, as the defendant maintained. \textit{Id.} at 798.
\textsuperscript{112} \textit{Id.} at 801. The appellate panel had a majority opinion, Green v. McDonnell Douglas Corp., 463 F.2d 337, 338 (8th Cir. 1972); a concurring opinion, \textit{id.} at 344; and a dissent, \textit{id.} at 346. Then it revised the portion of the opinion dealing with the allocation of burdens, \textit{id.} at 352; which resulted in a supplemental dissent, \textit{id.} at 353. See \textit{McDonnell Douglas}, 411 U.S. at 801-02 n.12. In short, the law was not clear at all.
\textsuperscript{113} \textit{McDonnell Douglas}, 411 U.S. at 798.
\textsuperscript{114} See \textit{infra} notes 115-25 and accompanying text.
\textsuperscript{115} \textit{McDonnell Douglas}, 411 U.S. at 802.
\textsuperscript{116} \textit{Id.} The court did note that the prima facie case could be made differently in different circumstances. \textit{Id.} at 802 n.13. Presumably, hiring an unqualified white instead of leaving the position open would also suffice.
any of the lower court cases nor to the earlier jury discrimination cases for support. In practice, this new formulation means that almost any time a qualified black is not hired for an open position, a prima facie case can be made out.

Once the plaintiff makes out a prima facie case, the burden shifts to the defendant who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Unfortunately, the Court was not very specific as to how much of the burden shifts. It failed to clarify whether the burden of persuasion shifts to the defendant or merely the burden of production. It is clear, however, that if the defendant fails to produce a "legitimate, nondiscriminatory" reason, the plaintiff will prevail by default.

Even if the employer succeeds in carrying its burden, however, it does not automatically win. Instead, the plaintiff must have the opportunity to show that the defendant's proffered reason is, in fact, a "pretext." The Court suggested that this may be done by comparing the plaintiff to similarly situated whites: if whites with the same shortcoming(s) were treated differently, it would create an inference that the reason is pretextual. Once again, the Court was not clear as to which party bears the burden of persuasion at this stage of the proceedings. If this is seen as a rebuttal of the legitimate reason, for example, then the defendant may still bear the burden; alternatively, if this is a distinct step, then the burden may have shifted back to the plaintiff. This three-step analysis became known as the "disparate treatment" theory of Title VII.

119. See Kovacic-Fleischer, supra note 117, at 636-37. As Kovacic-Fleischer notes, the lower courts confuse the concepts of inference and presumption. Id. at 637. If the prima facie case allows the fact-finder to infer discrimination, then the burden of persuasion shifts to the defendant, who must rebut the inference by a preponderance of the evidence. If the prima facie case merely establishes a presumption, then the defendant only has the burden of production. If satisfied, it will destroy the presumption. Id. at 634-35. To satisfy a burden of production, the defendant would have to introduce admissible evidence which would provide a legitimate non-discriminatory reason, but there would be no need to convince the factfinder of its truth. Id. at 637.
120. McDonnell Douglas, 411 U.S. at 802.
122. Id. at 804.
123. See id. at 807 (suggesting that the judge will make a determination at this juncture).
124. Belton, supra note 13, at 1227. It has been argued that this distinction is super-
as distinguished from the slightly older theory of "disparate impact."\textsuperscript{125}

The McDonnell Douglas framework was remarkably efficient for its time period. In the early seventies, both taste-based and statistical discrimination were rampant.\textsuperscript{126} For example, black workers only earned 66.5\% of what white workers earned in 1970,\textsuperscript{127} while black males only earned 64.4\% of what their white counterparts earned.\textsuperscript{128} Even when factors such as differing education levels are controlled, there is still a sizeable residual which can only be explained by discrimination.\textsuperscript{129} One study, in fact, found that merely being black cost a typical worker $5763 in 1972.\textsuperscript{130}

Beyond employment disparities, there is sociological evidence of both taste-based and statistical racial discrimination. According to poll data, in 1972, 40\% of white Americans believed that they should be able to segregate themselves from blacks.\textsuperscript{131} In 1973,
64% of whites would have voted for housing laws which would have allowed discrimination in renting or selling residences.\textsuperscript{132} In other words, a sizeable portion of the population had an aversion to blacks and presumably was engaging in taste-based discrimination.

The populace also showed signs of engaging in statistical discrimination. For example, as late as 1977, 51% of the white population believed that the main problem of blacks was a lack of education.\textsuperscript{133} Therefore, they would be less likely to hire a black they knew nothing about, only because they suspected him or her to be poorly educated. In addition, firms had a strong incentive to practice statistical discrimination. The average person of all races had 12.1 years of schooling in 1969, while the typical black (or "negro" in the language of government documents of the day) only had 9.8 years of education.\textsuperscript{134} As a result, race could be used as a cheap substitute for education and its corollary, productivity. In sum, an efficient rule would have to confront both forms of discrimination, a task which \textit{McDonnell Douglas} accomplishes.

First, the decision addresses taste-based discrimination by requiring the defendant employer to come up with at least one reason for the adverse employment decision which is not pretextual.\textsuperscript{135} If the real reason is race, then the plaintiff presumably will be able to show that the offered reason is pretextual by a comparison with similar white workers who are treated differently. The Court says as much.\textsuperscript{136} At the same time, it would not be efficient to induce employers to hire unqualified, or underqualified, blacks. By allowing employers to escape liability by articulating a nonpretextual, legitimate reason, the Court is providing for efficient employment decisions.

Furthermore, the Court seems to have struck the appropriate balance between type I and type II errors. As argued above, discrimination was fairly prevalent in 1973. Therefore, to be efficient, the scale should be tilted toward the plaintiffs and against the

Wood ed. 1990) [hereinafter \textit{AN AMERICAN PROFILE}].

132. \textit{Id.} at 519. These statistics are simply the most glaring in a long string of poll data that reveal a high incidence of discriminatory attitudes in the America of the early seventies. \textit{See id.} at 470-530.

133. \textit{Id.} at 475.


136. \textit{Id.}
defendants. In other words, we suspect that when a black is not hired, the real reason is discrimination. Therefore, we want to minimize false findings of no discrimination and are not as worried about erroneous findings against employers. The Court in McDonnell Douglas certainly tilts the balance that way. First, by making the prima facie case easy to prove, it puts the onus on employers to justify nearly every failure to hire a black. Second, by not limiting the defendant’s burden to a simple burden of production, the Court encourages lower courts to take a hard look at the defendants’ reasons. Finally, by making any failure to hire a black risky (at least in terms of litigation expense), it induces employers to hire blacks, all else being equal. In other words, the Court correctly identified the problem as discrimination, not false findings of discrimination, and tilted the balance that way.

The McDonnell Douglas framework also tackles the problem of statistical discrimination. In order to avoid losing by default on summary judgment, the defendant must offer a legitimate, nondiscriminatory reason. To provide one which will not be refuted as a pretext, the defendant must gather information about the applicants, both the ones to be rejected and the ones to be accepted. In order to convince the trier of fact, this information will presumably have to be accurate and related to expected job performance. Once this information is collected, however, there is no incentive for the firm to discriminate statistically. As noted above, statistical discrimination is only advantageous when race is used as a cheap proxy for information. Therefore, by obtaining the information necessary to defend a Title VII suit, the employer has lost its reason for using race as a proxy. In other words, the Court, by raising the costs of using race as a proxy, made information relatively inexpensive. Employers will thus switch to other sources of information, and societally-efficient employment decisions will be made.

There is some evidence that the Court was concerned with the efficiency effects of its ruling. The Court noted that “[t]he broad, overriding interest [of Congress in passing Title VII]... is effi-

137. See Kovacic-Fleischer, supra note 117, at 636, 639 (arguing that the prima facie case creates a presumption and that failing to rebut the presumption results in summary judgment).
138. See supra notes 60-62 and accompanying text.
139. See supra notes 66-67 and accompanying text.
cient and trustworthy workmanship.” Furthermore, the Court quoted *Griggs v. Duke Power Co.* to the effect that Title VII “does not command that any person be hired . . . because he is a member of a minority group,” clearly evincing a concern for efficient employment decisions.

In addition, even if the Court were not specifically trying to create an efficient rule, its conception of race relations at the time could push it toward an efficient result. If the Court felt that discrimination were a serious problem, it would be much more concerned with ensuring that all discrimination was driven out and less concerned with false findings of discrimination it would be more worried about type II than type I errors, even if it did not view them in the efficiency context. Indeed, the Court at the time was extremely concerned about racial discrimination. It had recently decided *Griggs v. Duke Power Co.*, which held that statistical disparities in employment decisions, even when resulting from “neutral” tests, could not be condoned unless the tests were a “business necessity.” *McDonnell Douglas*, the Court made it clear that “Title VII tolerates no racial discrimination, subtle or otherwise.” In other words, the Court was much more concerned with type II errors, even suggesting that type I errors (false findings) did not exist. As a result, it allocated a relatively high burden to the defendant employers, thereby greatly increasing the costs of discriminating and discouraging employers from doing so. In sum, nothing more than the Court’s accurate perception about the prevalence of discrimination could have led it to the efficient rule.

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141. *Id.* at 800 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).
142. Of course, it could be argued that the court was simply using common sense in providing these interpretations.
143. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring in part and dissenting in part) (stating that “this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been and whatever form it may have taken”); Chibundu, *supra* note 15, at 107 n.88 (arguing that the Court took a broad, remedial approach to racial discrimination from 1971 to 1977).
146. See *supra* notes 72-73 and accompanying text (discussing the deterrent effects of Title VII).
C. The Burdine Refinement

As noted above, McDonnell Douglas hardly cleared up all the confusion as to the allocation of burdens in Title VII cases. The crucial remaining question was whether, after the plaintiff had made a prima facie case, the burden of persuasion shifted to the defendant to prove its legitimate, nondiscriminatory reason, or whether the only burden which shifted was the burden of production.\textsuperscript{147} In 1978, the Court took two stabs at clearing up the controversy.\textsuperscript{148}

First, in Furnco Construction Corp. v. Waters,\textsuperscript{149} the Court further confused the matter. Explaining the burden which shifted to the defendant, the Court stated that "the burden which shifts . . . is merely that of proving that he based his . . . decision on a legitimate consideration."\textsuperscript{150} In the next sentence, however, the Court went on to say that "[t]o dispel the adverse inference . . . the [employer] need only 'articulate some legitimate, nondiscriminatory reason.'"\textsuperscript{151} The Court had described the burden first as one of persuasion, and then as one of production, helping not at all.

Second, in Board of Trustees of Keene State College v. Swee-ney,\textsuperscript{152} the Court claimed to settle the matter without really doing so. It held that the defendant only needed to articulate a reason but did not need to prove it.\textsuperscript{153} However, the Court did not clarify what it meant by articulation and thus did not clear up the confusion.\textsuperscript{154}

Given the tangled precedent, it is not surprising that a split developed among the circuits.\textsuperscript{155} The majority view was that the defendant only had the burden of production once the plaintiff had made out a prima facie case.\textsuperscript{156} In contrast, the minority view

\begin{itemize}
  \item \textsuperscript{147} Belton, \textit{supra} note 13, at 1237; Kovacic-Fleischer, \textit{supra} note 117, at 636-37.
  \item \textsuperscript{148} Belton, \textit{supra} note 13, at 1237.
  \item \textsuperscript{149} 438 U.S. 567 (1978).
  \item \textsuperscript{150} \textit{Id.} at 577.
  \item \textsuperscript{151} \textit{Id.} at 578 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).
  \item \textsuperscript{152} 439 U.S. 24 (1978).
  \item \textsuperscript{153} \textit{Id.} at 25.
  \item \textsuperscript{154} Belton, \textit{supra} note 13, at 1239.
  \item \textsuperscript{155} \textit{Id.} at 1237.
  \item \textsuperscript{156} See Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980); Jackson v. U.S. Steel Corp., 624 F.2d 436, 442 (3d Cir. 1980); Ambush v. Montgomery County Gov't, 620 F.2d 1048, 1054 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1015 (1st Cir. 1979).
\end{itemize}
read McDonnell Douglas and its progeny as requiring that the defendant carry the burden of proof for its legitimate reason.\footnote{157} Presenting with the opportunity to settle the dispute and choose the more efficient theory, the Court granted certiorari in one of the latter cases\footnote{158} to resolve the conflict among the circuits.\footnote{159}

In the case the Court accepted, \textit{Texas Department of Community Affairs v. Burdine},\footnote{160} the plaintiff worked for the defendant as an accounting clerk in its Public Service Careers division, which trained unskilled workers for public sector jobs.\footnote{161} After one promotion, she applied for the vacant position of project director.\footnote{162} The position went unfilled for six months, when a man from outside the division was hired.\footnote{163} In addition, the plaintiff and two other employees were laid off, although she was later rehired by another division.\footnote{164} As a result, she sued, alleging sex discrimination.\footnote{165} After losing in the District Court, she won a reversal from the Court of Appeals.\footnote{166}

The sole issue before the Supreme Court was the proper allocation of burdens in Title VII cases.\footnote{167} Justice Powell, again writing for a unanimous court, set out to clear up the confusion. First, he noted that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."\footnote{168} Once the plaintiff has

158. Burdine v. Texas Dep't of Community Affairs, 447 U.S. 920 (1980).
160. \textit{Id.} at 248.
161. \textit{Id.} at 250.
162. \textit{Id.}
163. \textit{Id.} at 250-51.
164. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251 (1981).
165. \textit{Id.} At this point, the reader may question what this case has to do with the economics of racial discrimination. First of all, the Court does not distinguish between race and sex cases. See \textit{Id.} at 259. As a result, the principles of this case apply to all race cases. Second, the economics of the two are similar, so the same economic reasoning still applies. See generally supra note 24. The problems that result from the lumping of race and sex cases are discussed in Part IV \textit{infra}.
166. \textit{Burdine}, 450 U.S. at 251-52.
167. \textit{Id.} at 250.
168. \textit{Id.} at 253 (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S.)}
established a prima facie case, a presumption that the employer discriminated is created.\(^{169}\) If the employer does nothing in response, then the plaintiff wins by default.\(^{170}\) Alternatively, if the employer does choose to respond, the burden that shifts is the burden of production.\(^{171}\) In other words, the employer needs to produce through admissible evidence\(^{172}\) a legitimate nondiscriminatory reason for the adverse decision. However, "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons," so the burden of persuasion does not shift.\(^{173}\) Finally, if the defendant meets its burden of production, the plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant's reason is a pretext.\(^{174}\)

From an economic standpoint, \textit{Burdine} made it harder to challenge taste-based discrimination while maintaining a strict line against statistical discrimination. By clarifying that the burden of persuasion always remains with the plaintiff, it made it harder for plaintiffs to prove discrimination (at least in those circuits that had shifted the burden to the defendant). In addition, by clarifying that the only burden on the defendant was one of production, instead of articulation, the Court made it easier for defendants to avoid summary judgment.\(^{175}\) Thus, \textit{Burdine} shifted the relative balance from that of \textit{McDonnell Douglas}, so that a greater effort was made to reduce type I errors, possibly at the expense of some type II errors.

At the same time, \textit{Burdine} had little impact on statistical discrimination. Any qualified black who was not hired could still present a prima facie case and shift some burden to the defendant employer. To avoid a summary judgment, the defendant still had to produce a "legitimate, nondiscriminatory reason." Therefore, the employer still had to collect information to be able to defend itself in court. As argued above, once the employer has acquired that information, race is no longer a cheap proxy for the information,

\begin{itemize}
\item \(^{24}\text{Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 251 (1981).}\)
\item \(^{25}\text{McDonnell Douglas, 450 U.S. at 254.}\)
\item \(^{26}\text{Burdine, 450 U.S. at 255 n.9.}\)
\item \(^{27}\text{Id. at 251.}\)
\end{itemize}
so that no incentive to discriminate statistically remains.\textsuperscript{176}

Thus, for \textit{Burdine} to be efficient, taste-based discrimination would have to be on the wane, while statistical discrimination remained a problem. In fact, the economic data seem to confirm that discrimination in general was on the decline. By 1980, black males' earnings as a percentage of white males' earnings had increased from 64.4\% to 72.6\%,\textsuperscript{177} and the ratio for all blacks had increased to 79.1\% by 1976.\textsuperscript{178} Furthermore, the gap also narrowed after taking into consideration factors such as education.\textsuperscript{179} For example, Verdugo found that the cost of being black had decreased from over $5700 to $4365 in real dollars between 1972 and 1977.\textsuperscript{180}

These numbers, however, only tell part of the story. While the earnings gap had decreased immediately following \textit{McDonnell Douglas}, it had hit its nadir in the late 1970's and had begun to trend upward just before \textit{Burdine} was decided in 1981.\textsuperscript{181} This does not mean that \textit{Burdine} was inefficient in altering the burdens,

\begin{itemize}
  \item \textsuperscript{176} See supra notes 66-67, 137-39 and accompanying text. Of course, it could be argued that by putting the ultimate burden of proof on the plaintiff, the need to gather information was reduced, since a fabricated reason would presumably avoid summary judgment. There are two flaws with this analysis. First, the reason still would have to be plausible to be effective, and that is much easier to do with accurate information. Second, it does very little good to avoid summary judgment if the false reason can easily be shown to be a pretext. See \textit{Burdine}, 450 U.S. at 258. Furthermore, if the reason is so obviously at odds with the facts as to be fraudulent (for example, asserting that the applicant did not have a high school degree when she in fact did), the employer risks sanctions under Rule 11 of the \textit{Federal Rules of Civil Procedure}. In sum, smart employers still would gather information.
  \item \textsuperscript{177} SMITH \& WELCH, supra note 128, at 6.
  \item \textsuperscript{178} Myers, supra note 127, at 91. See also David Card \& Alan B. Krueger, \textit{Trends in Relative Black-White Earnings Revisited}, 83 AM. ECON. REV. 85, 86 (1993) (noting that blacks' median and mean percentage shares of white wages both increased from 63\% in 1970 to 69\% in 1980); James P. Smith, \textit{Affirmative Action and the Racial Wage Gap}, 83 AM. ECON. REV 79, 81 (1993) (stating that the percentage wage gap between black and white males had narrowed from 39.5\% in 1971 to 28.4\% in 1980).
  \item \textsuperscript{179} See Juhn et al., supra note 129, at 113 (demonstrating that the difference in the natural log of wages between whites and blacks decreased from 0.40 in 1970 to 0.29 in 1980 (in other words, the white wage advantage decreased from 50\% to 35\%), and the residual difference (attributable to race) decreased from 0.25 to 0.21 (30\% to 25\%) over the same time period).
  \item \textsuperscript{180} Verdugo, supra note 130, at 670.
  \item \textsuperscript{181} See Juhn et al., supra note 129, at 113 (stating that the residual log wage difference went up from .21 in 1980 to .23 in 1985); Myers, supra note 127, at 91 (stating that black earnings had fallen from 79\% of white earnings in 1976 to 73\% of white earnings in 1985); Smith, supra note 178, at 81 (stating that the percentage wage gap increased from 28.4\% in 1980 to 30.3\% in 1983); Verdugo, supra note 130, at 670 (stating that the cost of being black increased from $4365 in 1977 to $5631 in 1982).
\end{itemize}
however. First, although the gap was increasing, blacks were still in a much better position than they were in the early seventies.\(^{182}\) Second, the U.S. experienced a deep recession in the early eighties. Since blacks were most likely the last hired before the recession, they were apt to be the first let go, thereby artificially depressing the statistics. Finally, we would expect the Court to lag behind economic indicators for two reasons. First, it takes time for cases to get to the Court, so it is always dealing with old facts. Second, economic changes often only become evident over time; there is a large gap between any phenomenon and its observation.\(^{183}\) In sum, the Court probably was correct in thinking that discrimination had decreased since *McDonnell Douglas*.

Given that there was some decrease in discrimination, the next question is whether that decrease was in taste-based discrimination, statistical discrimination, or both. The poll data strongly indicates that taste-based discrimination was waning. First, the percentage of whites who thought that they should be able to segregate themselves had dropped from 40% in 1972 to 30% in 1982.\(^{184}\) Similarly, the number of whites who opposed fair housing laws dropped five points to 59% between 1973 and 1980,\(^{185}\) while the number of whites who would vote for a black presidential candidate from their party rose from 74% to 86% over the same period.\(^{186}\) It is clear that the aversion to blacks in the white population had diminished substantially during this period. Therefore, there was probably less employment discrimination to eradicate, so the burdens on defendants did not have to be so demanding. At the same time, keeping strict burdens would probably result in a great number of erroneous findings of discrimination, which is hardly efficient.\(^{187}\) Therefore, by shifting the burden to make it harder for plaintiffs, the Court was taking into account the decreasing taste-based discrimination in America.

At the same time, statistical discrimination remained a serious problem. While the average black in 1980 now had 12.0 years of school, compared to 12.5 years for whites,\(^{188}\) other differences

\(^{182}\) For example, the percentage gap in wages had decreased from 39.5% in 1971 to 30.3% in 1983. Smith, *supra* note 178, at 81.

\(^{183}\) Interview with W. Thomas Bogart, Professor of Economics, Case Western Reserve University, in Cleveland, Ohio (Mar. 17, 1994).

\(^{184}\) *An American Profile, supra* note 131, at 479.

\(^{185}\) *Id.* at 519.

\(^{186}\) *Id.* at 526.

\(^{187}\) See *supra* notes 85-92 and accompanying text.

\(^{188}\) U.S. Bureau of the Census, *Statistical Abstract of the United States:*
persisted. As college education became more important, whites maintained a significant advantage. In 1980, 17.1% of whites had college diplomas, as compared to only 8.4% of blacks. As college education became more important, whites maintained a significant advantage. In 1980, 17.1% of whites had college diplomas, as compared to only 8.4% of blacks. Therefore, there was still an incentive to statistically discriminate. Furthermore, even if there was no reason to discriminate statistically, people (especially whites) believed that there was reason to do so. The percentage of whites who believed that blacks' difficulties were due to a lack of education was in the process of rising from 51% to 53%. In other words, even though they were not entirely correct, whites still believed that they received a better-educated worker if they hired a white than if they hired a black.

Moreover, whites also had reasons other than education for statistical discrimination. In 1979, whites made up 49.6% of the prison population, while blacks made up 47.8%. Given their respective portions of the population, blacks were far more likely to be in prison. Therefore, an employer hiring a white is, on average, less likely to be getting an ex-convict. In sum, while taste-based discrimination may have abated, statistical discrimination had not. Thus, Burdine was efficient because it realigned the burdens affecting taste-based discrimination while not altering the barriers to statistical discrimination.

The Court seemed aware that it was making this modification. In correcting the district court, Justice Powell noted that "Title VII . . . does not demand that an employer give preferential treatment to minorities or women." Nor, he asserted, was it "intended to 'diminish traditional management prerogatives,'" or to "restructure his employment practices to maximize the number of minorities . . . hired." In other words, the Court was showing a new deference to employers and was afraid of falsely finding discrimination against them. At the same time, the Court still wanted to combat true discrimination, but it "remain[ed] confident that the McDonnell Douglas framework permits the plaintiff meriting relief

190. As Strauss points out, statistical discrimination can persist for quite a while, even when there is no rational reason for it. Strauss, supra note 19, at 1640-43.
191. AN AMERICAN PROFILE, supra note 131, at 475.
192. STATISTICAL ABSTRACT 1990, supra note 188, at 187.
to demonstrate intentional discrimination."\(^{195}\)

Even if the efficiency effects were not specifically intended as such, they may have resulted, as above, from the Court's view of contemporary race relations. If the Court thought discrimination was deceasing, it presumably would relax the rules without thinking about efficiency. In fact, Burdine comports with a general shift in the Court's attitude toward racial discrimination, which was moving from a remedial perspective to a narrow antidiscriminatory perspective.\(^{196}\) While not ignoring discrimination, the Court was much more likely to give employers some leeway in their employment decisions. Perhaps the best statement of this philosophy was in Furnco Construction Corp. v. Waters, where Justice Rehnquist described the issue as "whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices" for that of the employer.\(^{197}\) In other words, courts were not to second-guess employers' decisions, but only to look for real discrimination. In sum, the Court in this period viewed discrimination as less of a threat, so they altered the burdens, keeping them efficient in the process.

**D. Hicks: Discrimination as Past History**

Unfortunately, Burdine did not resolve all the questions regarding Title VII. The Court never clarified what happens in disparate treatment cases after the plaintiff has shown that the defendant's proffered reasons for the adverse employment decision are pretextual.\(^{198}\) The majority of the circuits adopted what has

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196. Chibundu, *supra* note 15, at 139. Chibundu argues that this strand of reasoning can also be found in the Equal Protection cases of this period. *Id.* at 123-30. For examples of this trend, see Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982), stating that "[p]urposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality." See also New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) (holding that a rule excluding methadone users which had a disproportionate impact on blacks did not violate the Equal Protection Clause).
198. Lanctot, *supra* note 5, at 65, 101. Although the Court in Burdine stated that the plaintiff "may succeed in [establishing intentional discrimination] . . . indirectly by showing that the employer's proffered explanation is unworthy of credence," it also stated that the employer did not have to prove its proffered explanation to prevail; instead it merely had to offer a legitimate reason. *Burdine*, 450 U.S. at 256. Therefore, as Lanctot points out, there was more than enough room for the lower courts to disagree on the proper interpretation of Burdine. Lanctot, *supra* note 5, at 65-67, 101-03.
come to be known as the "pretext-only" rule under which, if the plaintiff succeeds in showing that the defendant's proffered reason is a pretext, then a finding of illegal discrimination is mandated by law. On the other hand, a minority of the circuits adopted what is known as the "pretext-plus" rule, which does not mandate a finding for the plaintiff merely because the plaintiff proved pretext. Instead, the plaintiff must go beyond showing that the reason was a pretext to show that the reason was a pretext for intentional discrimination. In other words, the plaintiff does not win simply by demonstrating the proffered reason to be false. Rather, the proffered reason must be hiding discrimination. Once again, the Supreme Court had an opportunity to step in and render the efficient decision.

The case the Court finally accepted, *Hicks v. St. Mary's Honor Center,* originated in the Eastern District of Missouri, which, ironically, was the same court in which *McDonnell Douglas* was filed. The plaintiff, Hicks, had been a model employee for the defendant, St. Mary's Honor Center, a halfway house operated by the Missouri Department of Corrections and Human Resources from 1978 to 1983. In fact, he had even been promoted to supervisor. In 1983, the administration of St. Mary's was reorganized. While Hicks kept his job, his once excellent evaluations took a turn for the worse and he was subject to repeated and severe disciplinary action. He was demoted, and then, after a

202. *See, e.g.,* EBOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992); Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991); Holder v. City of Raleigh, 867 F.2d 823, 827-28 (4th Cir. 1989).
204. 113 S. Ct. 2742 (1993).
206. *Hicks*, 113 S. Ct. at 2746.
207. *Id.*
208. *Id.*
209. *Id.*
confrontation with his supervisor, he was fired in 1984.210

At trial, the plaintiff easily established a prima facie case, and the defendant offered Hicks's disciplinary record and his confrontations with supervisors as its legitimate, nondiscriminatory reasons.211 The trial court, however, did not believe these reasons,212 finding that Hicks was the only supervisor punished for his subordinates' violations, that similar violations by other employees were ignored or punished less severely, and that the final confrontation was manufactured to provide an excuse for firing him.213 Although it agreed that the reasons were pretextual, the court refused to find for the plaintiff.214 Instead, the court ruled that while Hicks had "prove[n] the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."

In other words, while the reasons were a pretext, they were not a pretext for racial discrimination. The court offered several reasons for believing that race was irrelevant and that there was no institution-wide race problem: first, two members of the board which disciplined Hicks were black; second, his black subordinates were not punished; and, third, there was no overall decrease in the number of black employees.216 On appeal, the Eighth Circuit reversed and remanded, ruling that if the defendant's proffered reasons were shown to be pretextual, the plaintiff should prevail as a matter of law.217

Thus, the only question before the Supreme Court was whether the Court of Appeals was correct in holding that if the plaintiff successfully demonstrated pretext, then the plaintiff should win as a matter of law.218 Writing for a five-to-four majority, Justice Scalia reversed the Court of Appeals and remanded.219

210. Id.
213. Hicks, 756 F. Supp. at 1250-51.
214. Id. at 1252.
215. Id.
216. Id.
218. Hicks, 113 S. Ct. at 2746.
219. Id. at 2746, 2756.
sentially adopted the pretext-plus rule, holding that once the defendant has met its burden of production by producing a legitimate, nondiscriminatory reason, the presumption created by the plaintiff's prima facie case "simply drops out of the picture."\(^{220}\) The finder of fact then must proceed to "the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him] because of his race.'"\(^{221}\) The Court noted that if the trier of fact disbelieves the proffered reason, that, combined with the prima facie case, may "suffice to show intentional discrimination,"\(^{222}\) and "[n]o additional proof of discrimination is required."\(^{223}\) However, it rejected the argument of the Court of Appeals "that rejection of the defendant's proffered reasons compels judgment for the plaintiff."\(^{224}\) Instead, "it is not enough, ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."\(^{225}\) Justice Souter, joined by Justices White, Blackmun, and Stevens, filed a dissent.\(^{226}\)

Despite Justice Scalia's argument that Hicks followed directly from Burdine,\(^{227}\) from an economic point of view, it clearly represented a change. First, the decision made it significantly harder for the plaintiff to win a case.\(^{228}\) Before Hicks, in most circuits, plaintiffs merely had to show that the proffered reason was a pretext. However, after Hicks they needed to show that the pretext was covering for racial discrimination. As previously noted, direct evidence of racial discrimination is very hard to obtain.\(^{229}\) In ad-

\(^{220}\) Id. at 2749 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

\(^{221}\) Id. (quoting Burdine, 450 U.S. at 253) (brackets in original).

\(^{222}\) Id. at 2749.


\(^{224}\) Id.

\(^{225}\) Id. at 2754.

\(^{226}\) See id. at 2756 (Souter, J., dissenting). A full discussion of the debate within the Court is beyond the scope of this paper. Suffice it to say that both sides claimed to be following the precedent laid down in Burdine, although they did also offer policy arguments to buttress their respective cases.

\(^{227}\) See id. at 2751-53.


\(^{229}\) See supra notes 98-99 and accompanying text. See also Hicks, 113 S. Ct. at 2761-62 (Souter, J., dissenting) (reasoning that plaintiffs are greatly disfavored since employers are not likely to announce their discriminatory intentions).
dition, the plaintiff not only has to rebut the reasons stated by the defendant for the relevant action, but must also rebut potential explanations which were not raised but could occur to the trier of fact. As a result, "many plaintiffs . . . will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ." In other words, the Court has restruck the balance between type I and type II errors, making type I errors (false findings of discrimination) less likely, but increasing the chances of type II errors (letting true discrimination go unpunished).

Similarly, the Court's decision also impacts upon statistical discrimination. The employer still has to articulate a legitimate, nondiscriminatory reason for the decision or face summary judgment. However, prior to Hicks, if the reasons were flimsy, the plaintiff could merely show them to be pretextual and prevail. Therefore, it would behoove a defendant to gather information and come up with a solid reason. Now, however, even if the reason is shown to be a pretext, the plaintiff will not win unless actual racial discrimination is shown. Therefore, a defendant can avoid summary judgment simply by fabricating a reason and has much less to fear if it is shown to be a pretext. As a result, there is much less, if any, incentive to gather information because a Title VII suit can now be effectively defended without it. If information is not gathered, then race can again become a cheap proxy for information, and firms may have an incentive to engage in statistical discrimination.

Consequently, for the Court's decision in Hicks to be efficient, both taste-based and statistical discrimination would have to be on the decline. As with Burdine, the raw economic data are susceptible of several readings. In general, the status of blacks does not seem to have improved in the time between Burdine and Hicks.

230. Hicks, 113 S. Ct. at 2763 (Souter, J., dissenting); Lancot, supra note 5, at 129-30.
231. Hicks, 113 S. Ct. at 2766 (Souter, J., dissenting).
232. See supra notes 85-92 and accompanying text.
234. See supra note 174 and accompanying text.
235. See supra notes 224-25 and accompanying text.
236. Hicks, 113 S. Ct. at 2764 (Souter, J., dissenting).
237. See John Bound & Richard B. Freeman, Black Economic Progress: Erosion of the
For example, black males’ earnings held flat at 69% of white males’ earnings from 1980 to 1990.238 Even controlling for education, some studies found that the unexplained difference (due to discrimination) actually increased from 1979 to 1987.239

However, many economists have argued that the persistent gap between whites and blacks is not due to discrimination; instead, they blame other factors, such as growing income inequality and growing educational disparities.240 For example, one study found that while the percentage wage gap between black and white males fell only from 28.4% in 1980 to 27.0% in 1989, it fell from 23.9% to 15.2% when adjusted for educational changes and increased income inequality.241 Similarly, another study found that while the decrease in the rate at which the black-white earnings gap was narrowing in the 1980’s was 1.65%, it fell to 0.91% when education and other factors were accounted for, to 0.80% when blacks and whites with similar skills were matched, and to 0% when greater income inequality was taken into account.242 In other words, many economists believe that discrimination did decrease but that it was masked by other factors.

Post-1965 Gains in the 1980s?, in THE QUESTION OF DISCRIMINATION 32, 47 (Steven Shulman & William Darrity, Jr. eds., 1989) (arguing that blacks lost ground from the late 1970s through the 1980s); Juhn et al., supra note 129, at 107-08 (discussing causes for the lack of improvement in black wages); Nan L. Maxwell, The Effect on Black-White Wage Differences of Differences in the Quantity and Quality of Education, 47 IND. & LAB. REL. REV. 249, 249 (1994) (pointing out general agreement about the divergence in the 1980s); Shelley A. Smith, Sources of Earnings Inequality in the Black and White Female Labor Forces, 32 SOC. J. 117, 118 (1991) (showing that white women pulled away from black women in earning power in the 1980s).

238. Card & Krueger, supra note 178, at 86.

239. Juhn et al., supra note 129, at 129. The reader may note that none of the data is more recent than 1990. This is an unfortunate consequence of turnaround time in the economics field, where data from 1990 is not quite, but almost, brand new. As a result, it is fairly difficult to gauge the efficiency of Hicks since there is little current data. The difficulty in determining what is efficient until many years after the fact is one of the many rationales for the solution proposed in Part IV, infra.

240. See infra notes 241-42 and accompanying text.

241. Smith, supra note 178, at 81. The essential change in education is that there is now a greater disparity in school quality between mostly black (mostly inner-city and rural) schools and mostly white schools. As a result, blacks are not doing as well with the same number of years of education. Maxwell, supra note 237, at 249. The increase in overall wage inequality hurts blacks who tend to be at the bottom of the wage scale in the first place. Id. at 249; Juhn et al., supra note 129, at 108; Smith, supra note 178, at 81-82.

242. Juhn et al., supra note 129, at 143. See also Maxwell, supra note 237, at 260 (noting that two-thirds of the persistence of the wage gap can be accounted for by considering changes in education and income inequality).
The poll data are likewise mixed. First, some indicators show that taste-based discrimination is decreasing. For example, the number of whites who believed that they should be able to segregate themselves from blacks decreased to 22% in 1989 (from 30% in 1982), and the number who opposed open housing laws decreased from 59% in 1980 to 41% in 1989. On the other hand, only 81% of whites would vote for a black presidential candidate in 1989, down from 86% in 1982. Similarly, the number of whites who would not send their children to a half black or mostly black school stayed roughly the same from 1982 to 1989. As a result, it is hard to conclude that taste-based discrimination declined appreciably between Burdine and Hicks.

The case is more clear that statistical discrimination remains a serious problem. While the percentage of whites with college degrees grew from 17.1% in 1985 to 20.9% in 1988, the black percentage only increased from 8.4% to 11.3%. In addition, by 1991, those numbers had spread to 22% for whites and 12% for blacks. Therefore, there was still an incentive to use race as a proxy for education. Similarly, blacks still made up 46.9% of the prison population in 1986, a decrease of only 0.9% from 1979. So race could also be used as a cheap proxy for criminality.

Furthermore, it appears that people were engaged in statistical discrimination based on these traits. As noted above, the percentage of whites who believed that blacks were poorly educated actually increased in the eighties. In addition, the percentage of whites who believed that blacks in general were poorly motivated increased from 60% in 1985 to 63% in 1989. In other words, whites still think that blacks are less qualified and are apt to dis-

243. AN AMERICAN PROFILE, supra note 131, at 478.
244. Id. at 519.
245. Id. at 526. Of course, this could be just a result of voter antipathy toward the only serious black presidential candidate, Jesse Jackson. Alternatively, their antipathy toward Jackson could be partly racial. In other words, when the theoretical became possible, more people were opposed to it.
246. Id. at 500, 503.
247. See generally Strauss, supra note 19 (arguing that most, if not all, of the discrimination remaining in the labor market is statistical).
248. STATISTICAL ABSTRACT 1990, supra note 188, at 133-34.
250. STATISTICAL ABSTRACT 1990, supra note 188, at 187.
251. See supra note 190 and accompanying text. Statistical discrimination could also explain whites' continuing fears of sending their children to mostly black or half-black schools. See supra note 246 and accompanying text.
252. AN AMERICAN PROFILE, supra note 131, at 476.
criminate statistically.

Whatever its source, many recent studies have documented the continuing prevalence of discrimination in the labor market. For example, an Urban Institute study found that when white and black testers with identical qualifications were sent in to apply for jobs, the whites were 16% more likely to receive a job offer than the blacks. Similarly, a government study using Anglo and Hispanic testers found that the Hispanics were three times more likely to encounter unfavorable treatment, while Anglos received 52% more job offers. In sum, while the numbers are mixed, there was still plenty of employment discrimination in 1994, so the Court was probably ahead of the country when it decided Hicks. The Court has made it too easy to get away with discrimination. Therefore, discrimination will not be driven out as quickly as it could or should be, and the efficient, discrimination-free market will not be achieved as quickly.

It is ironic that the Court's decision may be inefficient, because the Court in Hicks seems most clearly concerned with efficiency. For example, one of Justice Scalia's reasons for adopting pretext-plus is that employers may have difficulty discovering the true reason for an employment decision. He argues that "[t]he notion that every reasonable employer keeps ‘personnel records’ on people who never became personnel . . . seems to us highly fanciful." Here, Justice Scalia is arguing that the information costs required to avoid statistical discrimination are too high, and it would be more efficient not to meddle. That is, the losses from information costs are greater than the gains from discrimination.


257. Id.

258. This is also Epstein's argument. See Epstein, supra note 22, at 76-78 (arguing that it is efficient for rational discrimination to persist in private, competitive markets). This has been established to be incorrect, or at least questionable. See supra notes 63-65 and accompanying text.
Interestingly enough, Justice Souter argues that the reverse is true since “[m]ost companies, of course, maintain personnel records,” the costs are not very high and are probably outweighed by the gains.259

Even if the Court were not specifically motivated by efficiency concerns in deciding Hicks, the decision clearly reflects the Court’s view that discrimination is not much of a problem in the nineties. Many commentators have noted that the Court believes that the problem of race discrimination has abated and that the Court should take less of a role in this area.260 In addition, the Court has been very explicit in stating that it believes that discrimination is a thing of the past. For example, in Freeman v. Pitts, Justice Scalia suggested that the problem of discrimination in the public schools was very much behind us and that the Court should disentangle itself from the issue.261 He stated that

[a]t some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon the current operation of schools. We are close to that time.262

It is clear that Justice Scalia and the conservative majority on the Court think that racial discrimination is rapidly becoming a relic of American history. They are much more concerned with false findings of discrimination than they are with preventing it, so they have shifted more of the burden to the plaintiffs.

E. Conclusion

The Court has consistently shifted the burdens in Title VII cases over time to make it harder for the plaintiff to win. As economic theory suggests, this is the efficient result if discrimination is decreasing. In fact, while discrimination has decreased perceptibly, albeit slowly, since the passage of Title VII, it has probably

259. Hicks, 113 S. Ct. at 2764 n.12 (Souter, J., dissenting).
260. See, e.g., Brian K. Landsberg, Race and the Rehnquist Court, 66 Tul. L. Rev. 1267, 1302 (1992) (arguing that “[t]he Rehnquist wing assumes that formal equal opportunity has led (or can lead) to a society in which the race of others does not affect our treatment of them”). See generally Blumoff & Lewis, supra note 13 (arguing that the Rehnquist Court is taking a common law, employment-at-will approach to Title VII).
262. Id. at 1453 (Scalia, J., concurring).
not decreased as much as the Court believes. As a result, the current law makes it too difficult for the plaintiff to prevail, resulting in too many type II errors (unpunished discrimination). This brings us to the question of what rule would be efficient and strike the right balance between type I and type II errors. This question is the subject of Part IV.

IV. SOLUTION: A NEW, EFFICIENT ALLOCATION OF BURDENS

Given that the Court, by adopting the pretext-plus rule in *Hicks*, made what is probably an inefficient decision, the question is what would constitute an efficient allocation of burdens. Strauss suggests that, since taste-based discrimination seems to be on the decline and statistical discrimination is depressingly resilient, disparate treatment theory should be abandoned in favor of disparate impact theory. This theory has several flaws, however. First, as Clark points out, it would not be politically palatable. Second, as this paper noted, there is still a fair amount of residual taste-based discrimination which disparate treatment can help to drive out. Finally and most importantly, it can hardly be efficient for firms to hire any available blacks, rather than the best blacks. Yet, by ending disparate treatment and replacing it with disparate impact, that is precisely what is encouraged. Firms will be punished for not hiring enough blacks but not for failing to hire a qualified black. Since information costs are still high, it may be cheaper for the firms to hire the first 100 blacks that come through the door than to do screening. Clearly, this is neither an efficient nor desirable result.

Strauss's theory suffers from the same fatal flaw as the Court's various approaches by trying to fit all employers into one framework. However, all employers are not created equal; some will discriminate and some will not. For example, let us assume that all firms discriminated before the passage of Title VII. After its passage, the firms will change their behavior but not uniformly. Not

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263. See *supra* notes 237-56 and accompanying text.
265. Clark, *supra* note 253, at 1708-09 (pointing to conservative opposition to quotas or anything that looks like one).
266. See *supra* notes 243-46 and accompanying text. See also Clark, *supra* note 253, at 1696-98 (arguing against abandonment of disparate treatment lawsuits); Donohue, *Advocacy Versus Analysis, supra* note 253, at 1608-10 (citing statistical data on employment discrimination).
every employer will discriminate less and less over time; rather, some firms will stop discriminating while others will remain bigoted.\textsuperscript{267} Eventually, we should have no discriminators left. Until that point, however, we should treat discriminators and nondiscriminators differently. With discriminators, we are not so concerned with type I errors (false findings), but we are very concerned with type II errors (letting them get away with it). On the other hand, with nondiscriminators, we are relatively more worried about type I errors. Similarly, a discriminator who does not have many blacks in the workplace will lack information about them and have an incentive to discriminate statistically. An employer with black employees, however, will have acquired information and will be less likely to discriminate statistically.\textsuperscript{268} In sum, we should have not one allocation of burdens, but two: one for discriminators and one for non-discriminators.

Therefore, the process and burdens should remain as they are, with one crucial difference. The plaintiff, as part of the prima facie case, should offer statistics showing whether or not the defendant's workforce was representative of the relevant labor pool.\textsuperscript{269} (The defendant, of course, could produce its own statistics demonstrating its excellent record.)\textsuperscript{270} If the court found that the defendant had

\textsuperscript{267} See Donohue, Further Thoughts, supra note 34, at 514 (stating that discriminators will not stop discriminating, but resources will move to non-discriminators); Strauss, supra note 19, at 1633 (reasoning that since capital will move from discriminators to nondiscriminators, some firms will discriminate and others will not).

\textsuperscript{268} Strauss, supra note 19, at 1641-42.

\textsuperscript{269} Obviously, the relevant labor pool is not the population at large, but the part of the population that is qualified for the position. For example, if the plaintiff had applied for a position at a law firm, the relevant pool would be lawyers. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) (holding that the relevant proportions for the purpose of set-asides was the proportion who were in a position to benefit). Additionally, the relevant comparison is to similar positions in the defendant's workforce. Obviously, an employer which is being sued for firing a black vice president would not succeed in showing a good record by showing that it had just hired 20 black truck drivers; it would instead have to show that it has a good history of hiring and promoting blacks in upper management. Some may object that this freezes current inequality in employment, since there are few blacks in some occupations because there are few opportunities for blacks in those fields. However, if the solution is not to force employers to hire blacks who are not qualified, that would be neither efficient nor fair to the employers. Rather, if we merely force employers to hire the blacks who are qualified, more blacks will become qualified and enter the field.

\textsuperscript{270} The burden would be on the plaintiffs to show by a preponderance of the evidence that the employer was a discriminator. While this may seem harsh in theory, in practice it is not. First, records of minority hiring would be easy to obtain, since employers are generally required to keep them and they would be accessible through discovery. Second, even if the plaintiffs lose this stage, they would be no worse off than all plaintiffs are
disparately few minority workers in similar positions, the burden of persuasion would rest with the defendant to show that its proffered reasons were the true reasons and not a pretext. On the other hand, if the court did not find a disparity, then the plaintiff would have the burden of proving that he or she was discriminated against.

This bifurcated allocation of burdens would be efficient for several reasons. First, it would protect nondiscriminators from false findings (type I errors) by putting the burden on the plaintiff. Therefore, they would not be encouraged to hire blacks simply because they are black, and it would discourage frivolous lawsuits. Second, it would impose a high cost on discriminators. Every time they turned away a minority applicant they would have to shoulder the burden of proof. As a result, the costs of going to court to prove their case each time they turned down a black applicant would quickly become onerous. This would tend to drive them out faster or force them to behave like nondiscriminators, thereby moving us closer to the perfectly efficient, nondiscriminatory market. In addition, it would reduce the number of type II errors (false findings of no discrimination), since the discriminator has the burden of proof. Finally, it deals efficiently with statistical discrimination. As Strauss points out, firms which already have a significant number of minorities are not lacking in information and have no incentive to discriminate statistically, so we do not want to waste resources on them. Discriminators, though, are likely to discriminate statistically. By putting the burden of proof on them, we strongly encourage them to gather information. Once discriminators do that, they no longer have an incentive to use race as a proxy for information. In sum, a two-track method is more efficient than fitting everybody into one theory.

These advantages extend beyond the application of bifurcated
burdens to race discrimination. As noted above, the Court does not
distinguish between race and gender cases in allocating bur-
dens.277 As a result, the same rules apply, regardless of the type
of discrimination alleged.278 Obviously, this leads to an inefficient
result. Gender and racial discrimination (to say nothing of age or
religious discrimination) will not be driven out of the economy at
an equal rate. Therefore, across all firms, the same test will not be
efficient for both types of discrimination. More importantly, even
individual firms may stop discriminating against blacks but not
against women, or vice versa. One test is again inappropriate. By
allocating the burdens based on the hiring record of the firm, this
method would allow for the efficient test to be applied in each
case. For example, a firm which no longer discriminates against
blacks but has an awful record of hiring and promoting women
would bear the burden of proof in a gender discrimination suit but
not in a racial discrimination suit.

In addition, a bifurcated burden allocation would save the
Court from ever having to alter the burdens again to maintain ef-
ficiency. Instead, the lower courts would apply the appropriate
burden in each case. As discrimination in the workplace declined,
courts, relying on hard statistics instead of generalized guesses
about the prevalence of discrimination, would more often assign
the burden to the plaintiff. However, plaintiffs would bear more of
the burden only as fast as discrimination decreased. If discrimina-
tion did not decrease, the burdens would not shift. Therefore, Title
VII would wither away at exactly the efficient rate without any
assistance from the Court.

This has several advantages. First, it saves the Court’s resour-
ces, since there is no need to rework the burdens every five to ten
years. Second, it allows for predictability and continuity in the law,
which would no longer be in flux every time the Court decided
that society had changed. Finally, and most importantly, it avoids
errors such as the one in *Hicks*. As noted above, it is extremely
difficult, even for trained economists, to determine exactly how
much discrimination exists in society as a whole and whether it is
abating.279 Furthermore, courts are particularly ill-suited for moni-

277. See supra note 165.
278. Id.
279. See supra notes 177-92, 237-55 and accompanying text. This problem is com-
pounded by the fact that there is often a long time lag between the occurrence of any
societal phenomenon and its observation by economists. See supra notes 183, 239.
toring economic trends. On the other hand, it is relatively easy for the courts to determine whether one employer has a history of discriminating. In fact, making specific factual findings are what courts do best. Therefore, the bifurcated allocation of burdens frees courts from difficult societal determinations of the amount of discrimination and allows them to focus on the narrower issues of each case.

There are still problems with this approach though. First, there are many firms that have excellent records which still occasionally engage in discriminatory behavior. However, plaintiffs in these cases would still have an opportunity to obtain relief; they would simply bear the burden of proof. This puts them in no worse position than all plaintiffs are in under Hicks. In addition, since the prima facie case remains the same, it would still be easy for those plaintiffs to avoid summary judgment.280 In other words, the only change is for discriminatory employers, so no plaintiffs would be worse off.

Second, a two-tiered approach would still have to overcome political opposition to quotas,281 since it would encourage firms to hire a certain percentage of blacks to avoid suits. The remedy for this would be to allow whites to sue on the same ground as blacks. While they would almost always bear the burden of proof,282 they could presumably win if the employer were engaging in particularly egregious reverse discrimination.

In addition, as Posner argues, the bifurcated allocation would encourage firms to locate in areas of low minority population so they could avoid hiring many blacks.283 There are several responses to this. First, Donohue points out that this is not much of a problem.284 In addition, people can move more easily than companies, so they cannot run forever. Finally, this problem already exists with disparate impact; while a two-tiered burden system does not solve the problem, it does not create it either.

280. See supra notes 115-17 and accompanying text.
281. See Clark, supra note 253, at 1708-09 (rejecting the quota system as politically objectionable).
282. Since there is presumably very little discrimination against whites, males, and other advantaged groups in the U.S. today, society is more concerned with type I errors (false findings of discrimination) than with type II errors (false findings of no discrimination). See supra notes 271, 273. Therefore, it is more efficient for these groups to bear the burden of proof in Title VII cases.
283. Posner, supra note 17, at 519.
284. Donohue, Further Thoughts, supra note 34, at 537-38.
A final argument against the bifurcated burdens is that the introduction of the additional stage will increase the costs of bringing a Title VII action and, therefore, discourage complaints. Such a disincentive would be good for unmeritorious claims. However, deserving claims will still be brought since Title VII provides for the recovery of attorney's fees, including expert witness expenses.\(^{285}\) Therefore, it will actually increase the cost to an employer of losing a Title VII suit. In other words, a bifurcated allocation of burdens will increase the costs of bringing frivolous suits and make discriminators even more leery of potentially successful Title VII claims since they will have to pay out higher attorney's fees. This furthers our goal of targeting Title VII more precisely towards discriminatory firms while protecting those who do not discriminate.

In conclusion, then, Title VII can be an efficient tool for driving out racial discrimination and achieving an efficient labor market. To do this, however, Title VII must change over time as race relations in society change. In fact, that is precisely what the Supreme Court has done by allocating and reallocating the burdens of proof in disparate treatment cases to keep it efficient. Due to the inherent difficulty of this project, however, the court went too far in *Hicks*, thinking that racial discrimination is less of a problem in American society than it really is. In fact, the true solution is not to provide one system of burden allocation but two: one for discriminators and one for nondiscriminators. That way, the courts can use Title VII to drive out racial discrimination without burdening nondiscriminatory employers, and we can most efficiently achieve the "antidiscrimination norm."

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