MATTERS OF PERSPECTIVE: RESTORING PLAINTIFFS' STORIES TO INDIVIDUAL DISPARATE TREATMENT LAW*

I. INTRODUCTION

The question of "what happened" in litigation starts with the stories that the parties on either side of the lawsuit tell.[1] Parties tell their stories to their lawyers,[2] lawyers tell the stories to the court through pleadings and arguments, and the court in turn interprets and retells the stories, determining what they are "about," legally and factually.[3] This telling and retelling of stories is "how law's actors comprehend whatever series of events they make the subject of their legal actions."[4] Before a factfinder enters the picture,[5] courts frame what a lawsuit is "about" by constructing litigants' stories into "facts."[6] And they do so, inescapably, through the prism of their own interpretations and understandings, conscious or unconscious.[7] How and what

* Paul J. Sopher, J.D., Temple University James E. Beasley School of Law, 2012. I dedicate this Comment to my wife, Leslie, and my children, Rose and Lucas, whose perpetual love and patience sustain me; and to my father, whose earthly story became a living memory during my writing of this Comment. My sincere thanks goes to Professor Sandra Sperino for providing me the seeds from which this Comment grew and for her thoughtful guidance throughout the writing process. I would also like to thank the *Temple Law Review* staff and editors for all of their hard work in bringing this to publication.

1. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110–11 (2000) (discussing how the law and the legal system are fundamentally premised on the concepts of narrative and storytelling).

2. *See id.* at 110 ("As clients and lawyers talk, the client's story gets recast into plights and prospects, plots and pilgrimages into possible worlds.").

3. *Id.*

4. *Id.*

5. In legal theory, questions of fact are to be decided by the factfinder (i.e., a jury in a jury trial, a judge in a bench trial), whereas questions of law are to be decided by a judge. A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 802 (2d ed. 2008). The role of the factfinder is to weigh evidence, make credibility determinations, and decide who or what to believe. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The judge's role is to determine the law and instruct the factfinder on the law. SPENCER, *supra*, at 802. This law/fact distinction, however, is not always clear; there are grey areas where characterizing a question as one of fact or law is arguable. *Id.*; *cf.* Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, *in* LAW AND THE ORDER OF CULTURE 42, 62 (Robert Post ed., 1991) (arguing that "[d]escriptions of facts are legal all the way down, just as legal rules always have as a crucial element a statement of the facts to which they are to apply. Law and fact are mutually constituting—not simply hard to tell apart").

6. As Amsterdam and Bruner explain,

> [a]s a practical matter, the administration of the law and even much of its conceptualization rest upon "getting the facts." Every recognized legal situation (whether problem or solution) is taken to involve a distinctive set of facts (actual or potential). In each such situation, some arbiter or agency or adviser is presumed to be able to decide what the facts *are*, at least for the purposes at hand. *Relevant facts* . . . are presumed to frame the issue in debate, delimit the choices of action that can be pursued, determine the visitation or the vindication to be authoritatively pronounced.

AMSTERDAM & BRUNER, *supra* note 1, at 110–11. *See also* FED. R. EVID. 104(a) (providing that judges decide preliminary questions of admissibility outside of the rules of evidence, except those on privilege).

7. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process.").

stories emerge in the litigation, however, are not just affected by a particular judge's framing of the facts. The very principles, rules, tests, and analytic devices of which the law itself is composed can affect this outcome on an even deeper level.[8]

A good deal of scholarship on individual disparate treatment law[9] has been geared toward criticizing how the burden-shifting proof framework first set forth in *McDonnell Douglas Corp. v. Green*[10] has unjustly interfered with substantive outcomes of cases.[11] One effect of the framework's use that has not been isolated in this literature, however, is how it unfairly shifts the focus of the court's attention on the employer-defendant's perspective to the exclusion of the employee-plaintiff's perspective; that is, how the framework prevents employee-plaintiffs' stories from being told.[12] This is the focus of this Comment.

As originally set forth, the *McDonnell Douglas* framework was thought to be a boon to plaintiffs by providing them with a method of proving discrimination

8. *See* AMSTERDAM & BRUNER, *supra* note 1, at 111 ("Reasoning within the law . . . depends not only upon conceptions about *specific* states of facts but also upon notions about the nature of things generally, what they are and how they are related—the classic *de rerum natura*. These 'things' are often not all that thing-like. They may take the shape of rules and principles, institutions and sources of authority."); *cf.* Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 160, 164 (2005) (suggesting that legal tests, taxonomies, and categories that courts and lawyers commonly employ in legal analysis are means of coping with and processing the "infinite variations" of things in the world, and are perhaps "a way to make our subjective judgments seem more scientific").

9. In the employment discrimination context, disparate treatment (also known as "intentional discrimination") is distinguished from the theory of disparate impact, which focuses on the discriminatory effect of an employer's facially neutral policy or practice, rather than the employer's discriminatory intent. The Supreme Court first recognized disparate impact as a theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that even "absen[t] . . . discriminatory intent . . . employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" are violative of Title VII. *Id.* at 432. This Comment restricts itself to discussion of the theory of disparate treatment. Additionally, discussion is limited to individual (as opposed to class) claims of disparate treatment.

10. 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, a court determines whether an employment action was discriminatory by proceeding through three phases of analysis: First, the employee must make a prima facie case showing that the employment action occurred under circumstances giving rise to an inference of discrimination; next, the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the action; and, finally, plaintiff must carry the burden of proof in showing that the employer's proffered reason was a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 801–03. See *infra* Part II.C for a more detailed discussion of *McDonnell Douglas*.

11. *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2229 (1995) (arguing that Title VII jurisprudence "cloaks substance in the 'curious garb' of procedure"); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 344 (2010) (arguing that "procedure becomes the chisel courts use to pare down the rights of employees"); McCormick, *supra* note 8, at 160–62 (arguing that courts' procedural use of the framework has effectively redefined discrimination (i.e., as "pretext") and this new definition bears little relation to the ways in which discrimination actually occurs); Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 757 (2006) ("One of the prominent criticisms of the *McDonnell Douglas* test is that it distracts the court from considering whether discrimination took place, and instead focuses on a rather mechanized and procedural framework.").

12. See *infra* Parts III.B and III.C for a discussion of how the framework has harmed plaintiffs.

"indirectly."[13] That is, the framework provided a means for plaintiffs to create an inference of discriminatory intent against the employer by casting sufficient doubt on the reasons the employer gave for taking the employment action in question (e.g., refusing to hire or terminating plaintiff).[14] Accordingly, analysis under the framework proceeded by focusing heavily on the stories defendants had to tell and whether or not those stories were credible.[15]

Supreme Court decisions subsequent to *McDonnell Douglas*, however, have severely limited the framework's relevancy and applicability, and emphasized that the adequacy of plaintiff's evidence *in toto* should be the prevailing consideration of the inquiry.[16] These decisions essentially rendered steps one and two of the framework mere formalities[17] and situated the pretext step as the central concern of the case.[18] They further suggested that the analysis at the pretext step is no different than an ordinary sufficiency of the evidence analysis which would be used in any civil case absent the shifting of burdens called for by the framework.[19] In none of its decisions, however, has the Court formally discarded the framework.[20]

What has become clear after these decisions is that the formal steps of the framework do not really lead anywhere except, at best, back to where plaintiff would have been in the framework's absence.[21] In the hands of the lower courts, however, the steps in the framework have not turned out to be mere harmless detours en route to the ultimate issue; they have functioned to steer and shape courts' analyses to the detriment of plaintiffs.[22] In the end, the employee-plaintiff says "discrimination," the employer

13. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (citing *McDonnell Douglas*, 411 U.S. at 804–05) (explaining that a plaintiff may meet her ultimate burden "indirectly" by showing the employer's reason for the employment action is "unworthy of credence"); Timothy M. Tymkovich, *The Problem With Pretext*, 85 DENV. U. L. REV. 503, 505 (2008) (noting that scholars and judges initially regarded the framework as "plaintiff-friendly" (quoting Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1227 (10th Cir. 2003) (Hartz, J., concurring))).

14. *McDonnell Douglas*, 411 U.S. at 804–05.

15. See *infra* notes 183–91 and accompanying text for a discussion of the concept of pretext.

16. See *infra* Part II.C.2 for a discussion of these decisions.

17. Under current law, plaintiffs and defendants are generally able to meet their respective burdens at steps one and two with ease. *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 665, 668 (1998) (noting that many courts simply presume plaintiff has made a prima facie case, and finding no case on record in which a plaintiff won at the second step because of a defendant's inability to articulate a reason for its employment action).

18. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 39 (2d ed. 2007).

19. Tymkovich, *supra* note 13, at 507.

20. Hosts of employment discrimination scholars, in light of these developments, have called for courts or Congress to altogether discard the framework. *See, e.g.*, Chin & Golinsky, *supra* note 17, at 672; Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 516 (2008); Tymkovich, *supra* note 13, at 528–29.

21. See *infra* Part II.C.2 for a discussion of limitations placed on the framework.

22. See *infra* Parts III.B and III.C for a discussion of how the framework has harmed plaintiffs.

responds "business reason," and lower courts sort out these cases guided by an employer-centered understanding of the employment situation.[23]

This has been particularly appreciable at the summary judgment stage of litigation. Despite the Supreme Court's admonitions to center the inquiry on the sufficiency of all of the evidence of record[24] and courts' obligation to draw all inferences in favor of the nonmoving party,[25] summary judgment analyses in the lower courts commonly privilege defendants' point of view and close off inquiry into potentially valuable evidentiary avenues stemming from the plaintiff-employees' perspective.[26] Additionally, use of the framework has caused courts to divide up and isolate plaintiffs' evidence, testing each piece for its ability to specifically rebut defendants' proffered reasons instead of viewing the evidence as an aggregate whole—that is, as a complete story.[27]

What lower courts should be doing at summary judgment is making an objective assessment of the evidence of the record, including evidence flowing from the employee's perception of the workplace. Using the employee's perspective as one evidentiary channel, a totality of the circumstances should be gauged and the propriety of summary judgment decided against that backdrop. This Comment looks to the hostile work environment and retaliation contexts to support this idea.[28]

Aligning itself with and drawing from that scholarship critiquing *McDonnell Douglas*'s placement of procedure over substance, this Comment argues that disparate treatment law in its present form has unfairly hindered plaintiff-employees' stories from being told, and looks to hostile work environment and retaliation doctrines to provide guidance on how these stories may be restored. Part II.A provides background on Title VII and its modes of administration and enforcement. Part II.B discusses deficiencies in the litigation model to address victims' experience of discrimination and to target discrimination as a societal ill. Against this backdrop, Part II.C looks at the development of Supreme Court disparate treatment doctrine and the effect of this doctrine on the lower courts. Part II.D outlines key concepts that have emerged from the hostile work environment and retaliation contexts. Part III.A then argues that use of a defendant-centered framework to assess disparate treatment cases simply no longer makes methodological sense in light of *St. Mary's Honor Center v. Hicks*.[29] Through close readings of two illustrative cases, Parts III.B and III.C trace how lower courts' use of the framework at summary judgment can improperly lead to the foreclosure of plaintiff-employees' perspectives from the analysis and result in improper grants of summary judgment where issues of fact exist for a jury. Part III.D then proposes that

23. See *infra* Parts III.A and III.B for a discussion of the employer-centered nature of the framework's application.

24. See *infra* Part II.C.2 for a discussion of how the Supreme Court has addressed analysis of summary adjudication under the framework.

25. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

26. See *infra* Parts III.B and III.C for a discussion of how courts have favored the defendant's point of view at the summary judgment stage.

27. See *infra* Part III.C for a discussion of how courts have hurt plaintiffs by treating their evidence piecemeal rather than as a whole.

28. See *infra* Part II.D for a proposal of how these doctrines can aid disparate treatment.

29. 509 U.S. 502 (1993).

the areas of hostile work environment and retaliation provide doctrinal guidance in guarding against the issues identified in the Discussion.

II. OVERVIEW

A. Title VII and its Mode of Enforcement

The Civil Rights Act of 1964[30] was a federal legislative package designed to eliminate discrimination on a massive scale.[31] It was landmark legislation both in terms of its historical and symbolic significance and its reach across so many areas of American public life.[32] Title VII of this legislation targets discrimination in the workplace.[33] Its central substantive provision makes it unlawful for a covered employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[34]

As is evident from this language, Title VII's prohibition is cast in very broad terms.[35] Consequently, it invites significant latitude in its interpretation and application.

Title VII created a federal agency, the Equal Employment Opportunity Commission (EEOC), to administer the statute.[36] Initially, the EEOC was conceived as having a broad swath of enforcement and interpretive powers.[37] Due to a series of concessions and compromises during legislation, however, the agency that emerged

30. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

31. *See generally* CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (discussing legislative background of Title VII).

32. For example, the Civil Rights Act affected voting (Title I), public accommodations such as hotels and restaurants (Title II), access to public facilities (Title III), enforced the desegregation of public schools (Title IV), and barred federal funding to government agencies that discriminate (Title VI). Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

33. 42 U.S.C. §§ 2000e, 2000e-1 to -17 (2006).

34. 42 U.S.C. § 2000e-2(a).

35. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (suggesting that Title VII's "broad language" is often best given meaning by reference to public law concepts).

36. 42 U.S.C. § 2000e-4.

37. Proponents of the original bill envisioned the EEOC as an administrative body modeled after the National Labor Relations Board, with administrative hearing powers subject to only limited judicial review, and the power to issue "cease and desist" orders for which it could seek judicial enforcement if necessary. ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 47–48 (1993); *see also Celebrating the 40th Anniversary of Title VII*: *First Principles—Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination*, EEOC (June 24, 2004), http://www.eeoc.gov/eeoc/history/40th/panel/firstprinciples.html (discussing the historical circumstances of enacting the employment provisions of the Civil Rights Act of 1964).

lacked these powers in meaningful form.[38] Although Congress has expanded the agency's reach and abilities somewhat over the years, its role and power remain constrained.[39]

Under the current Title VII, aggrieved employees are required to exhaust administrative remedies with the EEOC before they are permitted to file a lawsuit in court.[40] However, because conciliation at this level is nonmandatory and the agency has no binding adjudicatory power, few determinative outcomes are reached.[41] As a result, many regard the prerequisite agency procedures as mere bureaucratic hurdles employee-plaintiffs must overcome to reach litigation.[42] So, although the EEOC plays a limited role in Title VII's enforcement, in reality, litigation brought by private plaintiffs in federal court is its predominant mode of enforcement.[43] Congress gave aggrieved employees further reason to proceed more directly to litigation with passage of the Civil Rights Act of 1991, which amended Title VII to permit jury trials and statutorily defined compensatory and punitive damage awards in disparate treatment cases.[44]

B. Discrimination, Litigation . . . Consternation

A number of commentators have pointed out shortcomings and issues with combating employment discrimination via private litigation.[45] Others, more generally,

38. BLUMROSEN, *supra* note 37, at 47–48. The agency was limited to providing technical assistance to employers, receiving and investigating complaints, and attempting voluntary conciliation between parties. The agency itself could not prosecute charges of discrimination and could not adopt substantive interpretive regulations. *Id.*

39. In 1972, the EEOC was granted authority to litigate in federal court in its own name on behalf of complainants. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 4, § 706(f), 86 Stat. 103, 105–06 (codified at 42 U.S.C. § 2000e-5(f)). And it has been empowered to promulgate substantive regulations under the Age Discrimination in Employment Act, 29 U.S.C. § 628 (2006), and the Americans with Disabilities Act, 42 U.S.C. § 12116. The EEOC lacks the ability to issue regulations with the force of law for Title VII, however.

40. 42 U.S.C. § 2000e-5(b) (requiring aggrieved employees to initially file agency charge and permitting complainant to file lawsuit in federal court only after issuance of right-to-sue notice). If the Commission finds cause after the filing of a complaint it may attempt resolution by informal methods of conference, conciliation, and persuasion. *Id*.

41. In fiscal year 2011, the EEOC received 71,914 charges filed under Title VII. *Title VII of the Civil Rights Act of 1964 Charges FY 1997–FY 2011*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Sept. 19, 2012). Of those, 12,047 (14.4%) resulted in determinative resolution between the parties (i.e., withdrawal with benefits, negotiated settlement, or successful conciliation). *Id.*

42. *See, e.g.*, Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 57–59 (1996) (arguing that, absent massive reform and restructuring, the EEOC should be eliminated given that private litigation more effectively and expeditiously enforces federal antidiscrimination laws).

43. Marcia L. McCormick, *The Truth is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 205 (2009).

44. Pub. L. No. 102-166, sec. 102, § 1977A(a)(1), (c), 105 Stat. 1071, 1072, 1073 (codified at 42 U.S.C. § 1981a(a)(1), (c)). Title VII as originally enacted provided by way of remedies only backpay, reinstatement, and injunctions against future acts of discrimination. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261. Additionally, it only provided plaintiffs the right to a bench trial. *Id.*

45. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 861–64 (2008) (pointing out how Title VII relies upon employee initiative for its enforcement, then tracking the myriad ways employees in reality are "stymied and deterred" from taking this

have pointed out that engaging the societal ill of discrimination in any context through private lawsuits is troublesome given the nature of the problem being targeted as well as the nature and structure of the litigation model itself.[46] In contrast to more collective, processive reforms and responses,[47] litigation fails to comprehend the deeply historical and complex nature of discrimination and its situation within American social consciousness.[48]

The primary function of enforcement of antidiscrimination law under the litigation mode is the search for and imposition of liability on the perpetrator for his unlawful acts.[49] As Professor Alan Freeman points out, certain presuppositions inhere as the law proceeds under this mode.[50] Courts, in virtue of their constitutionally mandated position,[51] inevitably view their role as detecting and remedying individual "violation[s]."[52] Where a violation is discovered, the charge of the court is to neutralize the sanctioned conduct of the perpetrator, and, in turn, make the victim whole.[53] Regulation of antidiscrimination law under this mode thus operates on the presupposition that equality is the societal norm, and that discrimination is mere blameworthy conduct of certain individuals disrupting this norm.[54] Discrimination is

initiative); McCormick, *supra* note 43, at 209–14 (tracing reasons why private enforcement through litigation is not effective, including danger of retaliation, and potential plaintiffs' ignorance of rights and lack of resources).

46. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT 29, 29–31 (Kimberlé Crenshaw et al. eds., 1995) (distinguishing between understandings of discrimination as a violation of law versus a social and historical condition); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 762–64 (1991) (describing the way in which compensatory justice fails to capture the nature of civil rights problems).

47. For example, in a recent article, Marcia McCormick appealed to the legislative and executive branches to form a "truth commission" to promote equal employment opportunity in the private sector, given the ongoing shortcomings of judicial enforcement. McCormick, *supra* note 43, at 222–31. As she proposed, this fact-finding body would be designed "to promote transitional justice, an appropriate goal . . . where our employment discrimination laws are a piece of our transition from a society that used the law to enslave some segments of the population and even after slavery was abolished to keep some dependent on others for their support." *Id.* at 193.

48. *See* Freeman, *supra* note 46, at 30 (criticizing antidiscrimination law's reliance on the perpetrator perspective, which views racial discrimination "not as a social phenomenon but merely as the misguided conduct of particular actors").

49. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (describing Title VII as creating a "statutory employment 'tort'"); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 919 (1993) (pointing out that the Supreme Court has fashioned two models of liability under Title VII, each based on tort models of liability: disparate treatment, based on an intentional tort model, and disparate impact, based on a strict liability model).

50. Freeman, *supra* note 46, at 29.

51. Under the "case or controversy" clause of Article III of the Constitution, in order for a case to be justiciable, the plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent"; there must be a causal connection between plaintiff's injury and the conduct complained of; and there must be a likelihood that plaintiff's injury would "be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

52. Freeman, *supra* note 46, at 29.

53. *Id.*

54. *See id.* at 30, 41 (observing that the Supreme Court in much of its civil rights jurisprudence in the latter half of the twentieth century has demonstrated an underlying belief that "the war is over"—that "but for

thus understood as "apart from the social fabric and without historical continuity."[55] Although one danger of such an approach is that it gives rise to moral complacency of a sort with respect to society's response to remedying the historical effects of discrimination,[56] its most pressing danger, according to Freeman, is that it forecloses consideration of the "victim perspective" in the law's enforcement.[57] To the extent that the law proceeds from the "perpetrator perspective," as Freeman suggests, it fails to target discrimination's deeply social and historical root causes.[58]

Similarly, Professor Cass Sunstein, in a critique of civil rights law in general, has argued that enforcement of antidiscrimination law should not be guided by a principle of compensatory justice—a principle ill suited to the problem of discrimination in the United States.[59] Such an approach assimilates the problem of discrimination with problems arising in ordinary tort law, thereby confusing the realms of public and private law.[60] As courts proceed under a tort-style model to resolve cases turning on questions of equality, they employ traditional, predefined notions of causation, injury, and "restoration to the status quo ante."[61] Adhering to these predefined notions, the central question in each case becomes "whether an identifiable actor has harmed an identifiable person in an identifiable way."[62] Although perhaps appropriate in framing the injustice of discriminatory conduct on a superficial level, this question ultimately leads to confusion with respect to the aims of civil rights law.[63] In private litigation, the goal is restoration to the status quo ante where an injustice has occurred—an outgrowth of private litigation's principle of compensatory justice.[64] Such a goal, however, is unreachable in the civil rights context without ultimately implicating readjustments to extant sociohistorical power configurations—undertakings arguably well beyond the ken of the judiciary.[65] Nonetheless, points out Sunstein, courts in the civil rights

an occasional aberrational practice, future society is already here and functioning"). *See also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 741 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

55. *Id*. at 30.

56. *See id.* at 30 ("The fault concept gives rise to a complacency about one's own moral status; it creates a class of 'innocents' who need not feel any personal responsibility for the conditions associated with discrimination . . . .").

57. Freeman contrasts the "perpetrator perspective," which understands discrimination as specific violation, or series of specific violations, to the "victim perspective," which understands discrimination as the overall conditions of inequality for individuals: "those conditions of actual social existence as a member of a perpetual underclass[,] includ[ing] both the objective conditions of life . . . and the consciousness associated with those objective conditions." *Id.* at 29.

58. *Id.* at 30.

59. Sunstein, *supra* note at 46, at 762–65.

60. *Id*. at 762–63.

61. *Id*. at 763.

62. *Id*. at 762.

63. *Id*. at 763–65.

64. *Id*. at 762–63.

65. *See id.* at 762 (stating that courts' operating outside of the principle of compensatory justice would "lead [them] to require redress of social wrongs committed by third parties in the distant past, which would involve conspicuous social reordering and harms to innocent persons, rather than a restoration of some well-defined status quo ante").

context proceed under a tort litigation model, often oblivious or confused as to the scope and effect of the compensatory principles guiding their decisions.[66]

Both Freeman's and Sunstein's criticisms are underpinned by the idea that litigation itself is a response that may simply be inapposite to certain problems. This notion is echoed in some legal theory that has explored the form and structure of litigation and traced its conceptual limits.[67] This theory suggests that litigation, as an historical phenomenon, has assumed a particular narrative form only capable of recognizing certain stories, characterizing them certain ways, and providing certain relief.[68] Where a conflict or problem fails to fit into one of litigation's sanctioned forms, those individuals beset by a problem in a nonsanctioned form will find little satisfying redress through litigation's channels.[69]

Problems of perceptual differences in defining and recognizing discrimination engender further complications in the enforcement of antidiscrimination laws via the litigation mode. A significant body of research has explored the marked differences between individuals' perceptions as to what constitutes discriminatory conduct in the first place.[70] This research suggests that the extent to which one perceives and characterizes conduct as discriminatory can depend significantly on one's perceptual predispositions, and that these predispositions are deeply interconnected with one's

66. *See id.* at 763–64 (arguing that restoration to the status quo ante in the civil rights context is ultimately a conceptually incoherent task: "What would our practices be in a world without race and sex discrimination?").

67. *See generally* AMSTERDAM & BRUNER, *supra* note 1.

68. Amsterdam and Bruner put it thusly:

> In litigation, the plaintiff's lawyer is required to tell a story in which there has been trouble in the world that has affected the plaintiff adversely and is attributable to the acts of the defendant. The defendant must counter with a story in which it is claimed that nothing wrong happened to the plaintiff (or that the plaintiff's conception of wrong does not fit the law's definition), or, if there has been a legally cognizable wrong, then it is not the defendant's fault. Those are the obligatory plots of the law's adversarial process. At common law, moreover, the plaintiff's story-argument is classically shaped to a particular *writ*, which . . . is a kind of plot précis of what is at issue—trespass, *indebitatus assumpsit*, or whatever. And the defendant typically counters the plaintiff's writ-informed narrative with one known or believed to have been used successfully to that end . . . .
>
> An inevitable consequence of such adversarial storytelling is that it tends to focus the attention of storytellers and hearers alike upon certain considerations rather than others, and to put a premium on type-casting the elements of every tale to fit the stock model of the "relevant" considerations. . . . The judge and jury often have no choices but to grant *or* deny "redress," say, by compensating the plaintiff or penalizing the defendant. The outcomes of adjudication, given the specialized nature of adversarial storytelling and the limited choices that emerge from it, are a bit too pat.

Id. at 117–18.

69. A popular trial advocacy text summarizes the story arc of every litigation in three sentences: "There was a time when everything was fine. Then something terrible and disruptive happened. Now it is time to provide a remedy and restore order." STEVEN LUBET, MODERN TRIAL ADVOCACY 373 (4th ed. 2009). *Cf.* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 149–55 (2000) (tracing how the law and legal culture do not, and perhaps cannot in their present form, recognize and redress certain injuries suffered by women).

70. *See, e.g.*, Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 285 (Nielsen & Nelson eds., 2005) (discussing results of empirical studies on perceiving and reporting discriminatory conduct).

membership in a particular class (e.g., race, gender).[71] Other scholarship, drawing from social-psychological research, has argued convincingly that discriminatory values and preferences commonly affect decision making at a subconscious level in the form of cognitive bias.[72] Such fundamental perceptual complexities with respect to the presence or existence of the very thing being litigated have the potential to put both jurists and parties at cross purposes.

C. The Ball in the Hands of the Court: The Supreme Court's Doctrinal Approach to Title VII

Although private litigation may be an inherently troublesome mode of targeting the underlying, stratified social problems giving rise to the societal ill of discrimination, litigation is, practically speaking, what victims of discrimination have. What follows is an overview of the Supreme Court's response as the primary enforcing body of Title VII vis-à-vis disparate treatment suits. The Court's most significant response in this regard was the burden-shifting framework it initially set forth in *McDonnell Douglas Corp. v. Green*.[73] This tripartite framework has dominated the organization of disparate treatment cases[74] and the manner in which they are analyzed at litigation.[75]

The Court's decisions subsequent to *McDonnell Douglas* have suggested that the framework's scope and relevancy should be limited, and have emphasized that most cases should be resolved according to whether plaintiff has met her burden of persuasion on the factual issue of discrimination.[76] The framework, however, remains

71. *See, e.g.*, *id.* at 285–86 (discussing that perceptions of discrimination vary widely and depend on characteristics of the person, situation, and social structure); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1106 (2008) (arguing and citing empirical data to support assertion that "[b]lacks and whites, on average, tend to view allegations of racial discrimination through substantially different perceptual frameworks").

72. *See generally, e.g.*, Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); David Kairys, *Unconscious Racism*, 83 TEMP. L. REV. 857 (2011); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV 317 (1987).

73. 411 U.S. 792 (1973); *see* RUTHERGLEN, *supra* note 18, at 36 (characterizing burden shifting as the "dominant theme" in employment discrimination law).

74. Individual disparate treatment cases are treated under one of two analytic frameworks: (1) the *McDonnell Douglas* framework, or (2) the "mixed-motives" framework, which was first set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246–47 (1989), and modified by the Civil Rights Act of 1991 amendments to Title VII. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 578 (2001). Under the modified "mixed-motives" framework, a plaintiff must prove that a protected characteristic (e.g., race or sex) was a "motivating factor" of the challenged employment action. Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 118 (2007). If the plaintiff does so, the defendant may then prove that it would have taken the same employment action irrespective of the protected factor. *Id.* If the defendant successfully proves this, it is a partial defense; liability attaches, but damages are limited. *Id.* Despite the availability of the mixed-motives framework, in most cases courts mandate use of the *McDonnell Douglas* framework. *Id.* at 114, 119–20.

75. RUTHERGLEN, *supra* note 18, at 36–37.

76. See *infra* Part II.C.2 for a discussion of subsequent case law and how it has limited the formal steps of the framework and stressed focusing on the ultimate issue. *See also*, *e.g.*, U.S. Postal Serv. Bd. of Governors

intact, guiding lower courts in their adjudication of claims, most notably at the summary judgment stage.[77]

1. Burden Shifting

In 1973 the Supreme Court decided *McDonnell Douglas Corp. v. Green*, setting forth the three-step burden-shifting framework to be used in the analysis of disparate treatment claims.[78] Plaintiff Percy Green sued McDonnell Douglas claiming that it refused to rehire him based on his race and his involvement in the civil rights movement.[79] Green had worked for McDonnell Douglas for eight years and was laid off as part of a reduction in its workforce.[80] Upon his termination he and other activists engaged in disruptive civil rights protests against the company.[81] When Green reapplied for an open position, the company refused to rehire him, citing his participation in the protests against it as the reason.[82] Green filed suit under Title VII.[83]

With scant elaboration as to why under these facts it was departing from the normal order of proof in civil cases, the Court set forth the now familiar burden-shifting framework.[84] First, plaintiff bears the burden of establishing a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[85]

The Court noted that the prima facie case is not a rigid standard, and that the particular requirements will necessarily vary under differing factual scenarios.[86] If the plaintiff is successful in meeting her initial burden, the inquiry proceeds to the second step. At this step, the burden shifts to the employer to articulate "some legitimate, non-discriminatory reason" for the employment action.[87] If the defendant meets this burden, the burden then shifts back to plaintiff at the third step.[88] At this step, the plaintiff is

v. Aikens, 460 U.S. 711, 715 (1983) (explaining that the *McDonnell Douglas* framework is simply a clear method of organizing evidence and that the existence of discrimination is the question to be decided).

77. RUTHERGLEN, *supra* note 18, at 41–42.

78. 411 U.S. 792, 802 (1973).

79. *McDonnell Douglas*, 411 U.S. at 794–96.

80. *Id*. at 794.

81. *Id*.

82. *Id*. at 796.

83. *Id*. at 797.

84. The Court stated merely that it was resolving the "critical issue . . . concern[ing] the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* at 800. *See also* Sperino, *supra* note 11, at 753–55 (pointing out that in setting forth its new test the *McDonnell Douglas* Court made no effort to discuss prior case law).

85. *McDonnell Douglas*, 411 U.S. at 802.

86. *Id*. at 802 n.13.

87. *Id*. at 802.

88. *Id*. at 804.

"afforded a fair opportunity to show that [the employer's] stated reason for [the employment action] was in fact pretext."[89]

Eight years later, in *Texas Department of Community Affairs v. Burdine*,[90] the Court entertained the question of whether the defendant's burden at step two requires that the defendant prove by a preponderance of the evidence that the legitimate, nondiscriminatory reason for the employment action existed.[91] The Court held that defendant's burden at step two does not require such a showing; it requires only that the employer meet a burden of production.[92]

In its decision, the Court elaborated on the framework, attempting to explain its purpose and function. The Court stressed that, despite the intermediate burdens set forth in the framework, the burden of persuading the trier of fact of the existence of discrimination remains always with the plaintiff.[93] In describing the prima facie prong, the court noted that the plaintiff's burden in meeting it is "not onerous."[94] In essence, plaintiff must come forward with enough evidence to show she suffered an adverse employment action "under circumstances which give rise to an inference of unlawful discrimination."[95] The requirement of the prima facie case functions to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection."[96] Where the plaintiff meets this burden, a presumption arises that the employer discriminated against the employee.[97]

The employer can rebut the presumption established by the plaintiff at step one by merely articulating some legitimate, nondiscriminatory reason for the employment action.[98] The employer need not persuade the court that it was actually motivated by the reason.[99] Significantly, the *Burdine* Court stated that the purpose of step two is to "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[100] By rebutting the prima facie case with its proffered reason, the Court reasoned, the defendant causes the inquiry to proceed to a "new level of specificity."[101] The allocation of burdens in this manner is meant to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination."[102]

The Court explained that at the third step, where the plaintiff must show that the defendant's proffered reason was pretext for a discriminatory one, the plaintiff's burden "merges with the ultimate burden of persuading the court that she has been the victim

89. *Id*.
90. 450 U.S. 248 (1981).
91. *Burdine*, 450 U.S. at 250
92. *Id*. at 256–57.
93. *Id*. at 253.
94. *Id*.
95. *Id*.
96. *Id*. at 253–54.
97. *Id.* at 254.
98. *Id*.
99. *Id*.
100. *Id*. at 255–56.
101. *Id*. at 255.
102. *Id*. at 255 n.8.

of intentional discrimination."[103] The plaintiff may satisfy this ultimate burden, stated the Court, by either "directly . . . persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[104]

2. Limiting the Framework and Urging the Ultimate Issue

Although *Burdine* clearly held that the burden defendants carry at step two was only one of production, the opinion resulted in ambiguity with respect to what was required of plaintiffs at the pretext step.[105] This issue became critical in light of *Burdine*'s emphasis on the relative ease with which the burdens at steps one and two could be met. Liability, in most cases, critically turned on the question of pretext.[106] Courts split on the issue of what showing was required of the plaintiff to compel judgment at this step.[107] As the Supreme Court intervened in attempts to clarify matters, it limited the scope and relevancy of the burden-shifting scheme and implied that the formalistic concerns of allocating burdens of productions should never eclipse the ultimate factual issue of discrimination.[108]

In *St. Mary's Honor Center v. Hicks*,[109] the Court held that the plaintiff's disproof of the reason the defendant proffered at the second step does not, as a matter of law, *compel* judgment in the plaintiff's favor.[110] Although the plaintiff's discrediting of the defendant's reason *may* suffice to persuade the trier of fact to infer discrimination, it does not compel it.[111] To understand this holding fully, a short recitation of the facts and procedural history is necessary.

103. *Id*. at 256.

104. *Id*.

105. Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 713 (1995).

106. *See* Hart, *supra* note 72, at 753 (observing that the third step of the *McDonnell Douglas* framework is where most cases are won or lost).

107. *See* Davis, *supra* note 105, at 714–16 (citing exemplary decisions). In the view of some courts, the plaintiff could compel judgment in her favor by proving only that the defendant's alleged legitimate reason was pretext (the "pretext only" view). *Id.* at 716. Other courts read *Burdine* to suggest that where the plaintiff provides sufficient evidence to show the defendant's proffered reason was pretext, judgment may go to, but is not legally compelled in favor of, the plaintiff (the "permissive pretext" view). *Id.* at 715. Still others hold the view that proof of pretext alone is never sufficient to compel judgment in the plaintiff's favor. *Id.* at 714. Under this view, the plaintiff is required to disprove the defendant's reason and provide additional evidence of discrimination in order to get judgment in her favor (the "pretext plus" view). *Id.*

108. *See* Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 562 (2001) (noting that the Court eventually came to regard the framework as obscuring the ultimate issue of discrimination with intermediate questions, rather than illuminating it); Tymkovich, *supra* note 13, at 507 (2008) (pointing out that with *Burdine* and subsequent cases the Court began to return to use of traditional sufficiency of the evidence standard).

109. 509 U.S. 502 (1993).

110. *Hicks*, 509 U.S. at 511. The Court essentially adopted a "permissive pretext" view. *See* Davis, *supra* note 105, at 715.

111. *Hicks*, 509 U.S. at 511.

Melvin Hicks, an African-American man, worked for St. Mary's halfway house, maintaining a satisfactory employment record.[112] After receiving a new supervisor, he was the target of repeated and severe disciplinary action.[113] Hicks was eventually demoted and ultimately terminated, which Hicks claimed was racially motivated.[114] The employer cited as its legitimate nondiscriminatory reason repeated rules offenses of employees supervised by Hicks.[115] At a bench trial, Hicks successfully proved that St. Mary's proffered reason for the termination was pretextual.[116] Nonetheless, the trial court entered judgment as a matter of law for St. Mary's because it found that, although Hicks showed that the employer's reason was pretextual, he had failed to prove that the termination was racially motivated.[117] The trial court found that the real reason for the termination was not Hicks's race but his supervisor's personal dislike of him.[118] The Eighth Circuit reversed, holding that because plaintiff had proven pretext, he was entitled to judgment as a matter of law.[119]

The Supreme Court ultimately agreed with the trial court and held that proof of pretext alone does not compel judgment in plaintiff's favor.[120] Against a vigorous four Justice dissent[121] the majority stated that "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"; but such proof alone does not legally compel judgment in plaintiff's favor.[122] To get judgment in her favor, plaintiff must adduce whatever quantum of evidence sufficient to persuade the trier of fact that the employer's real reason for the employment action was discrimination.[123]

The Court stressed how, at the pretext step, the inquiry becomes that of the ultimate issue:

> If . . . the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. . . . The presumption [established by the prima facie case], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds

112. *Id*. at 504–05.

113. *Id*.

114. *Id*. at 505.

115. *Id*. at 508.

116. *Id*.

117. *Id*.

118. *Id*.

119. *Id*.

120. *Id.* at 509.

121. The dissent argued that, as explained in *Burdine*, the point of the *McDonnell Douglas* analysis is to narrow the inquiry to the issue of pretext. *Id.* at 533–34 (Souter, J., dissenting). Thus, where plaintiff proves pretext, she has effectively proved her case. *Id.* at 530. It would be unfair to impose on plaintiff "the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." *Id.* at 535.

122. *Id*. at 517–18 (majority opinion).

123. *See id.* at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.").

> to decide the ultimate question: whether plaintiff has proved "that the defendant intentionally discriminated against [him] . . . ."[124]

Thus, notwithstanding the framework's ostensible function of "sharpening" the inquiry as explained in *Burdine*, once the pretext step is reached, the ultimate issue predominates, and persuasion is to be accomplished by whatever evidentiary means available in the record.[125]

In *Reeves v. Sanderson Plumbing Products, Inc.*,[126] the Court underscored that plaintiffs may rely on any evidence in the record to support a finding of discrimination.[127] *Reeves* responded to an issue arising in the lower courts in the wake of *Hicks*.[128] Some lower courts had read *Hicks* to require plaintiffs to adduce evidence *in addition to* proof of pretext in order to support a finding of discrimination.[129] *Reeves* held that such additional proof is not necessary.[130] Proof of pretext along with the evidence establishing plaintiff's prima facie case may be sufficient for a finding of liability.[131] The point is that if the strength of that evidence (i.e., evidence establishing the prima facie case and that discrediting employer's reason) is sufficient to persuade the factfinder of the existence of discrimination, then liability attaches.[132] If it is not, then there should be no finding of discrimination. *Reeves* thus echoed *Hicks* in its emphasis on considering the entire evidentiary record for sufficiency in deciding the ultimate issue of the case and minimizing the formalities of the shifting burdens called for by the framework.

3. Lower Courts in the Wake of *Hicks* and *Reeves*

The broad principle advanced by both *Hicks* and *Reeves* was that the determination of disparate treatment claims brought with circumstantial evidence will be highly dependent on the evidence of record of each individual case.[133] Both opinions stressed that the ultimate issue of discrimination is a factual one on which the plaintiff bears the ultimate burden, and that this issue should never be eclipsed by the intermittent shifting burdens of steps one and two.[134] Despite this apparent minimization of the relevancy of the framework, neither *Hicks* nor *Reeves* formally

124. *Id.* at 510–11 (second alteration in original) (quoting *Burdine*, 450 U.S. at 253).

125. *Id.* at 506–08.

126. 530 U.S. 133 (2000).

127. *Reeves*, 530 U.S. at 147–49.

128. RUTHERGLEN, *supra* note 18, at 45 (explaining confusion among lower courts regarding pretext standards). See *supra* note 107 for a discussion of the distinction between the "pretext only," the "permissive pretext," and "pretext plus" views.

129. RUTHERGLEN, *supra* note 18, at 45. These lower courts read a "pretext plus" standard into *Hicks*.

130. *See Reeves*, 530 U.S. at 146 (calling the lower court's reasoning "misconceived").

131. *Id.* at 148.

132. *Id.* at 147–49.

133. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 295 (1997) ("[D]iscrimination is proven based on the evidentiary record that is adduced and the reasonable inferences that can be drawn from that evidence. The critical question at the heart of antidiscrimination doctrine is what those inferences are—when is it fair to draw a conclusion of discrimination and based on what evidence?").

134. *Reeves*, 530 U.S. at 143 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993).

discarded it. Both opinions were cast in the vocabulary of *McDonnell Douglas*, which perhaps insinuated to lower courts the framework's continuing vitality.[135] After *Hicks* and *Reeves*, lower courts endured in their use of the framework, dutifully abiding each step in their analyses,[136] most notably at summary judgment.[137]

Facing crowded dockets,[138] and relying on a trilogy of Supreme Court cases that significantly liberalized summary judgment standards,[139] lower courts began disposing of disparate treatment cases more and more at this pretrial stage.[140] At summary judgment, a court looks to the record to determine whether a trial is necessary.[141] If, in its assessment, the court decides that the nonmoving party (provided the nonmoving party bears the burden of persuasion at trial) does not have sufficient evidence for a reasonable jury to find in her favor, the judge grants summary judgment.[142] In looking at the evidence, the judge is required to take all of the nonmovant's evidence as true and draw all justifiable inferences in her favor.[143] In the disparate treatment context, then, the essential summary judgment question is whether the employee-plaintiff can be said to have adduced sufficient evidence from which a reasonable factfinder could draw an inference of discrimination.[144] As the Supreme Court has noted, summary judgment thus requires viewing the record evidence through "the prism of the substantive evidentiary burden."[145]

135. *See* Zimmer, *supra* note 74, at 577–78 (observing that lower courts are less inclined to follow the example of a Supreme Court decision where the Court does not explicitly announce a new legal rule).

136. *See* RUTHERGLEN, *supra* note 18, at 43–44 (stating that, although the Supreme Court has been more concerned with limiting the framework's overall significance, the lower courts have been more interested in refining it); Katz, *supra* note 74, at 120 (noting courts that regard use of *McDonnell Douglas* framework as mandatory).

137. *See* Malamud, *supra* note 11, at 2276 (reviewing large sample of disparate treatment cases at the pretrial stage and concluding that use of the framework "figures most centrally in summary judgment").

138. John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747, 747 (1988) (citing statistics to support assertion that employment discrimination claims comprise large portion of crowded federal docket).

139. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

140. *See* Jansonius, *supra* note 138, at 772–76 (discussing circuits that have adopted an expanded role for summary judgment in employment discrimination cases).

141. *See* FED. R. CIV. P. 56(c) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.").

142. The *Celotex* Court explained:

> [T]he party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law.

Celotex, 477 U.S. at 331 (citations omitted).

143. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158–59 (1970).

144. Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997).

145. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). *See also* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 109–10

For all of *Hicks*'s and *Reeves*'s characterizations of the third and final pretext step as being fundamentally about evidentiary sufficiency, these opinions offered no principled guidance on the amount and quality of evidence that is required to prove pretext—the ultimate issue under the *McDonnell Douglas* framework.[146] They merely iterated that it was the case that the pretext inquiry is one of evidentiary sufficiency. Lower courts were effectively left to deal with the question of evidentiary sufficiency on their own.[147]

D. Objective Determinations Through Subjective Channels: Approaches in the Hostile Work Environment and Retaliation Contexts

The prevailing doctrine in the area of disparate treatment, with its focus on pretext, stands in contrast to other areas of employment discrimination law that have incorporated plaintiff's perspective as a variable in the analysis. In the hostile work environment and retaliation contexts, courts have adopted approaches that expressly consider the plaintiff-employee's experience. These analytic schemes incorporate plaintiff-employee's perspective as one channel through which objective determinations of the existence of discrimination or other unlawful conduct are made. Additionally, in these contexts, the analysis tends toward gauging an overall picture—a totality of the circumstances.

1. Hostile Work Environment

The Supreme Court first recognized hostile work environment sexual harassment[148] as a theory of liability under Title VII in *Meritor Savings Bank v. Vinson*.[149] In *Vinson*, a female bank employee alleged that, over a prolonged period of her employment, her supervisor made sexual advances toward her, made suggestive remarks, and fondled her.[150] The employer argued that no violation of Title VII occurred, given that the employee suffered no tangible economic loss.[151] The Court rejected the employer's argument and stated that plaintiff's allegations were sufficient to state a claim for relief.[152] The Court stated that conduct amounts to actionable sexual

(2005) (assessing *Anderson* and other decisions and observing that development in summary judgment law has turned the summary judgment process into "a dry run of the trial based on the affidavits and other papers").

146. As Chambers noted, *Hicks* and *Reeves* were more geared toward deciding when a factfinder need *not* find for plaintiff (i.e., that proof of falsity and a prima facie case do not *necessarily* compel judgment for plaintiff). Chambers, *supra* note 145, at 122.

147. *See id.* at 126 ("Without a specific calculus for what proof suffices to support a verdict, the Court allows ad hoc decision-making based on a judge's view of evidentiary strength."); Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747, 753–54 (2001) (discussing "divergent" pretext standards among the lower courts in the wake of *Hicks* and *Reeves*).

148. Hostile work environment form of sexual harassment is distinguished from quid pro quo harassment, where tangible employment benefits are conditioned on sexual favors (e.g., "Sleep with me or you're fired."). Bryson v. Chi. State Univ., 96 F.3d 912, 915 (7th Cir. 1996).

149. 477 U.S. 57 (1986).

150. *Vinson*, 477 U.S. at 60–61.

151. *Id.* at 64.

152. *Id.*

harassment where it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[153]

In *Harris v. Forklift Systems, Inc.*,[154] the Court clarified and elaborated on this standard. Significantly, the Court stated that a determination of whether conduct was sufficiently "severe or pervasive" to amount to harassment entails, in part, a subjective inquiry from the victim's perspective.[155] And whether an environment is sufficiently hostile or abusive to be actionable requires consideration of the totality of the circumstances, not any one factor.[156] The *Harris* Court took the case in order to abrogate a standard used among many lower courts, which required the conduct in issue to "'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury'" before it was actionable.[157] *Harris* effectively set forth a two-part test to determine whether a work environment will be considered hostile.[158] The first part asks whether or not the plaintiff took offense to the employer's conduct.[159] This is a subjective inquiry that considers the perspective of the victim.[160] The second part engages in an objective inquiry. It asks whether or not a reasonable person would consider the conduct offensive.[161]

Although not widely adopted, the Ninth Circuit, in expanding on the analysis in *Harris*, created identity specific standards with respect to the objective portion of the inquiry.[162] In *Ellison v. Brady*,[163] the court adopted a "reasonable woman" standard.[164] The court stated: "We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[165] The court reasoned that because women are more commonly the victims of violent sexual assault, they may more readily perceive that a harasser's conduct is a "prelude" to violent sexual assault.[166] Conversely, "[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the

153. *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

154. 510 U.S. 17 (1993).

155. *Harris*, 510 U.S. at 21–22.

156. *Id.* at 23.

157. *Id.* at 20 (alterations in original) (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986)).

158. Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 207 (2001).

159. *See* Kress v. Birchwood Landscaping, No. 3:05-CV-566, 2007 WL 800996, at *17 (M.D. Pa. Mar. 14, 2007) (holding that evidence showing that plaintiff actively participated in the ribald atmosphere at work may be indication that plaintiff was not subjectively offended).

160. *Harris*, 510 U.S. at 21–22.

161. *Id.* at 22. *Harris* adopted a reasonable person standard in the face of the circuit court's application of a reasonable woman standard. *Id.* at 20–22.

162. Robinson, *supra* note 71, at 1157.

163. 924 F.2d 872 (9th Cir. 1991).

164. *Ellison*, 924 F.2d at 878–79.

165. *Id.* at 879.

166. *Id.*

underlying threat of violence that a woman may perceive."[167] Therefore, to avoid a male-biased brand of "reasonableness," the court embraced a reasonable woman standard.[168]

The Ninth Circuit extended this rationale to hostile work environment cases based on race. In *McGinest v. GTE Service Corp.*,[169] the court stated that just as allegations of sexually hostile workplaces are to be assessed from the perspective of a reasonable person of the victim's sex, so too must allegations of racially hostile workplaces "be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff."[170] Similar to the reasoning in *Ellison*, the court stated that analyzing this perspective is necessary given that members of protected classes often perceive racially motivated comments and actions by virtue of their membership in that class.[171] Additionally, proceeding through the lens of a reasonable member of the plaintiff's class has the effect of thwarting the taint of judicial bias.[172]

2. Retaliation

The Supreme Court has also incorporated the plaintiff's perspective as an analytic variable in its formulation of retaliation doctrine. Title VII contains an antiretaliation provision forbidding employers from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.[173] Many circuits had interpreted this provision as making actionable only employer activity that involved harms "related to employment or [that] occur at the workplace."[174]

In *Burlington Northern & Santa Fe Railway Co. v. White*,[175] the Court held that any employer conduct that is "materially adverse to a reasonable employee or job applicant" is actionable.[176] The standard the Court set forth to determine whether an employer's conduct is harmful enough to be material asks whether the action was "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination."[177] In adopting this standard, the Court emphasized that, though the nature of the inquiry is highly contextual, the standard it

167. *Id.*

168. *Id.*

169. 360 F.3d 1103 (9th Cir. 2004).

170. *McGinest*, 360 F.3d at 1115.

171. *See id.* at 1116 ("Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group.").

172. *Id.* ("By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.").

173. 42 U.S.C. § 2000e-3(a) (2006).

174. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

175. 548 U.S. 53 (2006).

176. *White*, 548 U.S. at 57.

177. *Id.*

set forth was an objective one, gauged through the "perspective of a reasonable person in the plaintiff's position."[178]

III. DISCUSSION

With little guidance on evidentiary sufficiency regarding proof of pretext, and with the procedural dictates of the framework intact, lower courts have made use of *McDonnell Douglas* at summary judgment to dispose of plaintiffs' cases that should rightfully proceed to a jury. At least in part, continued use of the framework after *Hicks* has led to this result. The framework after *Hicks* organizes the entire question of discrimination around defendants' reasons, but then, as the ultimate issue rises to the fore on the question of pretext, disproof of those reasons fails to yield a legally mandatory presumption in plaintiffs' favor. Analysis under a post-*Hicks* framework is "defendant centered" with no justifiable reason for being that way.

The defendant-centered nature of the framework has had the effect of leading courts to close off potentially worthy sources of evidence. The concept of pretext, which figures so centrally in the framework's operation, fixates courts on the employer's understanding of the employment situation.[179] Because pretext hinges on the issue of the defendant's sincerity with respect to its understanding of that situation (as opposed to discerning actual, objective circumstances), the plaintiff's perspective is often treated as irrelevant or superfluous and is thus foreclosed from serious consideration. This foreclosure is further buttressed by courts' deference to employers' business judgment.

The framework has distracted courts from the ultimate issue and has functioned to steer and shape the way courts treat plaintiffs' evidence at summary judgment as well. Both the lockstep, phase-by-phase approach engendered by following its steps, as well as the framework's fundamental commitment to the concept of pretext, have led courts to divide up and funnel bits of the plaintiff's evidence around the defendant's reasons for its actions.[180] Use of the framework has caused courts to lose sight of the evidentiary whole they should be assessing at summary judgment.[181]

With few sound legal reasons for adhering to the framework, lower courts should free themselves of its constraints at summary judgment and begin looking at the record as a more complete evidentiary whole and not through the employer-centered lens they currently use. The areas of hostile work environment and retaliation can help courts by providing doctrinal guidance in achieving this end.[182]

178. *Id.* at 69–70.

179. See *infra* Part III.B for a discussion of the framework's tendency to prioritize defendants' understandings of employment situations over plaintiffs'.

180. See *infra* Part III.C for a discussion of lower courts' use of defendants' proffered reasons as the organizing element of summary judgment analysis.

181. See *infra* Part III.C for a discussion of lower courts' failure under the framework to consider all the evidence of the record.

182. See *infra* Part III.D for a discussion of the proposal that courts should rely on hostile work environment and retaliation doctrines for developing the analytical framework in disparate treatment cases.

A. Why Retain a "Defendant-Centered" Framework After St. Mary's Honor Center v. Hicks*?*

Under a pretext standard, a plaintiff-employee's legal burden is, minimally, to prove that the employment action the plaintiff-employee suffered did not happen for the reasons the defendant-employer says it did.[183] Pretext analysis, by its very character, then, ineluctably shifts the defendant's narrative to the center of the inquiry, requiring the plaintiff to shape her narrative to it.[184] Put another way, a plaintiff's case under the framework essentially turns on the extent to which it can convincingly respond to the story that the defendant has told and the extent to which the response casts doubt on that story.[185]

The framework in its original form was structured that way by design.[186] Proving intentional discrimination is extremely difficult given that the existence of discrimination is essentially a subjective state of mind.[187] Moreover, direct evidence of discrimination is rare, and the defendant largely controls most of the evidence.[188] The novelty of the framework was that it provided a method of proving discriminatory intent through an inferential mechanism that did not require direct proof.[189] The ostensible rationale underlying its use thus cognized that the focus of the inquiry in

183. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–57 (1981).

184. *See* Martin, *supra* note 11, at 343 (noting that, as with all civil litigants, employment discrimination plaintiffs engage in storytelling, and that this storytelling seeks to "address the employers' explanations head on" and "portray[] the employers' non-discriminatory explanations for what they are—a pretext for discrimination." (internal quotation mark omitted))

185. *See* Katz, *supra* note 74, at 124 (characterizing the function of the framework as providing a victim of discrimination with a "target"—"a reason given by [an] employer for its actions"—at which plaintiff must shoot to prove her case).

186. Although commentators have noted that the *McDonnell Douglas* Court advanced the framework without articulating reasons as to why it did so, virtually all agree that as originally advanced, the framework was plaintiff friendly and that subsequent decisions narrowing the doctrine have been in plaintiffs' disfavor. *See, e.g.*, Sperino, *supra* note 11, at 745; Tymkovich, *supra* note 13, at 505–07.

187. *See* RUTHERGLEN, *supra* note 18, at 32 (Title VII's prohibition "focuses on the employer's process of decisionmaking—on what goes into an employer's decision rather than what comes out of it"); Tymkovich, *supra* note 13, at 504 (characterizing proof of intentional discrimination as necessarily a motive inquiry to which "a great deal of subjectivity inevitably attaches").

188. *See* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 881 (2010) (noting that causation in disparate treatment suits occurs in the mind of the decisionmaker/defendant who controls most relevant evidence).

189. One commentator explains that the framework was intended to operate similar to "hypothesis testing, a statistical procedure in which a researcher sets out to prove a proposition by attempting to disprove it." Selmi, *supra* note 133, at 327. As Selmi points out, the establishment of a prima facie case functions to eliminate other likely explanations for the employment action and introduces discrimination as a relevant explanatory variable. *Id.* at 326–27. Proceeding through the framework, a court is left to choose between a discriminatory motive and the employer's asserted, nondiscriminatory one. *Id.* "[T]he hypothesis of discrimination is, therefore, tested against a hypothesis of nondiscrimination . . . ." *Id.* at 327. As Selmi explains, "[i]mplicit in the binary nature of hypothesis testing is the fact that the researcher is only seeking to establish whether a particular hypothesis is true and is not trying to answer the larger question of 'what is truth.'" *Id. Cf.* Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997–98 (1994) (arguing that the framework, as originally conceived, was premised on the fundamental assumption that "adverse treatment of statutorily protected groups is more likely than not the result of discrimination").

disparate treatment cases should shift to the party who has best access to the evidence and who has the best information about the potential nondiscriminatory reasons for its actions: the defendant-employer.[190] By organizing the inquiry around the defendant's explanation of the employment action, the plaintiff can prove her case "indirectly" at the pretext step by showing that the story the defendant has told is not credible.[191]

This "defendant-centered" approach makes sense where disproof of the employer's articulated reasons for its actions commands a legally mandatory presumption in the plaintiff's favor. That is, structuring the question of proof around the defendant's side of the story (the defendant being the party who does *not* bear the ultimate burden of proof) stands to reason where the ultimate burden of proof is coextensive with the discrediting of that story.[192] As Justice Souter correctly pointed out in his *Hicks* dissent, if proof of pretext does not result in a mandatory presumption, and the ultimate issue at the third step is "wide open,"[193] then why "progressively . . . sharpen the inquiry into the elusive factual question of . . . discrimination"[194] via the first two steps?

The *Hicks* majority, however, asserted in no uncertain terms that proof of pretext does not perforce legally compel judgment for the plaintiff, and that once the inquiry reaches the pretext step, the framework becomes irrelevant. Many after *Hicks* have thus questioned precisely what purpose the first two steps of the framework leading up to the "wide open" factual question at the third step are supposed to serve.[195] If the issue at the pretext step is, as the *Hicks* majority suggests, solely one of evidentiary sufficiency, then why not proceed to this issue sooner rather than later?[196]

190. Katz, *supra* note 188, at 882–83.

191. *Burdine* states:

> Placing [the] burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.
>
> . . . [Plaintiff] may succeed in [proving intentional discrimination] . . . indirectly by showing that the employer's proffered explanation is unworthy of credence.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981).

192. Otherwise, the legal requirement of the defendant's burden of production at step two, in the words of the *Hicks* dissent, is "transform[ed] . . . from a device used to provide notice and promote fairness into a misleading and potentially useless ritual." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 534 (1993) (Souter, J., dissenting).

193. *Id.* at 533.

194. *Id.* at 533–34 (quoting *Burdine*, 450 U.S. at 255 n.8).

195. Malamud poses it thusly: "Why did the Court bother to create a special proof structure for disparate treatment cases if it was to have no effect at all on ultimate factfinding?" Malamud, *supra* note 11, at 2274–75. *See also* Chambers, *supra* note 108, at 561–62 (characterizing the steps in the framework after *Hicks* as merely procedural with no substantive legal force); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 862 (2004) (arguing that decisions subsequent to *McDonnell Douglas* so thoroughly eroded the inferential method of proof that the original *McDonnell Douglas* framework provided that the steps themselves no longer serve any meaningful purpose).

196. As Rutherglen points out, in most cases the ultimate question of intentional discrimination will turn on the defendant's proffered reason for the employment action, even absent the framework. RUTHERGLEN,

A method wherein proof of the incredibility of the defendant's proffered reason yields a mandatory presumption in favor of the plaintiff properly proceeds by situating the defendant's perspective as the analytic linchpin—the organizing element of the inquiry. To the extent that *Hicks* took from pretext its power to legally compel such a mandatory presumption, it leaves an analytic framework fundamentally defendant centered in character, with no sound explanation as to why the analysis should be structured that way.[197]

B. Privileging Defendants' Perspective, Attenuating Plaintiffs'

Under the framework, lower courts have developed law that discredits or generally forecloses from evidentiary consideration at summary judgment what courts have described as the plaintiff's "subjective belief" testimony with respect to the circumstances of the employment situation.[198] Essentially, courts have held that a plaintiff's understanding of the circumstances on which the employer based its decision is irrelevant given that what is at issue is the sincerity of the defendant's beliefs with respect to those circumstances.[199] Conversely, courts, by virtue of following the framework at summary judgment, unquestioningly credit the defendant's perspective advanced at step two, finding facts and drawing inferences against the nonmovant employee.[200]

A close reading of *Massey v. U.S. Customs and Border Protection*[201] allows us to explore these assertions as applied to a specific factual scenario. The opinion addresses a defendant-employer's motion for summary judgment.[202] Dolores Massey, an African-American employee at U.S. Customs and Border Protection, applied for a merit promotion to a position of Senior Customs Inspector.[203] The promotion decision was determined in large part through a rating system in which employees self-graded their performance and abilities, and their supervisors subsequently lowered or raised the

supra note 18, at 39. After all, the likely best defense to a claim that an employment decision was discriminatory is proof that the decision simply made good business sense. *Id.* And, because the plaintiff bears the ultimate burden of proof, she will have to, in some manner, overcome this defense. *Id.* at 39, 44. There is little doubt that both plaintiffs' and defendants' evidence will "organically" arrive at this issue. The imposition of purely procedural strictures on the order of proof to get there thus seems entirely superfluous.

197. *See* Chin & Golinsky, *supra* note 17, at 668–72 (questioning the vitality and relevance of the framework after the *Hicks* decision).

198. *See, e.g.*, Bohrer v. Hanes Corp., 715 F.2d 213, 219 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) (stating that plaintiff's testimony as to view of job performance not relevant in determining pretext); Springs v. Nicholson, 581 F. Supp. 2d 744, 748 (E.D.N.C. 2008) (stating that plaintiff's testimony and subjective belief that management's actions were result of discrimination not adequate to show pretext).

199. *See, e.g.*, Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1993), *cert. denied*, 510 U.S. 826 (1993) (holding that pretext turns on the employer's understanding of qualifications and criteria identified, not on those categories plaintiff understood to have been important).

200. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 232–33 (1993) (noting that use of the framework at summary judgment sanctions these practices and thus "transposes the proper application of summary judgment").

201. No. Civ.A. 03-6590, 2004 WL 3019234 (E.D. Pa. Dec. 28, 2004).

202. *Massey*, 2004 WL 3019234, at *1.

203. *Id.*

ratings according to their own assessments.[204] Based primarily on her direct supervisor's adjustments to her scores, Massey's employer denied her the promotion.[205] Massey filed suit under Title VII alleging that the decision was motivated by racial discrimination.[206] The employer contended that Massey was not promoted based on her relative merit and inexperience with respect to the other candidates who applied for the position.[207] It pointed to the rating scores as evidence that she was objectively less qualified.[208] Massey's direct supervisor downgraded her scores significantly more than other candidates as whom Massey contended she was as equally qualified.[209] And Massey pointed out inconsistencies in the supervisor's ratings, asserting that he lacked sufficient knowledge about her job performance and experience to warrant the downgrades.[210]

The court found that Massey had satisfied the requirements of the prima facie case, and that the employer, relying on the rating scores, had articulated a legitimate, nondiscriminatory reason for denying her the promotion.[211] As Massey acknowledged that she had no direct evidence of discrimination, she was obliged under the framework to come forward with circumstantial evidence sufficient to allow a reasonable factfinder to draw an inference of discrimination in order to survive summary judgment.[212] Massey sought to accomplish this by challenging the accuracy of her employer's articulated understanding of her performance and qualifications—in particular, her direct supervisor's accuracy with respect to his numerous downgrades of her scores.[213] That is, Massey tried to show that her supervisor's assessment failed to comport with her actual performance and qualifications, and, therefore, that her employer's reasons for taking the action it did under the circumstances were pretextual.[214]

Two factors made this an uphill battle for Massey. First, Massey's employer's perspective, subject only to a burden of production under the framework, was taken as true in the first instance, regardless of the degree to which it may or may not have accorded with reality.[215] Despite the court's recitation that the defendant's burden on

204. *Id.* at *3.

205. *Id.* at *5.

206. *Id.* at *3. Massey also alleged age discrimination under the Age Discrimination in Employment Act of 1967. *Id.* at *1, *3. Her age claim was analyzed parallel to her race claim under the *McDonnell Douglas* framework. *Id.* at *2.

207. *Id.* at *1.

208. *Id.* at *6.

209. *Id.* at *7–8, *10.

210. *Id.* at *8, *10.

211. *Id.* at *5–6.

212. Under the applicable Third Circuit standard, Massey had to come forward with evidence from which a factfinder could reasonably either "(1) disbelieve the defendant's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the defendant's action." *Id.* at *2 (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

213. *Id.* at *7.

214. *Id.*

215. The court accepted as true defendant's explanation that Massey's scores showed she was objectively less qualified, *id.* at *2, *6, and reflexively credited two pieces of the employer's evidence: (1) a declaration signed by Massey's direct supervisor in which he specifically denied ever considering her race; and

its own motion was to affirmatively "point[] out . . . that there is an absence of evidence to support the non-moving party's case,"[216] under the framework, the defendant was able to meet its burden by merely articulating any legitimate, nondiscriminatory reason.[217] And this reason stood as true unless and until Massey could discredit it.[218] Thus, as the court examined the record for issues of fact, it did so before a backdrop where the defendant's evidence had already been credited and an inference already drawn in its favor.[219]

Second, as a matter of law, the court deemed Massey's take on the underlying employment situation, out of which the employer made its decision, unworthy of evidentiary weight.[220] Because the belief of the employer was the critical fact at issue under the pretext inquiry, the "plaintiff's own perception of her abilities [was] not relevant in determining whether there [was] a genuine issue of fact of pretext for trial."[221] Rather, stated the court, the "focus [is] on the perceptions of plaintiff's supervisors."[222] This discounting of the plaintiff's perspective was a function of the framing of the legal question under the framework. As the court undertook the pretext inquiry, it was clear that at issue for it was not the extent to which plaintiff's actual performance, abilities, and experience warranted or did not warrant her being promoted with respect to the other candidates;[223] rather, the question was whether or not the sincerity of the employer's belief about Massey's performance, abilities, and experience could sufficiently be called into question.[224] Whether the employer's

(2) this supervisor's deposition testimony in which he stated he had some personal knowledge of Massey's work. *Id.* at *10. This automatic crediting was a function of the court's understanding of defendant's burden at step two: "[d]efendant satisfies its burden of production by introducing evidence, which, *if taken as true*, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." *Id.* at *2 (emphasis added) (citing *Fuentes*, 32 F.3d at 763).

216. *Massey*, 2004 WL 3019234, at *1 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

217. *See id.* at *2 ("The defendant need not prove that the tendered reason actually motivated its behavior because the ultimate burden of proving intentional discrimination always rests with the plaintiff." (citing *Fuentes*, 32 F.3d at 763)); *cf.* McGinley, *supra* note 200, at 231 n.128 (noting that courts generally do not require employer to present any evidence beyond employer's statement of the reason for its decision, and employers are generally not required to state the reason with any specificity).

218. *Massey*, 2004 WL 3019234, at *2.

219. *Id*. As McGinley observes:

> [Courts'] automatic crediting of the defendant's articulation is proper when the plaintiff has the burden of persuasion on the motion, but when the defendant brings the motion, it skews the result in favor of the defendant. Nevertheless, courts are drawing inferences in favor of the moving party even though the movant supposedly has a burden to show the absence of evidence supporting the plaintiff's position.

McGinley, *supra* note 200, at 232.

220. *Massey*, 2004 WL 3019234, at *8.

221. *Id.*

222. *Id.* at *9 (citing Billet v. Cigna Corp., 940 F.2d 812, 825 (3d Cir. 1991)).

223. Theoretically, under this question, if plaintiff could have made a showing that her performance, abilities, and experience warranted her promotion, and it was denied her, then the employer's reason for denying it—poor performance—may have been said to have been pretextual, and, thus, a potential question existed for a jury.

224. *Id.* at *8.

decision was objectively reasonable (as potentially gauged by the contending perspectives of the parties) was irrelevant.[225]

Setting aside whether or not Massey could have in fact adduced sufficient evidence to prove the adequacy of her performance, abilities, and experience, the framing of the legal question in this manner worked against her overcoming summary judgment. It shifted analytic focus to the sincerity of the employer's proffered reason for its actions and away from engaging the actuality of the employment situation and whether or not the employer's decision could have been said to have reasonably comported with that actuality.[226] At bottom, the court was not concerned with whether Massey's performance, abilities, and experience were as either party contended them to be, but only with whether Massey could come forward with some independent evidence going directly to her supervisor's stated belief about what *he* perceived her performance and abilities to be. The upshot was that the disputed testimony of Massey and her direct supervisor regarding the actuality of the underlying employment situation (i.e., whether Massey's performance, abilities, and experience merited the downgrades in her scores) was deemed immaterial and thus insufficient to create an issue of fact for trial.[227]

Under the analytic approach followed by the court, plaintiffs face an uphill battle in trying to point to the objective inadequacy of employers' reasons for their actions as a means of demonstrating pretext. Because the employer's reason is met with threshold acceptance under the framework, whether or not the employer's reason for taking the employment action makes objective sense becomes secondary, if not altogether irrelevant.[228] Thus, inquiry under the framework pushes toward searching for proof that the employer did not actually believe what it says it did at the time it says it believed it.[229] Precisely what and how much circumstantial evidence suffices to prove falsity of employers' beliefs, however, courts do not make clear, and instead operate ad hoc

225. *See id.* at *2 ("[I]n discrediting the defendant's proffered reason, the plaintiff cannot simply show that the defendant's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the defendant's actions." (citing *Fuentes*, 32 F.3d at 765)).

226. *See id.* at *9 ("Whether or not defendant reached an incorrect conclusion in declining to promote plaintiff is irrelevant.").

227. The court stated "the disparity in the parties' perceptions regarding plaintiff's work experience is not material to the disposition of the present motion." *Id.* at *3. With respect to Massey's job performance, the court acknowledged that Massey set forth some contradictions and inconsistencies with regard to her direct supervisor's assessment (though the court did not elaborate specifically what these were), but stated that these presented only a "'weak issue of fact' as to the credibility of defendant's stated legitimate, non-discriminatory explanation of why plaintiff was not promoted." *Id.* at *7 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000)).

228. *See, e.g.*, Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006) (noting that if the employer's reason has "'no basis in fact' whatsoever" but is believed by the employer, and that belief caused the employer to fire the plaintiff, then "[t]here would be nothing pretextual about [the employer's] action").

229. *See, e.g.*, *id.* ("The only concern in reviewing an employer's reasons for [the employment action] is the honesty of the employer's beliefs." (quoting Balderston v. Fairbanks Morse Engine Div., 328 F.3d 309, 323 (7th Cir. 2003))); Hart, *supra* note 72, at 754–55 (discussing and citing lower court decisions requiring plaintiff to show dishonesty on part of employer in order to meet pretext requirement).

under broad, open-ended standards.[230] What is clear is that, whatever this evidence is, it has proven extremely difficult for plaintiffs to muster.[231]

Without suggesting whether the specific facts of *Massey* did or did not warrant the resolution at which the court arrived, *Massey* demonstrates how the concept of pretext puts plaintiffs in the difficult position of having to adduce evidence that defendant's beliefs were insincere without the benefit of the court ascribing any evidentiary value to the employee's perspective of the circumstances of the underlying employment action.[232] *Massey* is emblematic of the principle found throughout lower courts' analyses that privileges the employer's perspective and attenuates the plaintiff's perspective. Courts time and time again refuse to find an issue of material fact in the context of a pretext analysis where a plaintiff tries to point to the unsoundness or questionable nature of the employer's reason, attempting to articulate his or her perception of the circumstances at issue in the suit.[233] In some instances, courts have not found an issue of fact even where the plaintiff's perception was corroborated by coworkers.[234]

230. The Third Circuit, for example, requires a plaintiff to "demonstrate . . . weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

231. *See* Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1904 n.74 (2004) (noting that "most all the evidence of why the defendant acted the way it did toward the plaintiff is in the hands of the defendant"). Given that employers generally control all of the relevant evidence, it is important to ask just what evidence courts should expect plaintiffs to adduce in order to survive summary judgment under the framework—especially where the employer's articulated reason for the employment action is the employee's poor performance. Should employees keep ongoing records of their adequate performance in order to someday be able to successfully prosecute a disparate treatment action in the event they become a victim of discrimination? If so, what effect would this have on their work? Their productivity? Would such evidence even make any difference?

232. McGinley aptly puts it as follows:

> [C]ourt[s] will not allow the plaintiff to present evidence to the factfinder that an employer's articulated, legitimate, non-discriminatory reason for the employment decision is not an adequate reason for the decision. But the courts misunderstand the argument. The plaintiff does not argue that the employer should not be permitted to discharge employees because the reason for their discharge is inadequate, but rather, that the employer's reason makes no sense. If the employer's alleged reason is nonsensical, the court should allow a factfinder to infer that the story told by the employer is not credible.
>
> It is illogical to prevent an employee from proving pretext by questioning the adequacy of the employer's reason for discharging or refusing to hire or promote the plaintiff.

McGinley, *supra* note 210, at 231–32.

233. *See, e.g.*, Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) ("[F]ederal courts are not arbitral boards, ruling on the strength of 'cause' for discharge. The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is race."); Healy v. N.Y. Life Ins. Co., 860 F.2d 1209, 1216 (3d Cir. 1988) ("[O]ur inquiry must concern pretext, and is not an independent assessment of how we might evaluate and treat [an] employee.").

234. *See, e.g.*, Jones v. Polk Ctr., No. 07-204, 2009 WL 700686, at *6 (W.D. Pa. Mar. 11, 2009) (noting that statement signed by twelve of plaintiff's coworkers saying that plaintiff's performance was not poor as employer alleged was "irrelevant in a pretext analysis" because "what matters is the perception of the decisionmaker"); Acampora v. Konica Bus. Machs. USA, Inc., No. 95-3936, 1997 WL 214800, at *7 (E.D. Pa. Apr. 22, 1997) (finding coworker's opinion of plaintiff's performance not indicative of pretext because focus is on perception of decisionmaker).

The underlying rationale of this principle is in many respects tied to courts' understanding of the employment relationship as principally a private, economic one.[235] Courts are extremely reluctant to interfere with the employment relationship, which they view should, under "normal" (i.e., nondiscriminatory) circumstances, be left to the regulation of the marketplace.[236] At a deeper level, the tendency to privilege the employer's "business judgment"[237] is indicative of the law's proceeding under a perpetrator perspective to the exclusion of the victim's perspective. That is, the law presumes that the status quo is fundamentally just in its operation until "interrupted" by discrimination. The law in the disparate treatment context (unlike the hostile work environment or retaliation contexts) simply refuses to broker the competing perspectives of the employer and employee with respect to their interpretations of the conditions of employment.[238] Instead, disparate treatment law frames the analysis in such a manner as to always give the employer the benefit of the doubt.[239] Pretext analysis treats the employer's perspective as the baseline.[240] The law is willing to intervene on this perspective not where the plaintiff may be able to present a convincingly alternative perspective but where the employee proves that the employer's perspective was not actually what the employer said it was.[241]

Pretext analysis, as commanded by *McDonnell Douglas*, is often inapposite where an ongoing relationship exists between the parties and where the employer's proffered

235. McCormick, *supra* note 45, at 197.

236. *Id.* at 197–98; *cf.* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 135 (1976) (discussing origins of employment at will doctrine in Anglo-American legal tradition and concluding that the doctrine was "generally adopted in the United States without much serious consideration of its theoretical support or potential impact").

237. Courts invoke the so-called "business judgment" rule throughout the circuits. *See, e.g.*, Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) ("[P]ursuant to the 'business judgment' rule an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise.") (citing Fennell v. First Step Designs, Ltd., 83 F.3d 526, 537 (1st Cir. 1996)).

238. In contrast, in analyzing hostile work environment, courts determine whether discriminatory conduct occurred by looking at the totality of the circumstances. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993). Courts gauge the totality by considering multiple factors, including the actual effect of the conduct on the plaintiff and whether or not the conduct was objectively severe and frequent. *Id.* at 23. No single factor predominates. *Id.*

239. McCormick suggests that the law's leaving the employment relationship to marketplace self-regulation does not leave the law neutral; rather, the law "is aligned with the holders of capital, protecting their right to control their property." McCormick, *supra* note 43, at 198. *See also* Martin, *supra* note 11, at 352 (arguing that the business judgment rule is merely a device courts use to rationalize unfettered employer discretion).

240. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) ("The broad, overriding interest [of Title VII], shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973))); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 (2004) (referencing Supreme Court decisions that suggest preservation of employer autonomy is one Title VII's central goals).

241. *See, e.g.*, Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 684–85 (7th Cir. 2000) ("A 'pretext for discrimination' means more than an unusual act; it means something worse than a business error; 'pretext' means deceit used to cover one's tracks. . . . [P]retext means a dishonest explanation, a lie rather than an oddity or an error.").

reason for the employment action may itself have been the product of ongoing but subtle discrimination.[242] This is particularly noticeable where the employer's evaluating criteria is, at least in part, subjective in nature.[243] The employer's reason for terminating the employee may be, for example, "poor performance" based on supervisor evaluations; however, the evaluations themselves may have been tainted over time by discriminatory animus.[244] These situations do not fit neatly into a *McDonnell Douglas* analysis because interrogating the sincerity of the reason the employer relied on in such cases will simply not be fruitful in ferreting out the sort of discrimination alleged. In these contexts, the plaintiff is not necessarily arguing that the employer's reason is false or insincere.[245] Rather, the plaintiff is challenging the racial, gender, or other class neutrality of the reason itself.[246]

To the extent fixation on the sincerity of the employer's reason is inapposite in these contexts, so then must use of the analytic framework culminating in the pretext inquiry be called into question. Because pretext conceives the possibility of proving discrimination narrowly as employer insincerity or dishonesty, it precludes more global, comprehensive assessments of the circumstances that gave rise to the suit, as presented by both parties involved—employer *and* employee.

C. Distracting, Dividing, and Funneling: Lower Courts' Treatment of Plaintiff's Evidence at Summary Judgment

The use of the framework by the lower courts to guide their analyses at summary judgment has essentially run counter to the realization of the broad principles set forth in *Hicks* and *Reeves*. Specifically, lower courts have not heeded *Hicks*'s admonition that the question confronted at the pretext step is the same fundamental one of evidentiary sufficiency confronted in any civil case, and that procedural dictates should

242. *See* Malamud, *supra* note 11, at 2319 ("There are situations . . . in which protected-group status is an inseparable part of the events leading up to an adverse decision, which we perhaps should be prepared to call 'intentional discrimination' despite the fact that their fact patterns do not fit the *McDonnell Douglas-Burdine* mold.").

243. Courts generally require heightened scrutiny where the employer has relied on subjective criteria for the employment action. *See, e.g.*, Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990). However, use of subjective criteria in itself does not create an inference of discrimination. *See, e.g.*, Denney v. City of Albany, 247 F.3d 1172, 1186 (11th Cir. 2001).

244. To be sure, courts are capable of finding and do find discrimination in such cases, but they must "swim against" the framework's "current" to do so. Malamud, *supra* note 11, at 2319.

245. Nor is the plaintiff necessarily arguing that the discrimination has risen to the level of a hostile work environment.

246. *See* Hart, *supra* note 74, at 771 (discussing rare case in which a court recognized such a context). Hart explains:

> An employer's explanation may be entirely honest in the sense that the employer felt she was making a neutral, unbiased decision for particular reasons, but the plaintiff may be able to point to circumstances surrounding the decision that call into question the employer's own 'honest' understanding of her reasons for the decision. When a court concludes that a plaintiff has proved that her employer was dishonest, it is simply assuming that an explanation, once called into question by the circumstances surrounding the decision, was a lie.

Id. at 756.

not eclipse this issue.[247] Lower courts become preoccupied with the formal elements of the framework and lose sight of and perspective on the ultimate factual issue.[248] Additionally, many lower courts have not acceded to the Supreme Court's directive in *Reeves* that in assessing evidentiary sufficiency for purposes of summary judgment, courts should consider *all* the evidence of record, not just select pieces.[249] Operating under the rubric of pretext, courts take the defendant's reason offered at step two as the organizing element of the inquiry. The plaintiff's evidence is then systematically funneled toward this reason and assessed for its ability to call it into question, rather than taken as a totality. Indicia of discrimination unable to be specifically causally linked to the defendant's decision fall by the wayside and potentially lose all probative value as to the ultimate issue.

A Seventh Circuit case provides an exemplum by which to explore these points. In *Traylor v. Brown*,[250] Cynthia Traylor, a female African-American employee of the Illinois Department of Transportation, brought an action under Title VII, alleging that her employer improperly denied her the opportunity to perform certain clerical and blacksmith duties for which she was qualified.[251] She alleged that only white, male employees were permitted to perform these duties.[252] Traylor was in fact the only female and the only African American who worked at the facility.[253] The white males at the facility who were permitted to perform blacksmith and clerical duties had the same job title as Traylor and held no special qualifications.[254] In fact, Traylor maintained that she was more qualified to perform these duties because, unlike the white males, she held a college degree.[255] Traylor repeatedly requested of her

247. In *Hicks*, the Court stated that "once the defendant has responded to the plaintiff's prima facie case, [a] court has before it all the evidence it needs to decide *not* . . . whether defendant's response is credible, but whether the defendant intentionally discriminated against the plaintiff." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983)) (internal quotation marks omitted). And, *Hicks* goes on, a court "should . . . proceed[] to this specific question directly, just as . . . courts decide disputed questions of fact in other civil litigation." *Id.* (quoting *Aikens*, 460 U.S. at 715–16).

248. Chin & Golinsky, *supra* note 17, at 669 (pointing out that the framework requires courts to engage in at least seven distinct steps of analysis and to assess the evidence three separate times, concluding that "[c]learly . . . the inquiry into elusive factual questions is not being 'sharpened'").

249. *Reeves* stated that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive," but proof on the ultimate issue depends on "all of the evidence in the record." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 150 (2000). *Reeves* explained that in determining the propriety of judgment as a matter of law (and thus, by extension, summary judgment) courts should consider a number of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, *and any other evidence* . . . that properly may be considered." *Id.* at 148–49 (emphasis added). *See also* Zimmer, *supra* note 74, at 591–92 (arguing that *Reeves* stands for the principle that summary judgment courts must consider all evidence that is produced as a result of the procedural operations of the framework).

250. 295 F.3d 783 (7th Cir. 2002).

251. *Traylor*, 295 F.3d at 785.

252. *Id.* at 786.

253. *Id.*

254. *Id.* at 786–87.

255. *Id.* at 790.

supervisors that she be given the opportunity to perform the duties.[256] Her supervisors, however, denied her requests without explanation, either ignoring them altogether or responding "[W]e'll see."[257] On one particular instance in which Traylor requested to perform clerical duties, her supervisor replied, "I don't have to let you in that office."[258] In support of her claim that her employer's reasons for denying her these opportunities were discriminatory, Traylor pointed to remarks by some of her coworkers referring to her as "black girl" and "token."[259]

The court reviewed the district court's grant of summary judgment in favor of the employer, and ultimately affirmed its ruling.[260] Proceeding under the burden-shifting rubric, the court first analyzed whether Traylor made out a prima facie case of race and sex discrimination.[261] In a rigid application of these requirements, the court found that, although Traylor was a member of a protected class, was performing her job satisfactorily, and that similarly situated individuals were treated more favorably, she did not show that she experienced an adverse employment action, and thus did not make out a prima facie case.[262] Her employer's denying her the opportunity to perform the duties with heightened responsibilities did not, in the court's judgment, amount to "material harm"[263] with respect to the "terms, conditions or privileges" of her "employment."[264] Traylor, the court found, did not suffer termination, demotion, or discipline, and her pay was unaffected.[265] Traylor maintained that she did in fact suffer material harm in that the denial of these responsibilities denied her prestige and the opportunity for professional advancement.[266] However, because Traylor could not adduce evidence to show that those who performed these duties necessarily received advancement, the court found this argument of Traylor's unavailing.[267] Traylor also argued that the disparate treatment to which she was subject—denial of job duties that white males were permitted to perform—was in and of itself an adverse employment action.[268] The court dismissed this argument by reasserting that Traylor failed to meet all four elements of the prima facie case, and her attempt to collapse the one element into the other contravened "well-settled law."[269] It concluded that because Traylor failed to make out a prima facie case, summary judgment was appropriate on these

256. *Id.* at 786.

257. *Id.*

258. *Id.*

259. *Id.* at 788 n.3.

260. *Id.* at 785–86.

261. *Id.* at 788. The court recited that Traylor was required to show the following in order to make out a prima facie case: "(1) that she was a member of a protected class; (2) that she was performing her job satisfactorily; (3) that she experienced an adverse employment action; and (4) that similarly situated individuals were treated more favorably." *Id.* (citing Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc., 254 F.3d 644, 650 (7th Cir. 2001)).

262. *Id.*

263. *Id.* (quoting Haugerud v. Amery Sch. Dist., 259 F.3d 678, 693 (7th Cir. 2001)).

264. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

265. *Id.* at 789.

266. *Id.*

267. *Id.*

268. *Id.* at 789–90.

269. *Id.* at 790.

grounds alone.[270] Nonetheless (and perhaps sensing the inappropriateness under these facts of foreclosing her case at the prima facie step),[271] the court proceeded to the next two steps in the framework.[272]

Before examining the court's treatment of those steps, however, we should take stock of the court's analysis thus far. A court's role at summary judgment is to assess the evidence of the record to determine whether a genuine issue of material fact exists for a jury. In its own words, the court understood its obligation at summary judgment to "construe all facts, and draw[] all reasonable inferences from those facts, in favor of Traylor, the non-moving party."[273] Yet, despite the central summary judgment question, the court narrowly focused on a subprong of the prima facie requirement.[274] The court essentially ignored the full spectrum of the plaintiff's circumstantial evidence and its probative value vis-à-vis the ultimate issue, and was prepared to close off Traylor's case in its entirety due to what it deemed her inability to meet a seemingly minor formal requirement.[275] Traylor, in the court's eyes, failed to come forward with evidence sufficient to show that the individuals who were given the opportunities to perform the duties she was denied actually received tangible benefits or advancement as a result of those opportunities.[276] Not only does such evidence have little to do with the ultimate issue in the case, but it is unlikely that any plaintiff would anticipate or understand ever needing such evidence to make out a case of discrimination in the first place.

Putting it plainly, Traylor understood the following: she was not permitted to perform challenging job tasks for which she was qualified and that she had requested to perform. Only white males were permitted to perform them, even though they did not have a college degree as she did. When she repeatedly asked her supervisors why they would not permit her to perform the jobs, they refused to provide her with any explanation, let alone a reasonable one. She was the only African American and the only woman working in a job environment traditionally dominated by white males. She

270. *Id.*

271. See *supra* notes 93–97 and accompanying text for a discussion of how the Supreme Court has characterized the requirements of the prima facie case as flexible and not difficult to meet. *Cf.* Malamud, *supra* note 11, at 2313 (noting that with the framework, the Court "created rule-like formulations, with the hope that the lower courts will bend them correctly, without any principled guidance").

272. *Traylor*, 295 F.3d at 790. The *Traylor* court's reluctance to predicate summary judgment on the failure of the prima facie case is not untypical. Courts commonly proceed to steps two and three despite a finding that the prima facie case failed. *See, e.g.*, Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20 n.2 (1st Cir. 1999) (analyzing the defendant employer's proffered nondiscriminatory reason for demoting plaintiff despite finding it "doubtful" that the plaintiff met one of the prongs of a prima facie case); McManamon v. N.Y. Dep't of Corr., No. 07 Civ. 10575, 2009 WL 2972633, at *6 (S.D.N.Y. Sept. 16, 2009) (concluding that plaintiff did not meet his burden of making out a prima facie race and age discrimination case, but continuing to analyze the defendant employer's reason for not hiring the plaintiff). Malamud posits that lower courts' tendency to evaluate all of the evidence despite a failed prima facie case is, at least in part, suggestive of lower courts' awareness of the framework's limitations. Malamud, *supra* note 11, at 2299–301.

273. *Traylor*, 295 F.3d at 787 (citing Hall v. Bodine Elec. Co., 276 F.3d 345, 352 (7th Cir. 2002)).

274. *See id.* at 788 (noting that, although Traylor met three of the four subprongs of the prima facie case, she could not prevail because she was unable to establish all of them).

275. *See id.* at 790 ("Traylor's failure to establish one element of her prima facie case, even if she had established all of the others, is enough to support a grant of summary judgment to her employer.").

276. *Id.* at 789.

was called the "black girl" and the "token" by her coworkers.[277] Traylor sensed that it was more likely than not that her race and/or gender were on the minds of her supervisors when they refused to allow her to perform the job duties. Traylor perceived discrimination. This was the story with which she came to court. This was her evidence. In a strange turn under the framework, however, the court's concern became that Traylor could not prove that her coworkers received tangible benefits from performing the job tasks Traylor asked to perform.[278]

Having expended a good deal of its analytic energies on whether Traylor made out a prima facie case, but conceding for the moment that she did, the court then proceeded to the next two steps in the framework.[279] Here, the framework's procedural workings again operated to distract the court from the ultimate issue and dictated the manner in which the court went about assessing the plaintiff's evidence. The employer offered the following as its reasons for denying Traylor the opportunity to perform the duties: it was satisfied with the work the white males were performing with respect to those duties, and it preferred to keep the duties relegated to the individuals who had consistently performed them over a number of years.[280] The court found that these reasons satisfied the defendant's burden of production, noting that they were "perfectly reasonable."[281] Turning to the third and final step, and framing the analysis in pretext terms, the court assessed the extent to which the plaintiff's evidence could call the employer's reasons into doubt.[282] Dividing up Traylor's evidence into pieces and funneling them to the defendant's explanation for its actions, the court disposed of the component pieces of Traylor's evidence in turn.

The court first considered Traylor's contention that she was qualified to perform the job duties.[283] The court found that this evidence failed to rebut the employer's proffered reasons.[284] The fact that Traylor was just as or more qualified than the individuals who were performing the job duties had "nothing to do with [the employer's] explanation that other employees were already performing those duties satisfactorily and effectively."[285] Of course, whatever Traylor's contention, her qualifications alone do not function as evidence of discrimination; rather, her qualifications along with the fact that other equally or lesser qualified white male employees were treated differently does.[286] The court, however, in direct contravention to *Reeves*,[287] ignored the rest of this evidence that it had acknowledged at the prima facie step of the analysis and instead honed in on Traylor's qualifications in

277. *Id.* at 788 n.3.

278. *Id.* at 789.

279. *Id.* at 790.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. This, along with the fact that Traylor was a member of a protected class, is the evidence that comprises her prima facie case.

287. See *supra* notes 131–32 and accompanying text for a discussion of how *Reeves* requires consideration of the evidence comprising plaintiff's prima facie case at summary judgment.

isolation.[288] In the court's view, Traylor's being qualified cast no doubt on the employer's reason for denying her the opportunity to perform the job duties.[289] Reasoned the court, the employer may prefer to have only a limited number of people performing certain tasks in the interests of efficiency and economy.[290] In the absence of evidence sufficient to cast doubt on the sincerity of the employer's proffered reasons, the court refused to question the employer's decision: "[W]e do not sit as a super-personnel department over employers scrutinizing and second-guessing every decision they make."[291]

The court treated the discriminatory remarks separately.[292] With surprisingly little analysis, it found that Traylor could not show that the remarks were specifically "causally related" to the decision not to allow her to perform the duties.[293] Traylor could not show that the remarks were not "stray" and amounted to more than mere "random office banter."[294] Absent such a showing, the remarks were not deemed probative to show that the employer's reasons for its decision were pretextual.[295] Summarizing its pretext analysis, the court concluded that Traylor failed to present evidence "other than her own conjecture" to call the employer's reasons into doubt.[296]

Entirely preoccupied with the ability of Traylor's evidence to specifically respond to the articulated reasons for the employer's decisions, the *Traylor* court failed to consider the aggregate circumstances of the plaintiff's employment situation as the

288. *Traylor*, 295 F.3d at 790.

289. *Id.* Put in the court's terms, it is difficult to disagree.

290. *Id.* The court cited defendant's evidence that the only individual who was allowed to perform office duties had done so since 1987, and the individuals who consistently performed the blacksmith duties had experience doing so. *Id.*

291. *Id.*

292. *Id.* at 788 n.3.

293. *Id.*

294. *Id.* (citing Schaffner v. Glencoe Park Dist., 256 F.3d 616, 622–23 (7th Cir. 2001)).

295. *Id.* Interestingly, the court noted that the remarks were treated at the district court as the basis for a separate hostile work environment claim that was dismissed by the district court because it was not raised at the administrative level. *Id.* Presumably, the district court dismissed the evidence along with the claim, as it did not consider the remarks in deciding the disparate treatment claim. *Id.* The "stray remarks" doctrine the court invoked here typifies the sort of per se rules lower courts have developed in assessing plaintiffs' evidence at summary judgment. Martin, *supra* note 11, at 347–51. The doctrine essentially provides that if biased, discriminatory remarks cannot be temporally connected to the employment decision and/or attributable to the decisionmaker, then they are not probative of the employer's discriminatory intent and therefore insufficient to raise a triable issue of fact. *Id.* at 348–49. The Fifth Circuit's formulation is typical: "comments are evidence of discrimination only if they are '1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the complained-of adverse employment decision; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" Jackson v. Cal-Western Packaging Corp., 602 F.3d 374, 380 (5th Cir. 2010) (quoting Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 400–01 (5th Cir. 2000)). The doctrine effectively permits courts to examine in isolation what may be a key component of plaintiff's overall case. Courts analyze the evidence only in connection with the person, time, and place in which the employment decision was made rather than as part of a greater story that, in its entirety, may point to discrimination. *But see, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 (5th Cir. 2000) (concluding that biased remarks may be probative even if uttered "not in the direct context of the decision and even if uttered by one other than the formal decisionmaker, provided that the individual is in a position to influence the decision" (footnote omitted)).

296. *Traylor*, 295 F.3d at 791.

evidence depicted them. Using the employer's reasons articulated at step two as its point of analytic departure, the court systematically divided up Traylor's evidence into component parts, funneled those parts to the employer's reasons, and tested each piece in turn for its ability to call those reasons into doubt.[297] Under this brand of analysis, indicia of discrimination will only ever be deemed worthy of evidentiary weight insofar as they can narrowly be connected to the employer's proffered reasons, despite the potential for them as a totality to lead a reasonable factfinder to infer discriminatory intent.[298]

Even under the *Traylor* court's own characterization of the facts, and considering the evidence outside of the burden-shifting construct, there appeared to be a question for a jury. That is, a reasonable factfinder could infer that Traylor's supervisors' refusals to allow her to perform the job duties arose from discriminatory intent. Yet, in its efforts to assess Traylor's evidence to show "pretext," the court lost sight of the totality of the evidence, in turn losing sight of the ultimate factual issue. The court thereby denied Traylor the possibility of ever telling her story to a jury.

This practice of dividing evidence up and evaluating the component pieces in isolation, as *Traylor* exemplifies, abounds in lower court summary judgment opinions.[299] These sorts of "divide and funnel" approaches are not only inconsistent with *Hicks*'s and *Reeves*'s broad principles, they effectively sap plaintiffs' evidence of any power by removing that evidence from their full contextual milieu.[300] As a plaintiff's circumstantial evidence is assessed in piecemeal fashion, its narrative force becomes diminished along with its ability to raise a triable issue of material fact. Plaintiffs are thus deprived of the full force and effect of their stories and consequently of the opportunity to tell them to a jury.

D. Proposal: Adopting Methods from the Areas of Hostile Work Environment and Retaliation

As a means of avoiding the negative effects engendered by use of the *McDonnell Douglas* framework discussed above, and, as a first step toward restoring plaintiffs' stories to disparate treatment summary judgment analysis, this Section proposes that lower courts adopt methods employed in the related areas of hostile work environment and retaliation.

1. Legal Defensibility and Desirability

As a preliminary matter, there are a number of reasons why adoption of these doctrinal methods in the disparate treatment context is legally defensible under the

297. *See id.* at 789–91.

298. The court signaled the departure of its reasoning down the narrow pretext path when it observed, "Traylor does not attempt to contradict [the employer's] proffered reasons." *Id.* at 790.

299. The practice has been observed, characterized, and criticized by a number of commentators. *See, e.g.*, Martin, *supra* note 11, at 345 (describing courts' "chip[ping] away" at plaintiff's evidence at summary judgment); McGinley, *supra* note 200, at 233 (criticizing courts' "piecemeal approach" to circumstantial evidence at summary judgment); Zimmer, *supra* note 74, at 591 (criticizing courts' "slicing and dicing" of record evidence at summary judgment).

300. *See* Malamud, *supra* note 11, at 2324 (noting that "evidence takes its meaning from context").

current state of the law. First, the analytic frameworks in the areas of disparate treatment, hostile work environment, and retaliation are court made and used in the enforcement of the same statutory source: Title VII.[301] As "creature[s] of the common law,"[302] there is no statutory requirement dictating their distinction. Moreover, Title VII's broad language affords courts significant interpretive latitude in its application. Second, despite the failure of lower courts to take heed, the Supreme Court has stated that use of the *McDonnell Douglas* framework was "never intended to be rigid, mechanized, or ritualistic."[303] And, as discussed, in its opinions dealing with the framework, the Court has so significantly minimized it in purpose and function as to effectively render it nonbinding.[304] Lower courts no doubt have the room within these opinions to develop and modify their own common law doctrinal approaches.[305]

Drawing from standards created in the hostile work environment and retaliation areas in particular (as opposed to other standards, or no standard at all) is equally desirable. The Supreme Court has left much to the analytic discretion of lower courts to sort out what constitutes evidentiary sufficiency on the ultimate issue at summary judgment. In the absence of concrete guidance from the Court, lower courts have demonstrated a tendency to "drift" toward rule-like constructs.[306] Simply abandoning the *McDonnell Douglas* framework for a "simpler" or more "direct" sufficiency of the evidence standard, as some commentators have endorsed,[307] may amount to no standard at all and yield results similar to those under the current pretext standard.[308] Judges may well slip back into their "defendant-centered" ways. To the extent analytic devices are needed or desired in disparate treatment law, lower courts should draw from the hostile work environment and retaliation contexts. Courts are already familiar with the operation of these devices and cognize the object of their application. These approaches have embraced a totality of the circumstances method of evidentiary analysis, and employ structured, but circumstance-specific, proof methods—

301. In fact, whether an employer creates a hostile work environment or engages in disparate treatment, it violates the same exact statutory provision: 42 U.S.C. § 2000e-2(a)(1). *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). The prohibition against retaliation falls under a different, but related, provision: 42 U.S.C. § 2000e-3(a).

302. Katz, *supra* note 74, at 120 n.49 (referring to the *McDonnell Douglas* framework).

303. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

304. *See* Katz, *supra* note 74, at 142 (arguing that proper understanding of law shows that use of *McDonnell Douglas* framework is nonmandatory).

305. *See* Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately) (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714–16 (1983)) ("[T]he Supreme Court has recognized the problems created by *McDonnell Douglas* and given us a precedent which enables us to ignore *McDonnell Douglas* without violating our lower-court duty to follow the dictates of the Supreme Court.").

306. *See* Malamud, *supra* note 11, at 2324 (speculating that in the framework's absence judges may fall back into "hard and fast" per se rules). For an example of one of these per se rules, see *supra* note 295, which discusses the stray remarks doctrine.

307. *See* Chin & Golinsky, *supra* note 17, at 673–79; Tymkovich, *supra* note 13, at 528–29.

308. *See* Malamud, *supra* note 11, at 2322–24 (warning that discarding the framework may make intentional discrimination more difficult to litigate and might encourage judges to expand their role in litigation by fashioning more "rules" of evidentiary sufficiency).

approaches sorely missing from the one courts currently employ in the disparate treatment context.

2. The What and Why

What follows is a preliminary sketch of what approaches from these areas could be deployed at disparate treatment summary judgment analysis, and an elaboration on the benefits of doing so.

Parallel to the Supreme Court's reasoning in *Harris v. Forklift Systems, Inc.*,[309] lower courts should adopt in their analysis of disparate treatment an analytic prong that looks to the plaintiff's perception of the circumstances surrounding the employment action in question.[310] This subjective inquiry would function to make a threshold determination as to the tenability of the plaintiff's claim, as it does in the hostile work environment context.[311] Although probably met in most instances, adoption of such an analytic variable would work to frame the inquiry in such a manner as to shift the focus off of the employer and toward a more holistic evaluation of the case. Moreover, it would encourage courts to evaluate more thoughtfully evidence flowing from the plaintiff's experience, such as portions of her deposition testimony, which, under the current framework, are often not credited or are passed over altogether.

As is evident in the hostile work environment context, the real value of a subjective prong is not in what it bears on its own but in its operation with the objective prong of the inquiry that follows it.[312] Disparate treatment law should adopt a similar objective prong that inquires into the circumstances of the employment action from the viewpoint of a reasonable employee. Such an inquiry would engender a fairer, more balanced assessment of the employment circumstances under which the employment action was taken and would thus aid in assessing the tenability and plausibility of the employer's reasons for its actions.[313] The question of employment discrimination will often turn on the soundness of the employer's business reasons for its actions, whether or not the question is analyzed under the *McDonnell Douglas* framework. And, as discussed, courts are reluctant to second-guess those reasons. Use of a "reasonable employee" standard would permit courts to consider plaintiff's own assessment of the circumstances while tempering the risk of courts' imposing on the employer's business judgment. Thus, for example, where the employee's performance is at issue, the court would not dismiss out of hand the employee's understanding of her own performance, but would depart from it to gauge whether there are objective indicia to support her view over the explanation provided by the employer. Adopting such an analytic approach would, at minimum, ensure consideration of the varying perspectives of both

309. 510 U.S. 17 (1993).

310. See *supra* notes 155–61 and accompanying text for a description of this inquiry in the hostile work environment context.

311. See *supra* note 159 and accompanying text describing this determination in the hostile work environment context.

312. See *supra* Part II.D.1 for a discussion of hostile work environment's bifurcated subjective/objective inquiry.

313. *Cf.* Deanna C. Brinkerhoff, Note, *A More Employee-Friendly Standard for Pretext Claims After* Ash v. Tyson, 8 NEV. L.J. 474, 491–92 (2008) (arguing for adoption of circumstance-specific "reasonable employer" standard in pretext evaluation).

parties rather than taking the employer's perspective as the baseline, as the *McDonnell Douglas* framework currently does.

Lower courts should also adopt circumstance- and identity-specific reasonableness standards.[314] Such standards would encourage courts to assess the circumstances surrounding the employment action from the perspective of a reasonable employee in plaintiff's protected class and situation.[315] Adoption of these standards would encourage judges to reflect on their own biases and preconceptions about workplace norms and conduct.[316] This would in turn encourage them to take account of indicia that could support an inference of discrimination that may have otherwise gone overlooked. These standards would function to bridge gaps in the disparate perceptual frameworks that currently exist among litigants and judges.

Because deciding whether an employment action was discriminatory often hinges on subtle questions of fact,[317] seemingly slight differences in the adjudicator's perceptual framework may have significant repercussions for the parties. This concern heightens at summary judgment, where a judge sits as a gatekeeper, deciding whether or not issues of fact exist for a jury. In disparate treatment cases, judges more often than not must interpret a factual record that is comprised of varied and potentially divergent pieces of circumstantial evidence. Receptiveness to subtle factual glosses can thus be critical to the very survival of a plaintiff's case.[318] Inquiring whether a reasonable employee in the plaintiff's circumstances would perceive the employment action as discriminatory would encourage judges at summary judgment to more receptively evaluate the record for issues of fact. It would, moreover, promote judges' consideration of the evidence in the light most favorable to the nonmoving party-employee—as is required at summary judgment.

The dominant consideration of both the hostile work environment and retaliation contexts is gauging a totality of the circumstances of the employment situation to determine whether the conduct under scrutiny can and should be deemed objectively injurious and therefore blameworthy.[319] In bifurcating the inquiry into subjective and

314. See *supra* Part II.D.2 for an explanation of these standards.

315. *Cf., e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 70 (2006) (deciding that retaliatory schedule change may make little difference to some employees, but to plaintiff, who was a young mother with school-age children, such action might deter her from complaining of discrimination); Ellison v. Brady, 924 F.2d 872, 879–82 (9th Cir. 1991) (deciding that harassing conduct of coworker, including love letters, references to sex, and repeated advances, were severe from reasonable woman's perspective, despite perhaps not appearing so from male perspective).

316. *See* Hart, *supra* note 72, at 745 ("[L]ike employers, judges are subject to cognitive biases and may be unable to see beyond their own assumptions in evaluating the merits of a case."). See *supra* notes 162–72 and accompanying text for a discussion of the Ninth Circuit's justification for adopting such standards.

317. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) (describing "elusive factual" nature of discrimination).

318. *See* Robinson, *supra* note 71, at 1164 ("In many instances, judges have created evidentiary rules that implicitly rest on substantive assumptions about the nature of discrimination. Although judges tend to frame these as neutral evidentiary rules, they may actually be vehicles for judicial skepticism about the prevalence of discrimination.").

319. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (objective severity of harassment should be judged from perspective of reasonable person in plaintiff's position, considering all circumstances). This is effectively the same inquiry in the retaliation context. See *supra* Part II.D.2 for a discussion of retaliation

objective prongs, these areas implicitly recognize that overall "objective" determinations are made, at least in part, through subjective channels of inquiry. Importation of this central idea into disparate treatment law via adoption of analytic methods from these areas would encourage a more holistic approach to evidentiary assessment at summary judgment and would discourage the sort of "divide and funnel" maneuvers that lower courts currently engage in to keep cases from going to a jury.

Disparate treatment under the *McDonnell Douglas* rubric does not offer a sound method or means to arrive at assessment of the overall circumstances of a litigated employment action, despite *Reeves*'s apparent exhortation that all of the plaintiff's evidence should count.[320] The inquiry under *McDonnell Douglas* essentially becomes boxed into an either/or decision between *either* believing the employer's stated reason *or* "something else." And this "something else" could be discrimination or not, depending on what the factfinder believes (or, in the case of summary judgment, depending on what the judge deems is sufficient to allow a factfinder to believe). To break out of this constrained analytic box, courts must begin asking questions that extend to the experiences of both parties, not just defendant, and which strive for a more complete view of the record evidence: Did plaintiff perceive the circumstances surrounding the employment action as discriminatory? Does the evidence objectively suggest that plaintiff's perception of the job situation was reasonable? Does the totality of the circumstances presented through the evidence tend to suggest a likelihood of discrimination? Only through questions so framed will courts be able to center disparate treatment analysis where it appropriately should be and allow plaintiffs' stories to emerge.

IV. CONCLUSION

The Supreme Court's post-*McDonnell Douglas* decisions left the burden-shifting framework intact, but only as a procedural skeleton.[321] In the hands of the lower courts, this skeleton has wreaked havoc. It has procedurally distracted courts from substantive issues and encouraged an understanding of the employment situation being litigated through a defendant-oriented perspective. At summary judgment, it has prevented courts from viewing plaintiffs' evidence as a whole and has consequently kept their stories from going to juries. On a macro scale, it has further perpetuated the "perpetrator perspective" and potentially hindered litigation from opening itself up to more productive and fairer ways of addressing the pernicious societal ill of employment discrimination.

As proposed in this Comment, adopting analytic devices from the hostile work environment and retaliation contexts is a legally defensible and desirable move toward opening up disparate treatment law to achieving those ends. Casting the inquiry at summary judgment, at least at one phase, through the channel of plaintiff's perspective

doctrine. *But see* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61 (2006) (noting that Title VII's antiretaliation provision is broader than its substantive antidiscrimination provision).

320. *See* Zimmer, *supra* note 74, at 600 (describing lesson of *Reeves* decision as being that all record evidence of plaintiff's should count). See *supra* notes 126–32 for a discussion of *Reeves*.

321. *See* Chambers, *supra* note 108, at 579 ("[I]n *Hicks*, the Supreme Court eliminated the implications of the *McDonnell Douglas* test while leaving that structure intact.").

creates distance between the court's own presuppositions as to what constitutes discrimination and the employer's presuppositions as to its own conduct. By tempering this inquiry with a reasonableness standard, courts would begin constructing a fairer, more objective, and balanced picture of the employment situation at issue.

It should be pointed out that employees' rights are not the only interest implicated by disparate treatment law's operating to deny plaintiffs their stories. Understanding better how an employee actually perceives the conduct she alleges to be discriminatory[322]—whether or not that conduct ultimately amounted to discrimination—can provide an employer the opportunity to reexamine its own practices and potentially encourage it to develop ones that foster more and better mutual understanding with its employees, thus preventing future litigation.[323]

To be sure, this Comment does not suggest that the adoption of analytic devices borrowed from the hostile work environment and retaliation contexts will act as some sort of panacea in the disparate treatment context. Indeed, those doctrines themselves have been criticized as they have been applied in the hands of the lower courts.[324] The proposals presented here are necessarily preliminary, but they suggest a direction courts can take based on existing, accepted doctrine, to assimilate the overarching principles gestured at by the Supreme Court's decisions in *Hicks* and *Reeves*. By adopting these approaches, lower courts would better position themselves to carry out Title VII's broad vision of eliminating the conditions of discrimination experienced by those victim classes whom it was designed to protect.

322. *See generally, e.g.*, Ann Hopkins, Price Waterhouse v. Hopkins*: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357 (2005) (providing a fascinating and insightful firsthand account of one plaintiff's experience of discrimination in the workplace).

323. *See* Susan Sturm, *Law's Role in Addressing Complex Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35, 54 (2005) (Laura B. Nielsen & Robert B. Nelson eds.) (discussing courts' role in creating legal "architecture" to shape norms that promote effective problem solving and conflict resolution between employers and employees).

324. *See, e.g.*, Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 74–75 (1999) (criticizing lower courts' use of summary judgment in hostile work environment claims whose factual bases do not merit it); Brake & Grossman, *supra* note 45, at 905 (arguing that developments in retaliation law have left plaintiffs unprotected).