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It is perhaps surprising that nearly forty years after Congress enacted Title VII,[1] courts still struggle with the most fundamental questions of how to analyze evidence proffered to prove discrimination, and how to instruct juries charged with determining whether employers have violated the law. Although jury trials have been available in Title VII cases only since Congress passed the far-reaching amendments contained in the Civil Rights Act of 1991,[2] the basic proof paradigms have been well-developed since the Supreme Court first confronted Title VII cases in the early 1970s.[3] The lower courts nevertheless

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1. "Title VII" is the shorthand label used to refer to the employment discrimination provisions of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-1 *et seq.* (2000).

2. *See* 42 U.S.C. § 1981a (2000) (providing for compensatory and punitive damages under Title VII and the Americans with Disabilities Act (ADA) in cases of intentional discrimination and trial by jury when such damages are sought). This provision was the centerpiece of the 1991 amendments. *See* Civil Rights Act of 1991, Pub. L. No. 102–166 § 102, 105 Stat. 1071 § 3 (1991) (describing the four purposes of the act and stating that one of the purposes was "to provide appropriate remedies for intentional and unlawful harassment in the workplace"). On the other hand, jury trials have been available under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (2000) since it was enacted in 1967. *See* 29 U.S.C. § 626(c)(2) (2000) (providing for a trial by jury in age discrimination employment actions); Lorillard v. Pons, 434 U.S. 575, 585 (1978) (finding Congress intended that "under the ADEA a trial by jury would be available where sought by one of the parties").

3. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (explaining proof paradigm for disparate treatment cases). Courts have applied the disparate treatment proof scheme without exception by courts in ADEA cases. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that Title VII requires elimination of practices that operate invidiously to discriminate on the basis of race unless related to job performance, regardless of employer's lack of discriminatory intent; that is, holding that the disparate impact theory is available under Title VII); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141–42 (2000) (citing lower court cases so holding, and assuming *arguendo* that the *McDonnell Douglas* framework applies to ADEA case). On the other hand, there has been greater doubt about whether the disparate impact analysis applies in ADEA cases. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (leaving open the question of whether a disparate impact theory of liability is

struggle to translate the statutory and Supreme Court pronouncements into jury instructions. These efforts are fraught with difficulty in part because, as the Court has noted, "the question facing triers of fact in discrimination cases is both sensitive and difficult."[4] The sensitivity of these factual questions derives in part from the awareness that laws against discrimination embody one of the nation's highest priorities.[5] The questions are also sensitive because it is a serious matter to charge an employer with flouting these fundamental prohibitions, and a difficult and emotionally challenging task to render a judgment about what really motivated an employer's decisions. Jurors, for the most part, are people who have held jobs and who may be sympathetic with persons who have suffered indignities in the workplace, and yet they do not want to impose liability unjustifiably and perhaps thereby unfairly label an employer as racist or sexist. More to the point, judges want to be sure that jurors make their decisions based only on the law and facts presented, and not on their sympathies for the plaintiff. Because the question posed in employment discrimination is sensitive and difficult, and because the cases typically involve factual situations that resonate in common workplace experiences, the courts' task of formulating instructions that clearly guide jurors' deliberations in accordance with the law is particularly crucial. The courts' task has frequently generated divergent views about how to understand the evidence and law in discrimination cases.

Another question somewhat analogous to the pretext instruction issue Mr. Vollmer discussed in his Note, that has also generated confusion, is whether to instruct a jury on "mixed motives" in the absence of direct evidence. The mixed motives rubric applies when it appears that both legitimate and illegitimate reasons motivated an employer to take action against an employee or applicant for employment. In a 1989 sex discrimination case, the Supreme Court decided that if an employer is partly motivated by a discriminatory reason it could nonetheless avoid liability if it could demonstrate that it would have made the same decision without reliance on the prohibited characteristic.[6]

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available under the ADEA).

4. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

5. *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (describing the ADEA as "but part of a wider statutory scheme to protect employees in the workplace nationwide" that includes Title VII and the Americans with Disabilities Act, and as "part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (describing Title VII's remedial provision for back pay as "part of a complex legislative design directed at an historic evil of national proportions").

6. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (stating that when a Title

Justice O'Connor wrote a concurring opinion in which she stated that the plaintiff would need to present "direct evidence" to show that the employer's "decisional process has been substantially infected by discrimination" before the special burden shift would be triggered.[7]

Congress responded to *Price Waterhouse v. Hopkins*[8] and other Supreme Court decisions by enacting the Civil Rights Act of 1991, which expressly overruled the premise that an employer could avoid liability under Title VII by establishing the same decision defense.[9] Instead, Congress provided that an employer that established it would have taken the same action "in the absence of the impermissible motivating factor" would not be liable for back pay, reinstatement, or damages, but would only be subject to declaratory and injunctive relief, attorney's fees, and costs.[10] The statute says nothing about the type of evidence needed to establish that a prohibited factor motivated a decision or to shift the burden to the employer to prove its affirmative defense. Most Courts regarded Justice O'Connor's concurring opinion in *Price Waterhouse* as the controlling analysis of the proof requirements in that case, and the majority of lower courts therefore assumed that the mixed motives burden-shifting depended on the plaintiff's presentation of direct evidence of discrimination.[11] Most lower courts' views on that point did not change with passage of the Civil Rights Act.[12]

In its recent decision in *Desert Palace, Inc. v. Costa*,[13] the Supreme Court attempted to alleviate the burgeoning confusion in the lower courts about the evidence necessary to trigger the mixed motives analysis and garner a mixed motives jury instruction in a Title VII case. The Court concluded, in a

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VII plaintiff proves gender was a motivating factor, "the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

7. *Id.* at 269, 270 (O'Connor, J., concurring).

8. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

9. *See* 42 U.S.C. § 2000e-2(m) (2000) (codifying the motivating factor standard for proving a violation when "other factors also motivated the practice").

10. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

11. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 852–53 (9th Cir. 2002) (surveying the opinions of the courts of appeals on the need for direct evidence in mixed motives cases, but holding that such a requirement is untenable under the statute and noting that the "best way out of th[e] morass" of contradictory and conflicting decisions by the courts of appeals is to "return to the language of the statute, which imposes no special requirement and does not reference 'direct evidence'"), *aff'd* 123 S. Ct. 2148 (2003); *see also* Desert Palace Inc. v. Costa, 123 S. Ct. 2148, 2152 (2003) (citing lower court cases that held direct evidence is required to establish liability under section 2000e-2(m)).

12. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2000).

13. Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

unanimous opinion, that a plaintiff need not present direct evidence of discrimination to obtain a mixed motives instruction.[14] Using the statutory text as its "starting point," the Court observed that "Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration."[15] The Court stressed that the statutory text "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[16] Moreover, the Court emphasized, the statute's silence on the type of evidence required in mixed motives cases "also suggests that [the Court] should not depart from the 'conventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases' . . . [that requires] a plaintiff [to] prove his case 'by a preponderance of the evidence' . . . using 'direct or circumstantial evidence.'"[17] As the Court continued the rationale for "treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[18] Accordingly, to obtain an instruction under § 2000e-2(m), the Court stated, "[A] plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[19]

While the Supreme Court found no basis in the statutory text or the law of evidence for a direct evidence requirement, the lower courts' misreading of the statute is understandable given their reliance on the prior Supreme Court decision in *Price Waterhouse*.[20] In contrast, the reason for the diverging views on the need for a "pretext" instruction—the topic of Mr. Vollmer's excellent Note—is somewhat less easy to comprehend.[21] The Note gives a

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14. *Id.* at 2155.

15. *Id.* at 2153.

16. *Id.*

17. *Id.* at 2154 (alteration in original) (citations omitted).

18. *Id.* (citation omitted).

19. *Id.* at 2155 (quoting § 2000e-2(m)).

20. In *Desert Palace*, the Court declined to decide whether Justice O'Connor's opinion had been the controlling opinion in *Price Waterhouse* because the "starting point" for analysis "is the statutory text." *Id.* at 2153.

21. The need for this instruction has been hotly contested in employment discrimination cases. It is an issue upon which the Equal Employment Opportunity Commission (Commission) has had occasion to express its views with some frequency. *See, e.g.*, Conroy v. Abraham Chevrolet-Tampa, Inc., No. 8:01-CV-1466 (M.D. Fla. 2003), *appeal pending* No. 03-11405-GG (11th Cir.) (in which the Commission filed a brief as amicus curiae); Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1233 (10th Cir. 2002) (same); Ratliff v. City of Gainesville, 256 F.3d 355, 357 (5th Cir. 2001) (same).

comprehensive, thorough, and balanced review of the evolution of the evidentiary standards and proof paradigms applied in employment discrimination cases, and of the arguments for and against mandating a pretext instruction, and concludes that whether to give a pretext instruction should be left to the court's discretion. From the perspective of a litigant for the agency charged with the interpretation, administration, and enforcement of the federal laws prohibiting employment discrimination, the Note's ultimate conclusion is not entirely tenable.[22] While Mr. Vollmer identifies an emerging split in the courts of appeals on whether a pretext instruction should be given as a matter of course, there is much less justification for the difference of opinion on this issue than there was for the difference of opinions on the mixed motives question. The Supreme Court has made it pellucidly clear that the pretext instruction embodies a correct statement of the law,[23] and thus, in the Commission's view, there is no basis for a trial judge's refusal to give this instruction to the jury in appropriate cases.

The instruction in question is usually formulated in something like the following language: "If you do not believe the defendant's stated reason for the decision, you may, but need not, presume the defendant was motivated by race discrimination."[24] This instruction is the "pretext" or "negative inference"

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22. Congress has specifically charged the Commission with enforcement authority for Title VII. *See* 42 U.S.C. § 2000e-4 (2000). It acquired from the Department of Labor the authority to enforce the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (2000) and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(2000), through the Executive Reorganization Plan of 1978, 5 U.S.C. § 901 *et. seq.* (2000); and it was charged by Congress with enforcement authority for the employment provisions in Subchapter I of the Americans with Disabilities Act of 1990, codified at 42 U.S.C. § 12101 *et seq.* (2000).

23. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (concluding that the prima facie case and sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination without additional independent evidence of discrimination).

24. *See, e.g.*, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1236–37 (10th Cir. 2002) (discussing plaintiff's proffer of an instruction identical to the Eighth Circuit Court of Appeals' Model Instruction 5.95, which states, "You may find that plaintiff's race was a motivating factor in defendant's decision to demote or discharge plaintiff if it has been proved by a preponderance of the evidence that defendant's stated reason(s) for its decisions are not the true reasons, but are a 'pretext' to hide discriminatory motivation"); *see also* Ratliff v. City of Gainesville, 256 F.3d 355, 359 (5th Cir. 2001) (plaintiff's proffered instruction stated, "If the Plaintiff disproves the reasons offered by Defendants by a preponderance of the evidence, you may presume that the employer was motivated by age discrimination."); Conroy v. Abraham Chevrolet-Tampa, Inc., No. 8:01-CV-1466 slip op. at 4 (M.D. Fla. Feb. 13, 2003) (plaintiff's proffered but rejected instruction stated, "A plaintiff may attempt to prove pretext directly by persuading you that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Disbelief of the defendant's explanation may be enough to infer discrimination.").

instruction plaintiffs ordinarily seek when they have attempted to prove their case through indirect evidence.

While it may sound like an oxymoron to suggest that it is "mandatory" for a court give an instruction on a "permissible inference," the real point is that, in many cases, if a court fails to give such an instruction the result will be prejudicial error.[25] Given that possibility, trial courts should ordinarily give the instruction and avoid the risk of reversal and the adverse effects on judicial economy and efficiency of needing to conduct new trials. To illustrate why it will usually constitute prejudicial error to refuse to instruct a jury on the permissible negative inference in cases involving purely circumstantial evidence, it might be helpful to consider the evidence in a hypothetical case, and then explain how the Title VII proof requirements would apply to that evidence. Consider the following hypothetical:

> Mr. Jones, an African American, began working for ABC Company in 1990 as a marketing manager, and over the course of ten years he received numerous merit raises and performance bonuses. In 1996, he was promoted to a pilot position as a unit manager in which he supervised six subordinate marketing managers and sales persons. He had a bachelor's degree in business administration when he was hired. During the course of his employment he attended classes at night and earned his MBA. He also took numerous training courses and programs provided by his employer in personnel management, emerging technology, new software programs used by the company, as well as workshops and seminars about each new product ABC intended to market. In 2000, a new director of marketing strategies transferred in as Mr. Jones's boss. Three months later the new director demoted Mr. Jones to a nonmanagerial position. The director told him the company's sales record no longer justified continuation of the unit manager position he had held for four years. Nine months later, ABC fired him, stating that things were not working out. Mr. Jones asked for a chance to improve his work and asked what he needed to do, but was told it was too late. He filed a charge with the EEOC alleging race discrimination in the decisions to demote and fire him.
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> ABC Company told the EEOC that it demoted Mr. Jones because of his poor performance and that it subsequently fired him for the same reason. When asked for specifics, the company said that it decided to demote Mr. Jones because he was not keeping up with new marketing strategies and was not good at motivating his subordinates. Further, the company said

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25. *See Townsend*, 294 F.3d at 1243 (reversing due to erroneous instructions); *Ratliff*, 256 F.3d at 364 (same); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998) (same); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994) (holding in housing discrimination case that the jury needs to be told that it "is entitled to infer, but need not infer" that defendant did not meet its burden of proof if the jury "disbelieve[s] the defendant's explanation").

> that after it demoted Mr. Jones, he became indifferent toward his job, did little work, and failed to submit a performance improvement plan as requested.
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> Mr. Jones asked for a right to sue notice and filed suit in federal court seeking reinstatement and damages under Title VII. His case was tried by a jury. Mr. Jones submitted the following evidence: that he was the only African American to have been promoted to a unit manager position; that his personnel file contained only positive evaluations of his performance in that position; that one month before his demotion he had been given a merit raise; that all of his subordinates had received awards and commendations from the company; that a white person with only two years of college was placed in his former unit manager position; that no one else had ever been demoted from a management position unless he or she had been counseled about performance deficiencies; and that he had not been asked to submit a performance plan but that two white employees who were told to submit performance improvement plans did not do so but were not fired.
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> ABC Company managers testified that they had repeatedly counseled Mr. Jones that they were concerned about his failure to motivate his subordinates and his failure to learn the new products the company planned to market. These managers stated that the individual they promoted to the unit manager position had exceptional managerial skills despite his lack of experience and education.

Why should the plaintiff get a pretext instruction at the end of this case? It is axiomatic that a plaintiff has a right to an instruction on his theory of the case, provided that his theory is both valid in law and supported by evidence in the record.[26] As the Third Circuit explained in *Smith v. Borough of Wilkinsburg*,[27] "It is black letter law that '[i]t is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth.'"[28] The court stressed that "it is clear that the jury must be given the legal context in which it is to find and apply the facts."[29] The question thus is whether the pretext instruction embodies the theory of the plaintiff's case in this scenario, or

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26. *See, e.g.*, Febres v. Challenger Caribbean Corp., 214 F.3d 57, 62 (1st Cir. 2000) ("A party has a right to an instruction on her theory of the case, provided that her theory is both valid in law and supported by evidence in the record."); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (stating that a plaintiff is entitled to instruction on legal theory if he or she submits evidence on the theory's requisite elements).

27. Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998).

28. *Id.* at 278.

29. *Id.* at 280.

whether it is just one of many possible permissible factual inferences that a jury may draw without special legal instruction to do so.

Although the overarching theory in every discrimination case is that the plaintiff has been the victim of discriminatory treatment, a fair statement of the specific theory, or of the legal context, to be submitted to the jury in many cases is that the plaintiff has proven that she was the victim of discrimination by demonstrating that the employer's stated reasons for its actions are incredible and that discrimination is therefore the more likely explanation for what happened. In the hypothetical case described above, for example, the plaintiff has no direct evidence of the employer's reason for demoting and firing him, so the theory he must present to the jury is that the reasons the employer has given are so obviously contrived, contradictory, and contrary to the evidence that the employer must be lying to cover up a discriminatory motive. If that is the theory, he is entitled to the pretext instruction if it is a correct statement of the law and if his evidence supports that theory.[30]

There cannot be any real doubt that the pretext instruction captures an accurate legal principle. It is instructive, however, to review how the pretext issue emerges as the central disputed point in most circumstantial evidence cases in order to understand why the instruction is both legally sound and crucial to guide the jurors' deliberations in such cases. To prevail on a Title VII claim, all that the statute requires is that a plaintiff demonstrate that race or another protected characteristic (color, religion, national origin, or sex) was the cause of an employment decision.[31] Quite simply, all that is meant by intentional discrimination is that a prohibited characteristic motivated the decision. A plaintiff may prove such an intentional discrimination claim without producing any direct or affirmative evidence of the employer's motive for its decision.[32] This point is crucial because plaintiffs seldom have access to

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30. *See supra* note 24 and accompanying text (stating that a plaintiff has a right to a jury instruction on his theory if his theory is supported by law and evidence).

31. *See* 42 U.S.C. § 2000e-2(a) (2000) (defining unlawful employment practices). Specifically, the statute states:

> (a) It shall be an unlawful employment practice for an employer–
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> (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[.]

Id.

32. *See, e.g.*, Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2154 (2003) (finding that conventional rules of civil litigation apply in Title VII cases, permitting plaintiffs to prevail when they prove their cases by a preponderance of the evidence using either or both circumstantial and direct evidence (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983))).

any direct evidence of the employer's discriminatory motives.[33] Whatever type of evidence the plaintiff relies on, the central factual question in most cases that get to a jury is whether the motive for the employer's action was discriminatory.

The Supreme Court long ago endorsed a three-part allocation of burdens of production to guide the inquiry into the ultimate question of whether discrimination was the reason for a challenged employment decision when there is no direct evidence of the employer's motives. This framework is used by courts to assess the sufficiency of evidence to survive summary judgment, so if cases are submitted to a jury there is usually no need for discussion of this proof scheme. Nevertheless, it is helpful to understand the paradigm to appreciate the pretext issue and the evidence that is presented and argued to juries. First, the plaintiff must establish a prima facie case consisting of four essential points: membership in a protected class (which is usually obvious and easy to establish, since all persons of all races, colors, national origins, religions, and both genders are protected by Title VII); qualification for the job in question (meaning that she meets the stated experience and educational requirements for the job); that she applied for the job and did not get it (or that she was discharged if it is a discharge case); and that the job remained open and the employer hired someone (usually outside the protected class) of similar qualifications (or replaced the plaintiff with someone of similar qualifications in a discharge case).[34] The Supreme Court has emphasized that the prima facie showing is not onerous,[35] and that the elements are flexible and must be adapted to the particular factual situation.[36]

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33. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) ("[T]here will seldom be 'eyewitness' testimony as to the employer's mental processes." (quoting *Aikens*, 460 U.S. at 716)).

34. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (summarizing the lower court's finding that a prima facie case was established by proving that plaintiff was black, qualified for the job, demoted from the job and discharged, and that the position remained open until it was filled by a white man); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the prima facie case for racial discrimination); *accord* Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 n.6 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802).

35. *Burdine*, 450 U.S. at 253.

36. *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations."); *accord Aikens*, 460 U.S. at 715 (noting that plaintiff's burden of proof to establish a prima facie case varies with the facts); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (suggesting that the *McDonnell Douglas* inquiry is not rigid); *Burdine*, 450 U.S. at 253–54 n.6 (same (quoting *McDonnell Douglas*, 411 U.S. at 802)).

The point, for purposes of this discussion, is that proof of these facts eliminates the two most common reasons that someone may not get hired for a job—that she does not meet the stated qualifications or that the employer decided not to hire anyone at the time.[37] In the Jones hypothetical, the plaintiff established the requisite prima facie elements by showing that he is a protected minority, that he was qualified for the job by virtue of his education and experience and with evidence of his performance reviews, promotion and bonuses, that he suffered adverse employment actions, and that others outside his protected class received more favorable treatment. This showing creates a rebuttable inference of discrimination because it eliminates the possibilities that ABC Company fired Mr. Jones because he was unqualified to do the job or that ABC simply eliminated his job for economic reasons.

As the Supreme Court has explained, if the plaintiff meets this light burden it then becomes necessary for the employer to explain the reason for its decision.[38] An employer loses if it offers no explanation.[39] The reason for this result, according to the Court, is that it is presumed that employers are rational and act for some reason when making employment decisions,[40] and that they are in the best position to explain what those reasons are.[41] The employer's burden is only to explain what its reason is. It does not have to prove by a preponderance that it took the action for the stated reason.[42] In the hypothetical case, ABC Company met its burden when it advanced as a reason for Mr.

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37. *See Burdine*, 450 U.S. at 253–54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (stating that the *McDonnell Douglas* formula requires plaintiffs to eliminate "the two most common legitimate reasons . . . to reject a job applicant").

38. *See McDonnell Douglas*, 411 U.S. at 802 (explaining that the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its decision).

39. *See Hicks*, 509 U.S. at 509 (stating that no issue of fact remains for the trier of fact if the defendant "has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a non-discriminatory reason for the adverse action").

40. *Furnco Construction*, 438 U.S. at 577 ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.").

41. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) ("[T]he employer is in the best position to put forth the actual reason for its decision.").

42. *See* Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 257 (1981) (stating that an employer need not persuade the trier of fact, but must produce admissible evidence of a nondiscriminatory reason for the employment decision to rebut the presumption raised by the plaintiff's prima facie case); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the employer's burden).

Jones's demotion and subsequent termination that his performance was poor in that he did not learn new marketing strategies or motivate his subordinates.

After the employer meets its burden of articulating a reason, the case moves to the third stage and the plaintiff has the opportunity to prevail by attacking the credibility or veracity of the employer's stated reason for its decision.[43] Of course this description of the proof burdens does not control the presentation of evidence at trial and when we say that the case "moves" to the third stage, that only describes a step in the analysis of the evidence, not any actual sequence of events in the courtroom. In the hypothetical Jones case, at this third stage it is apparent that Mr. Jones can prevail only if the jury believes the employer is lying to hide a discriminatory motive. Mr. Jones has no direct evidence of ABC's motive, but he has considerable circumstantial evidence that casts doubt on the company's explanation that it fired him for performance problems. His evidence shows that a month before he was demoted he had been given a merit raise, that his personnel file contained only positive evaluations and that his subordinates had received awards and commendations (despite the allegation that he did not know how to motivate his subordinates). Further, his evidence showed that he was the only African American who had ever held a management position and that after firing him, ABC Company placed a white person in his job who had markedly less education and experience. Finally, his evidence showed that the company did not follow its usual policy of counseling him about his performance deficiencies (although the company maintained it had), that he tried to find out how to improve, that he was not asked to do a performance improvement plan, and that two other employees who failed to do an improvement plan when asked were not fired. All of this evidence may make the company's stated reasons seem incredible, but it does not directly prove that the company had a discriminatory motive.

The point of the pretext instruction is to assist jurors analyzing this type of evidence to answer properly the ultimate question of what motivated the employer. According to the Supreme Court Decision in *Reeves v. Sanderson Plumbing Products, Inc.*,[44] if the fact-finder does not believe that the employer's stated reason is true, then the fact-finder is permitted to infer that the real reason for the action is discrimination.[45] In *Reeves*, the Court held that

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43. *Burdine*, 450 U.S. at 256 (explaining that shifting burdens are necessary to ensure that the plaintiff will have the opportunity to prove that the proffered justification is a pretext for discrimination). The Court further stated that the plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256.

44. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

45. *See id.* at 148 ("[A] plaintiff's prima facie case, combined with sufficient evidence to

the prima facie case and sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination without additional independent evidence of discrimination, although such a showing will not always be adequate to sustain a jury's finding of liability.[46] The question posed by Mr. Vollmer's Note is whether jurors need to be told this, or if they will know it from their common experiences.

The Commission believes that if cases are submitted to juries,[47] the lesson of the *Reeves* decision is that it is incumbent on trial courts to instruct jurors that if they do not believe the employer's stated reasons for its actions, they are entitled to infer that the pretextual reason is a cover up for discrimination.[48] In the Jones hypothetical case, we have established that the plaintiff's theory is that he was demoted and fired because of his race and that a jury can reasonably come to that conclusion based on the employer's shifting and apparently false explanations for its decisions. We have said he is entitled to an instruction that articulates his theory of the case if it is a correct statement of the law, and it is supported by the evidence in the record. Here, the plaintiff's proof clearly satisfies this burden, and in the absence of any direct evidence of motive or animus, the plaintiff can prevail only if the jury believes the employer is lying to hide a discriminatory motive.

In the Commission's view, the permissive inference instruction should be given in such cases because, first and foremost, it correctly states the law on the plaintiff's central theory of his case, and second, without it there is a very real risk that jurors will find for the defendant because they think the plaintiff is required to prove his case through affirmative evidence. When typical jury charges are examined as a whole, it is easy to see why jurors might reach that conclusion. Jury charges always contain an instruction that the plaintiff must prove discrimination by a preponderance of the evidence and that it is her

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find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.").

46. *Id.* at 148.

47. Obviously, some cases do not warrant submission to a jury because the plaintiff has not made out a prima facie case or has failed to present any credible evidence that rebuts the employer's stated reasons for its decision. In such cases, courts properly award summary judgment to the defendant. *See, e.g.*, Dammen v. UniMed Med. Ctr., 236 F.3d 978, 982 (8th Cir. 2001) (affirming summary judgment for defendant, and concluding that plaintiff's weak prima facie evidence and the low probative value of plaintiffs' pretext evidence did not constitute a submissible case of age discrimination where plaintiff failed to contradict many of the reasons defendant offered for plaintiff's discharge).

48. *See Reeves*, 530 U.S. at 148 (factfinder's disbelief of reasons put forward by defendant may, together with elements of prima facie case, allow jury to infer ultimate fact of intentional discrimination); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (same).

burden to do so.[49] It is not unreasonable for a juror to think that "evidence" means affirmative proof. Jury charges also typically contain an instruction not to second-guess the business judgments of the employer, and that directive increases the likelihood that they will find discrimination only if the plaintiff has presented affirmative evidence of bias.[50]

Although the inference that someone may lie to cover up an illegal motive is simple to draw, it is not intuitively obvious. This point generated enormous confusion for courts as they struggled to clarify the relationship between finding that the employer's stated reason is "unworthy of credence,"[51] that is, that it is a pretext, and finding that the employer discriminated. The Supreme Court emphasized in *St. Mary's Honor Center v. Hicks*[52] that the plaintiff always retains the ultimate burden of proving discriminatory intent.[53] The Court's language in *Hicks* led some courts to believe that the pretext and ultimate discrimination issues were separate questions and they assumed that evidence of pretext was not sufficient, by itself, to support a finding of discrimination. Thus, they read *Hicks* to mean that the plaintiff must produce some affirmative evidence of discriminatory motive in addition to the prima facie case and pretext evidence.[54] These courts thus imposed a "pretext plus"

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49. *See, e.g.*, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1243 (10th Cir. 2002) (Henry, J., concurring) (discussing this "preponderance of the evidence" instruction and its potential for confusing jurors when they reach the pretext question).

50. For example, in *Conroy v. Abraham Chevrolet*, No. 8:01-CV-1466, slip op. at 4 (M.D. Fla. Feb. 13, 2003), the court instructed the jury:

> So far as you are concerned in this case, an employer may discharge, refuse to promote or otherwise adversely affect an employee for any other reason, good or bad, fair or unfair, and you must not second guess that decision or permit any sympathy for the employee to lead you to substitute your own judgment for that of Defendant even though you personally may not approve of the action taken and would have acted differently under the circumstances.

51. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 256 (1981).

52. St. Mary's Honor Ctr.v. Hicks, 509 U.S. 502 (1993).

53. *See id.* at 518 (quoting *Burdine's* holding that "[t]he plaintiff retains the burden of persuasion").

54. *See, e.g.*, Gillins v. Berkeley Elec. Coop., 148 F.3d 413, 416–17 (4th Cir. 1998) (stating that although plaintiff demonstrated that defendant's reasons were "obviously contrived," such evidence "is not in itself sufficient" to survive summary judgment because a "pretext-plus" standard for summary judgment applies); Fisher v. Vassar Coll., 114 F.3d 1332, 1347 (2d Cir. 1997) (en banc) (reversing a finding of discrimination despite a sustainable finding of pretext because there was not sufficient evidence of discrimination); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994) (stating that plaintiff must have adequate direct or circumstantial evidence of animus beyond evidence of pretext to survive summary judgment); Marcantel v. La. Dep't of Transp. & Dev., 37 F.3d 197, 200 (5th Cir. 1994) (stating that *Hicks* instructs that "the 'pretext-only' doctrine is not enough; even if the employee proves that the employer's nondiscriminatory reason is pretextual, the plaintiff must

burden on plaintiffs in their effort to tease out what it meant for a stated reason to be a pretext for discrimination. The Supreme Court granted certiorari in *Reeves v. Sanderson Plumbing Products, Inc.* to clarify this precise point.[55] Because courts have found this basic evidentiary rule so difficult to apply, the Commission agrees with the Third Circuit that "[i]t does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing [an] inference [of discrimination from the falsity of the employer's proffered explanation]."[56] Given the differences of opinion among judges over the years concerning how a jury may use its finding of pretext, "it would be disingenuous to argue that it is nothing more than a matter of common sense."[57] Although Judge Brorby thinks this whole question of the permissive negative inference is more difficult for judges than for jurors, who are more likely to rely on common sense and realize that trials are just about

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prove that an unlawful discriminatory intent motivated the employer's action"); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000) (explaining that the Court granted certiorari to resolve conflict among the circuits "as to whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination") (citation omitted).

55. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140–41 (2000). Even though the *Reeves* decision gave clear guidance on this point, a number of courts continue to reject plaintiffs' cases because they do not have sufficient evidence beyond the showing of pretext. *See, e.g.*, Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 47 (1st Cir. 2002) (stating "the slight suggestion of pretext here, absent other evidence from which discrimination can be inferred," did not meet plaintiff's burden in Title VII national origin discrimination case and granting summary judgment for employer); Price v. Fed. Express Corp., 283 F.3d 715, 725 (5th Cir. 2002) (affirming summary judgment because plaintiff failed to produce evidence that the employer's nondiscriminatory explanation was false and failed to present evidence raising an inference of racial discrimination). In *Price*, an African American plaintiff met all job prerequisites and had far more company seniority than selected white candidate. *Id.* at 718. He lacked some posted qualifications but had military and police investigative experience that arguably made him a better choice for security manager. *Id.* at 719. The court found that the plaintiff's evidence did not disprove employer's explanation that the selected candidate was better qualified, but went on to state that even assuming plaintiff "presented evidence showing that FedEx's explanation is pretextual, his evidence of pretext does not support an inference that intentional discrimination was the real reason for the employment decision." *Id.* at 723; *see also* Mathes v. Furniture Brands Int'l, Inc., 266 F.3d 884, 887 (8th Cir. 2001) (affirming summary judgment for defendant in an ADEA case where the court concluded that plaintiff's proof was insufficient to get to trial because it "created only a very weak inference" that defendant's reason for firing her was untrue; although the evidence showed defendant discharged her for reasons other than her poor performance, the reason supported by the evidence was that her boss had a personal preference to work with his previous secretary).

56. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998) (remanding the case for a new trial because the court failed to instruct jury on "pretext").

57. *Id.*

whose story to believe,[58] in fact that assumption may unfairly denigrate the "legal professionals" who have found this to be a thorny question. The question has been a thorny one for precisely the reason identified at the outset: Deciding someone has violated the laws against discrimination is a weighty responsibility and it is a tough call to make when there is no affirmative evidence of discriminatory animus.

Of course, the inference is only permissible, and jurors may certainly refuse to draw that conclusion. Indeed, "the plaintiff may or may not ultimately prevail in the litigation [by discrediting the employer's explanation], because the factfinder may or may not choose to make the permissible inference of discrimination."[59] Absent an instruction on pretext, however, there is no way to know whether the jury exercised its prerogative not to make the inference, or did not realize such an inference is permissible. That is precisely why in recent decisions the courts of appeals have found reversible error in the refusal to give a pretext, or negative inference instruction.[60] In *Townsend v. Lumbermens Mutual Casualty Co.*,[61] the Tenth Circuit recognized that the significance of pretext in determining discrimination has been a difficult matter for the courts and "would certainly be difficult for a jury."[62] Reasoning that "the danger [is] too great that a jury might make the same assumption that the Fifth Circuit did in *Reeves*," the court held:

> [I]n cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory. Moreover we are persuaded by the position of the EEOC that the issue is whether in the absence of any instructions about pretext, "the jury found for the defendant because it believed the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment decisions."[63]

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58. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1247 (10th Cir. 2002) (Brorby, J., dissenting) ("While the question of how much weight should be given to evidence of pretext in discrimination cases has proven thorny for legal professionals, I doubt the jury viewed this case as anything more than a trial to decide which party was telling the truth.").

59. Combs v. Plantation Patterns, 106 F.3d 1519, 1530 (11th Cir. 1997); *cf.* Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 650–51 (4th Cir. 2002) (upholding trial court's decision to give pretext instruction because the "instructions . . . made clear that the jury could, but did not have to, infer discrimination if it disbelieved [the employer's] explanation").

60. *See, e.g.*, *Townsend*, 294 F.3d at 1241 (finding error due to inadequate jury instruction); Ratliff v. City of Gainesville, 256 F.3d 355, 364 (5th Cir. 2001) (finding error in the district court's refusal to give an inference instruction).

61. *Townsend*, 294 F.3d at 1247 (10th Cir. 2002).

62. *Id.* at 1241.

63. *Id.* (quoting EEOC's brief as amicus curiae).

The trial court in *Townsend* instructed the jury that for the plaintiff to recover on his federal employment discrimination claim, he had to "prove by the preponderance of the evidence that defendant intentionally discriminated against plaintiff." The concurring judge in *Townsend* explained that giving this "burden of proof" instruction, without an accompanying explanation of the permissive inference that arises from a finding of pretext, is likely to confuse the jury since a "rational juror might very well have interpreted such an instruction to require affirmative proof of discriminatory intent."[64] Because of this potential jury confusion, "absent the proposed [pretext] instruction, jurors are left without adequate guidance as to the circumstances in which they may infer discriminatory intent."[65]

In *Ratliff v. City of Gainesville*,[66] the Fifth Circuit similarly remanded plaintiff's ADEA claim for a new trial, holding that, "in light of the changes made to a plaintiff's evidentiary burden in discrimination cases outlined in *Reeves*, the district court erred in failing to give an inference instruction."[67] Consistent with the Fifth Circuit Pattern Jury Instructions, the district court in *Ratliff* had advised the jurors that they were "permitted to draw such reasonable inferences from the testimony and exhibits as . . . are justified in the light of common experience,"[68] but did not instruct the jury that it could infer that the employer's explanation was a pretext for discrimination if it disbelieved the employer's proffered reasons.[69] The Fifth Circuit rejected Gainesville's arguments that the plaintiff's requested "pretext" instruction was redundant in light of the general inference instruction and held that the requested instruction was warranted.[70]

Those who believe the inference instruction is unnecessary suggest that it will confuse jurors by focusing their attention on the intermediate question of pretext rather than the ultimate question of discrimination, and by introducing legal jargon such as "prima facie case" and "burden of production." The first concern is misplaced because the point is that the pretext inquiry *does* merge with the ultimate finding of discrimination and that the two questions are

64. *Id.* at 1243 (Henry, J., concurring).

65. *Id.* at 1244 (Henry, J., concurring).

66. Ratcliff v. City of Gainesville, 256 F.3d 355 (5th Cir. 2001).

67. *Id.* at 364.

68. *Id.* at 360 nn. 5–6.

69. *See id.* (listing jury instructions).

70. *Id.* at 361 n.7; *see also* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998) (remanding for a new trial because the district court failed to give "pretext" instruction); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994) (holding that the court must inform the jury of the permissive inference).

intertwined. Rather than being an "intermediate" question, in indirect evidence cases the pretext issue is really interconnected with the ultimate question. It is, in essence, the whole ball game.[71] Further, the concern that such an instruction necessarily involves the introduction of legal jargon is not a fair criticism because it is a simple matter to frame the desired inference instruction without using any legalistic terminology.[72]

A related concern is that singling out this permissible inference gives it undue emphasis because it is just one of an infinite number of permissible inferences that jurors may make.[73] There are two responses to this concern. First, the other permissible inferences typically involve affirmative conclusions that may be drawn from facts in evidence.[74] For example, if the plaintiff introduces evidence of stray remarks (that is, racial slurs directed at people other than the plaintiff or made by people other than the decision maker), statistical evidence (showing disproportionate underrepresentation of a particular group), or the different treatment of similarly situated persons (as in the Jones hypothetical facts that white persons who did not submit performance improvement plans were not fired), the jury is readily able to understand that such facts may suggest that the bias they reveal affected the employer's treatment of the plaintiff. The jury may infer from affirmative evidence that these facts may suggest that bias infected the decision the plaintiff is challenging. But, in the negative inference context, the jury is allowed to conclude that the employer has a discriminatory motive simply because it does not believe the employer's explanations for what it did. Even more important than the qualitative difference in the negative inference involved in the pretext instruction, which lifts it out of the realm of the other typical permissive factual inferences, is the fact that the negative inference deserves emphasis because it is so integral to the plaintiff's theory of his case. For this reason, it is simply too significant to omit.[75]

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71. *See, e.g.*, Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 256 (1981) (finding that pretext burden "merges with the ultimate burden").

72. *See supra* note 24 and accompanying text (giving sample instruction language).

73. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1245–46 (10th Cir. 2002) (Brorby, J., dissenting) ("In some instances, a facially neutral permissive inference might draw unwarranted attention to a small portion of evidence presented at trial or mislead the jury as to the applicable law.").

74. *See, e.g.*, William J. Vollmer, *Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 407, 441 (explaining possible inferences).

75. *See Townsend*, 294 F.3d at 1244 (Henry, J., concurring) ("[A]bsent the proposed instruction, jurors are left without guidance . . . .").

There is also an argument that the instruction is unnecessary because the point is better made by counsel in closing argument. Counsel's arguments, however, are not an adequate substitute for a complete and accurate statement of the law by the judge.[76] It is the trial court that "must ensure 'that the jury [is] given full and complete instructions by relating the law to the relevant evidence in the case.'"[77] As the Tenth Circuit noted in *Townsend*, "While counsel may be relied on to point out facts and suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. This is particularly true where, as here, the law goes to the heart of the matter."[78] Indeed, as the Third Circuit noted in *Smith v. Borough of Wilkinsburg*,[79] "It is difficult to understand what end is served by reversing [or, as in this case, denying] the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext . . . if the jurors are never informed that they may do so."[80]

Although plaintiff's counsel may certainly argue to jurors that they can infer discrimination if they do not find the employer's explanation credible, the real thrust of the argument will usually be an effort to persuade the jury on that basic factual issue, that is, to persuade the jury that the employer's reason is not credible. In the Jones hypothetical, counsel would argue that the jury should believe Mr. Jones's version of events that he was never counseled about his performance or told to prepare a performance improvement plan. Counsel would also argue that the lie to Jones that the employer's unit manager position was being eliminated, and the employer's subsequent choice of a less qualified white person to fill that very position, demonstrate that its stated reasons are untrue. Counsel would argue that the very fact the company gave different reasons at different times for its decision supports the conclusion that the company is lying. Finally, of course, counsel would argue that all these incredible statements have been offered to cover up a discriminatory motive.

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76. *But see* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (stating that "a judge need not deliver instructions describing all valid legal principles"); *see also* Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 n.9 (8th Cir. 2001) (expressing doubt, in dicta, that the pretext instruction is compulsory); Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (same).

77. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 279 (3d Cir. 1998) (quoting Choy v. Bouchelle, 436 F.2d 319, 325 (3d Cir. 1970)).

78. *Townsend*, 294 F.3d at 1241; *see also Smith*, 147 F.3d at 278 (noting the "inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case" (internal quotes and citations omitted)).

79. Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998).

80. *Id.* at 280.

That last argument may well confuse the jury because it has heard that the *judge* will explain the applicable law, and this point about permissible inferences sounds like a legal principle. In other words, from a juror's perspective, although it would seem to be appropriate for counsel to emphasize the evidence that permits the jury to infer that the employer's reason is not true, it is a qualitatively different argument to tell the jury it can conclude, despite the absence of affirmative evidence, that its disbelief in the employer's reason permits it to assume the employer is lying to cover up a discriminatory motive.

Meanwhile, defense counsel in this situation would argue just as vigorously that its reasons are true, that it had a legitimate concern with Mr. Jones' job performance and that it tried in good faith to let him know about his deficiencies. Counsel would no doubt emphasize that the plaintiff did not produce a shred of evidence that the employer acted with discriminatory animus—that he could not produce any witness who ever heard a racial slur or any suggestion by anyone that Mr. Jones's race had anything to do with his difficulty in motivating his subordinates or his poor performance. Without a statement of the law from the judge, the jury would have no neutral statement of the legal rules that could legitimately guide its evaluation of the evidence. Providing a statement of the governing rules is the judge's job, and it simply cannot be done by counsel through argument, because then it sounds like an argument instead of a rule.

In sum, the pretext instruction embodies a simple and common sense principle that can be explained in nontechnical language. It embodies a correct and crucial statement of the law that goes to the heart of the majority of circumstantial evidence cases that go to a jury. Without the instruction there is a very real possibility that jurors will not realize they are legally permitted to find discrimination in the absence of affirmative evidence and that reviewing courts will not be able to tell whether the absence of this instruction misled the jury. Because the Supreme Court has twice instructed the lower courts that the permissible inference is a legally correct and critically important principle in employment discrimination cases, the lower courts should follow the logic of *Hicks* and *Reeves* and act to create uniformity among the circuits without the necessity for further Supreme Court review of this legal point. Because there is no conceivable downside to giving the instruction, and because there is no legal impediment and no risk of reversal on that basis, the courts should follow the wise guidance of the Second, Third, Fifth and Tenth Circuits, and routinely give a pretext instruction when the plaintiff has offered credible evidence of pretext in a circumstantial evidence case.