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The Imperative of Instructing on Pretext: A Comment on William J. Volmer's Pretext in Employment Discrimination Litigation. Mandatory Instructions for Permissible Inferences?

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I. Introduction

Over the decades, courts have regularly described certain principles of employment discrimination law in terms evocative of a species of physical trial, akin perhaps to calf roping or alligator wrestling. Courts have "grappled,"[1]

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1. *See, e.g.*, Misra v. Smithsonian Astrophysical Observatory, 248 F.3d 37, 39 (1st Cir. 2001) (stating that courts have "grappled" with the question of whether Title VII of the Civil Rights Act of 1964 offers Smithsonian employees a remedy for employment discrimination); Cox v. City of Memphis, 230 F.3d 199, 203 (6th Cir. 2000) ("Only a handful of lower courts have grappled with the issue of tainted eligibility lists."); Devlin v. Transp. Communications

"wrestled,"[2] and "struggled"[3] with the slippery concepts that are the hallmarks of the field and observers still conclude that some of the unruly targets of these exertions remain unsubdued.[4] The tripartite evidentiary framework for disparate treatment cases, which the United States Supreme Court first articulated in *McDonnell Douglas Corp. v. Green*,[5] has been among the most difficult employment discrimination doctrines to pin down.[6] Moreover, when Congress, in the Civil Rights Act of 1991,[7] established the right to a jury trial for Title VII claims,[8] it exacerbated the difficulties that *McDonnell Douglas*

Int'l Union, 173 F.3d 94, 99 (2d Cir. 1999) ("grappling" with the differences between pregnancy-based and age-based employment discrimination); West v. Phila. Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995) (commenting that courts grapple with the question of defining when an unlawful employment practice actually occurs).

2. *See, e.g.*, Nielsen v. Moroni Feed Co., 162 F.3d 604, 608 (10th Cir. 1998) (contending that courts have "wrestled with the relationship between a disability and conduct related to that disability" in cases involving disability-based employment discrimination); Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1100 (11th Cir. 1987) ("wrestling with the liquidated damages issue" in a disparate treatment case); Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985) ("wrestling" with the interrelationships of the tripartite evidentiary framework in a religious discrimination case).

3. *See, e.g.*, Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467 (2d Cir. 2001) (stating that courts have struggled with the question of whether a plaintiff "may" or "must" show a prima facie case); Iadimarco v. Runyon, 190 F.3d 151, 158 (3d Cir. 1999) (contending that "courts have struggled" in applying the tripartite evidentiary framework in some cases); Smith v. Borough of Wilkinson, 147 F.3d 272, 278 (3d Cir. 1998) (asserting that courts have "struggled" to define the evidentiary framework used in employment discrimination cases).

4. *See, e.g.*, Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659 (1998) (contending that the analysis adopted by the Supreme Court in employment discrimination cases has been "heavily criticized by judges, practitioners, and academics alike"); Michael L. Murphy, Note, *The Federal Courts' Struggle with Burden Allocation for Reinstatement Claims Under the Family and Medical Leave Act: Breakdown of the Rigid Dual Framework*, 50 CATH. U. L. REV. 1081, 1095–1129 (2001) (discussing the existing confusion in the courts under the Family Medical Leave Act); John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 749 (2002) (commenting that courts have been unable to clarify what intentional discrimination means because it is indefinable).

5. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a summary of the tripartite framework, see *infra* note 21.

6. Ironically, because of the sheer numbers of disparate treatment claims filed each year, it is likely that the *McDonnell Douglas* framework is also the most frequently applied doctrine. Westlaw's KeyCite listing for the decision, last checked on October 14, 2003, reflects 44,912 entries, and notes that the decision has been cited or applied in fifty-two Supreme Court and 4,807 Court of Appeals decisions in the three decades since it was decided.

7. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

8. 42 U.S.C. § 1981a(c) (2003), added by § 102 of the Civil Rights Act of 1991; Pub. L. No. 102-166, 105 Stat. 1071 (1991), at § 1977A(a).

posed. The tripartite framework, developed and refined for the analysis of evidence at summary judgment or a bench trial, was not easily imported into the rubric of jury trials, and courts struggled with translating its core concepts into common speech understandable by juries.[9]

It is onto this well-trammeled pitch that William J. Vollmer steps with his excellent Note. In *Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*,[10] Mr. Vollmer meticulously documents a split that has developed in the Courts of Appeals over whether to mandate a jury instruction on pretext in the appropriate disparate treatment case.[11] Mr. Vollmer crystallizes the arguments for[12] and against[13] requiring a pretext instruction and ultimately concludes that the balance weighs in favor of leaving the matter to the trial court's discretion.[14] As I discuss below, Mr. Vollmer's conclusion has considerable merit and, when viewed through the lens of the law that applies to the question of how (or if) to instruct juries on permissible inferences, it seems almost inevitable. But I propose to push two aspects of Mr. Vollmer's discussion further in an effort to add some luster to the case in favor of requiring the instruction.

Part II provides an obligatory summary of the post-1991 Civil Rights Act Supreme Court jurisprudence on the question of pretext.[15] In Part III of this Article, I will explore whether instructions that do not address pretext are truly adequate to charge the jury on the applicable law in a disparate treatment case in which the plaintiff has made a threshold showing of pretext. Next, in Part IV, I will consider Mr. Vollmer's suggestion that any risk inhering in the failure to give such an instruction can truly be avoided through the arguments of

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9. *See* EDWARD J. DEVITT ET AL., 3A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.04 (4th ed. 2000 Supp.) (proposing a simplified instruction and collecting cases that address the propriety of reciting the *McDonnell Douglas* burden shifting formula in instructions to the jury); *see also infra* note 43 and accompanying text (discussing model instructions adopted by the Eighth, Ninth, and Eleventh Circuits).

10. William J. Vollmer, Note, *Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?*, 61 WASH. & LEE L. REV. 407 (2004).

11. *See id.* at 417–29 (discussing the circuit split over whether courts should instruct a jury that it may infer intentional discrimination if it does not believe the defendant employer's justification for the discriminatory result).

12. *See id.* at 429–35 (stating the argument for mandating the use of this inference in jury instructions).

13. *See id.* at 435–42 (describing the argument against requiring the pretext instruction).

14. *See id.* at 443–44 (concluding that the prudent and conservative path is that this decision should fall within the discretion of the trial court).

15. Readers seeking a complete chronicle of this evolution should refer to Mr. Vollmer's thorough discussion. *See* Vollmer, *supra* note 10, at 413–16 (discussing the development of the *McDonnell Douglas* framework).

counsel. Finally, I will suggest that a shift in perspective on these two points may be sufficient to tip the balance in favor of requiring the instruction in an appropriate case.

II. The Supreme Court's Pretext Jurisprudence

The passage of the Civil Rights Act of 1964 was one of the watersheds in the development of the United States' national conscience regarding citizens' entitlement to equal treatment regardless of sex, skin color, ethnicity or religious affiliation. Of particular significance was Title VII of the Act,[16] which protected against discrimination in employment. While the ideals undergirding Title VII may at first seem relatively easy to articulate, the determination of whether a particular employer's decision runs afoul of the statute has proved more difficult. First, Title VII was long on impact, but in relative terms it was somewhat short on exegesis of the principles it sought to mandate.[17] Moreover, while the effectiveness of Title VII in ending employment discrimination remains the subject of dispute, it seems clear that civil rights era enactments at least have had the effect of forcing most discriminatory animus underground.[18] As a consequence, in a disparate treatment case—a case in which the alleged discrimination is not pegged to a particular policy or practice and its effects, but to a specific decision allegedly made with discriminatory animus—proof will almost necessarily be made "indirectly," through the use of circumstantial evidence and the inferences that flow from it.[19]

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16. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

17. For example, while taking a stab at defining, *inter alia*, "employer" (42 U.S.C. § 2000e(b)), "religion" (42 U.S.C. § 2000e(j)), and "because of sex" (42 U.S.C. § 2000e(k)), and at establishing what sorts of employer decisions were and were not subject to scrutiny under the Act, the Act leaves undefined such core terms as "discriminate," "color," and "race."

18. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (opining that, while smoking guns are "largely things of the past," "[r]acial and gender inequality persists in many places of employment").

19. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (demonstrating that, because there is often no direct evidence of discriminatory intent, "Courts of Appeals . . . have employed some variant of the framework articulated in *McDonnell Douglas* to analyze . . . claims that are based principally on circumstantial evidence."); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact is both sensitive and difficult . . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

In its 1973 decision in *McDonnell Douglas Corp. v. Green*,[20] the Supreme Court took on the problem of proving discrimination in the disparate treatment arena. Title VII does not define discrimination, and the Court sensibly avoided doing so. Instead, the *McDonnell Douglas* Court established the now familiar tripartite structure within which evidence could be conceptually ordered so that the fact-finder could determine if discrimination had indeed occurred.[21]

Since *McDonnell Douglas*, courts have variously grappled, wrestled, and struggled with the tripartite proof structure, necessitating regular input and glossing by the Supreme Court.[22] However, as Mr. Vollmer accurately observes, in the past decade the Court has increasingly focused on the third aspect of the *McDonnell Douglas* tripartite structure, namely the requirement that the plaintiff show that the defendant's articulated reason for its conduct was actually a pretext for illegal discrimination.[23]

In *St. Mary's Honor Center v. Hicks*,[24] the Supreme Court attempted to clarify the nature of the plaintiff's burden of proof at the third stage of the *McDonnell Douglas* progression. The Court concluded that in order to prevail the plaintiff must demonstrate "both that the [employer's proffered] reason [for its decision] was false, and that discrimination was the real reason" for the challenged decision.[25] In so holding, the *Hicks* Court emphasized that the ultimate fact of discrimination *vel non* could be inferred from the falsity of the employer's explanation coupled with the plaintiff's prima facie case.[26]

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20. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

21. *Id.* at 802–05. Put simply, *McDonnell Douglas* held that in a disparate treatment case, the plaintiff first has the burden of proving a prima facie case of discrimination. *Id.* at 802. The elements of the prima facie case are not fixed, but are expected to be sufficient to eliminate the traditional, nondiscriminatory reasons for employment decisions. *Id.* at 802 n.13. For example, in a termination case the plaintiff would be expected to show that she was a member of the protected class, that she was qualified for or was adequately performing her job, and that she was fired and the position was not eliminated after her discharge. Once the plaintiff's prima facie burden is met, the employer must articulate a legitimate, nondiscriminatory reason for its action. *Id.* at 802. Once the employer meets this burden of production, the plaintiff will prevail if she proves that the articulated reason was a pretext or "cover-up," and that discrimination was the real reason for the decision. *Id.* at 804.

22. *See generally* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

23. *See* Vollmer, *supra* note 10, 414 n.46 (noting that recent legal disputes regarding the *McDonnell Douglas* framework have centered primarily on the pretext part of the test).

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

25. *Id.* at 515.

26. *See id.* at 511 (explaining that the fact-finder's disbelief of the defendant's explanation, combined with the plaintiff's showing of a prima facie case, is enough to infer intentional

Despite the *Hicks* Court's attempt to settle the question of pretext, courts continued to be confused over whether, under any circumstances, falsity plus the prima facie case would be sufficient to show pretext.[27] Ultimately, the Supreme Court granted certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*[28] to address the circuit split.[29] The *Reeves* Court finally resolved the matter, concluding that a jury may indeed infer discrimination from a false explanation alone.[30] It is in this context that the question of how (or if) to instruct the jury on pretext arises.

III. The Adequacy of Jury Instructions that Fail to Address Pretext

Mr. Vollmer suggests that the argument against a pretext instruction "begins with the principle that a judge need not instruct the jury on permissible inferences."[31] It is indeed a correct statement of the law that instructions on inferences are generally left to the discretion of the court.[32] Thus, if one accepts that the categorization of pretext as a "permissible inference" is the appropriate jumping-off point, any discussion about whether the pretext instruction may be required takes on a flavor of inevitability.

However, the terrain of the argument[33] changes somewhat when the jumping-off point shifts from the law as it applies to instructing on inferences to the axiom 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

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discrimination).

27. *See Reeves*, 530 U.S. at 140 (documenting the conflict among the courts of appeals).

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

29. *Id.* at 140.

30. *See id.* at 146–47 (concluding that, although proof that the employer's proffered reason is incredible does not necessarily establish intentional discrimination, it is permissible for the fact-finder "to infer the ultimate fact of discrimination from the falsity of the employer's explanation").

31. Vollmer, *supra* note 10, at 435.

32. *See* Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("[A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference.").

33. It should not go unrecognized that in his balanced and thoughtful Note, Mr. Vollmer actually argues quite convincingly for the position that a pretext instruction may be required. *See* Vollmer, *supra* note 10, at 429–35. His discussion of the role of pretext in *Hicks* and *Reeves* is quite compelling, *id.* at 431–35, as is his suggestion that a pretext instruction would "corral unfounded speculation regarding the correct legal standard." *Id.* at 434. In fact, for this author, these aspects of Mr. Vollmer's very effective presentation carried the day for the opposing side of the argument.

factual issues involved in their search for truth."[34] In the latter context, the focus of the inquiry becomes whether, in a particular disparate treatment case, a court can accurately instruct the jury without instructing on pretext. If it cannot, then the decision not to instruct on pretext is error, regardless of whether the omitted legal principle articulates an inference.

The question of whether a court can accurately instruct the jury without instructing on pretext presents both pragmatic and jurisprudential fronts. The former is a practical, common sense inquiry: Given that, post-*Reeves*, the law is clear that a showing of pretext is sufficient to support a finding of discrimination, is it possible for the jury to "get it" without a specific instruction on pretext? The latter question is more esoteric: Is it possible for an instruction that omits pretext to fully and accurately instruct the jury regarding the law that must be applied in a disparate treatment case?

Certainly, from a pragmatic standpoint, there is good reason to be concerned about juries' ability to understand the inference of discriminatory animus that may flow from a showing of pretext. I am not aware of any jury or social science research documenting that jury confusion over pretext is truly a concern, but as Mr. Vollmer points out, the potential for such confusion is corroborated by the split in the circuits that prompted the Supreme Court to grant certiorari in *Reeves*.[35] The confusion manifested by jurists over the issue of "pretext-plus" lends real force to the argument that a jury is likely to make a mistake regarding the potential legal import of its conclusion that the defendant's proffered reason for its employment decision is false. As Mr. Vollmer suggests,[36] and the Equal Employment Opportunity Commission seems to concur,[37] this potential for confusion is the crux of the argument that a

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34. 9A CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2556 (2d ed. 1995).

35. Vollmer, *supra* note 10, at 415–16. Judge Brorby, a detractor of this view, suggests in his dissent in *Townsend* that "[w]hile 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 is telling the truth." Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1247 (Brorby, J., dissenting). This begs the question, however, because at issue in the pretext realm is not simply the question of whether the defendant is telling the truth, but also the possible legal ramifications of the determination that the defendant is indeed not telling the truth.

36. Vollmer, *supra* note 10, at 432–34.

37. *See* Brief of Amicus Curiae Equal Employment Opportunity Commission at 14–15, Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232 (10th Cir. 2002) (noting that a jury could easily become confused regarding its ability to infer discrimination) (on file with the author).

pretext instruction is necessary to "corral"[38] unfounded juror speculation regarding what is required to prove intentional discrimination.[39]

At this point, it is tempting to end the analysis of the problem. If one cannot assume that, in the exercise of common sense, juries will see that the employer's lying is enough to support the conclusion that it acted discriminatorily, then surely a jury instruction is necessary. And yet, the possibility of juror confusion about pretext, taken in a vacuum, is probably not enough to carry the day. The risk of juror confusion arguably flows from the failure to instruct on *any* permissible inference, and possibly from the failure to give any discretionary instruction. The potential for jury confusion matters only if the absence of the disputed instruction results in the charge as a whole failing to convey "a clear and correct understanding of the applicable law."[40] Accordingly, the argument in favor of a pretext instruction must be grounded in a showing that an understanding of the legal implications of pretext is necessary to the jury's ability to fully comprehend the law that applies in a disparate treatment case.

At first blush, this seems to be a difficult case to make. In recent years, commentators have begun to regard the *McDonnell Douglas* tripartite structure as antiquated and irrelevant, at least insofar as it relates to how a jury should understand a disparate treatment case.[41] This perspective finds some support in

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38. This wonderful metaphor is Mr. Vollmer's creation. Vollmer, *supra* note 10, at 435.

39. Mr. Vollmer and the EEOC are not alone in emphasizing pre-*Reeves* confusion as grounds for requiring the instruction. For instance, the United States Court of Appeals for the Third Circuit remarked:

> If it is to be assumed that jurors have ordinary intelligence, it may not be assumed that they are students of the law. The task of the jury, to apply the rules of law as given by the court below, certainly cannot be satisfactorily accomplished . . . in the abstract. Without a charge on pretext, the course of the jury's deliberations will depend on whether the jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3rd Cir. 1998) (citations omitted).

40. *See* WRIGHT & MILLER, *supra* note 34, at § 2556 (stating that the particular form or wording of a jury instruction is within the court's discretion as long as it conveys a clear understanding of the applicable law and does not confuse the jurors).

41. *See, e.g.*, Chin & Golinsky, *supra* note 4, at 668–72 (describing the tripartite test as wrought with cumbersome and meaningless formalities that make the inquiry confusing to courts and jurors alike); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 371 (1997) (questioning whether the *McDonnell Douglas* three-step approach accomplishes a useful purpose for anyone other than the publishers of the Federal Reporters), all cited in White, *supra* note 4, at 711 n.11; Kenneth R. Davis, *The Stumbling Three-Step Burden-Shifting Approach in Employment Discrimination*

recent decisions in which the Supreme Court, when discussing the application of the tripartite formula in the context of an assessment of the ultimate question of discriminatory intent, dismisses the formulation as irrelevant to the ultimate burdens in the case.[42] Moreover, lower courts have adhered to this notion and, in the decade since the jury trial became available to Title VII plaintiffs, have largely eschewed the tripartite formula in their jury instructions in favor of conclusion-driven instructions requiring the jury to simply determine whether the plaintiff's protected status was "a motivating factor" in the challenged decision.[43] It is possible, however, that lower courts have gone too far in tossing aside *McDonnell Douglas*'s proof structure in favor of a naked assessment of the "ultimate question." A close reading of *Hicks* and *Reeves* suggests that the Supreme Court still seems to consider pretext (and the potential of its implicit linkage to the prima facie case) as a fundamental aspect of discrimination proof.

As Mr. Vollmer correctly points out,[44] Title VII does not define "intentional discrimination," nor do the Supreme Court decisions interpreting the statute. Moreover, locating discriminatory intent is undeniably a difficult proposition, requiring the divination of internal and often secret motivations.[45] The *McDonnell Douglas* line of cases is notable in that it establishes, virtually *sui generis*, a proof structure, complete with elements, burdens, and presumptions, that is intended to enable the project of locating and pinning down an inherently elusive factual proposition. In that context, the Court's repeated emphasis on

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Cases, 61 BROOK. L. REV. 703, 704 (1995) (citing critics that fault the *McDonnell Douglas* approach "for its insistence on jamming facts into an inapt mold and for its unwieldy complexity which displaces reasoned determinations with the vagaries of befuddled jurors"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2237 (1995) (suggesting that, after *Hicks*, the *McDonnell Douglas* proof structure has become an empty ritual that does nothing the normal rules of civil procedure cannot do and that it would be better to abandon it rather than repair it).

42. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) (noting that once the defendant has carried his burden of production, the *McDonnell Douglas* framework is no longer relevant).

43. *See, e.g.*, EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS (CIVIL) § 5.01 & cmts. (2001) (specifying that to win a disparate treatment case a plaintiff must show that membership in a protected group was a motivating factor in the adverse employment decision); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS (CIVIL) § 12.1 & cmts. (2001) (same); ELEVENTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS (Civil) § 1.2.1 (2000) (stating that a plaintiff must show that discrimination was a "substantial or motivating factor"); *see also* DEVITT ET AL., *supra* note 9, § 104.04 (requiring the plaintiff to show that the defendant intentionally discriminated).

44. Vollmer, *supra* note 10, at 434 n.176 (citing White, *supra* note 4, at 749).

45. *See* Sturm, *supra* note 18, at 459–60 ("Smoking guns . . . are largely things of the past . . . . Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.").

the role of pretext takes on a special weight. In fact, it is arguable that the assessment of pretext (along with the prima facie case) is the requisite format for the discernment of discriminatory intent.

To make this point, it is necessary to consider *McDonnell Douglas*'s prima facie case/pretext construct and the relationship of that construct to proof of discrimination *vel non*. As an initial matter, courts employ the prima facie case merely to force the employer out of the weeds, so to speak.[46] Its elements are fluid,[47] and its mission is to identify the bare circumstances that eliminate traditionally valid reasons for an employment action, such as poor performance or lack of qualifications.[48] Although at its inception the prima facie case is deemed to give rise to an inference of discrimination,[49] it is clear that once the burden of production demanded by the prima facie case is met, any legal presumption of discrimination drops out of the case.[50] However, this does not mean that the prima facie elements lose what inherent vigor they may have as indicia of discrimination.

In fact, although the current Court is wont to declare that the *McDonnell Douglas* tripartite proof structure is "irrelevant" at the third stage of the case, upon closer examination it seems that the Court still embraces the *Burdine* Court's twenty-year-old perspective on the potential impact of the prima facie case's linkage with a showing of pretext:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn there from may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed,

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46. *See Hicks*, 509 U.S. at 510–11 (describing the presumption flowing from the prima facie case as having the "role of forcing the defendant to come forward with some response"); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (discussing the relationship between the plaintiff's prima facie case and the defendant's burden of production).

47. *See Burdine*, 450 U.S. at 253 n.6 (stating that the prima facie proof required from a plaintiff is flexible and therefore may vary from case to case); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (noting that factual requirements will differ from case to case).

48. *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.").

49. *Id.* at 254.

50. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) ("The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture.").

> there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.[51]

This is not a far cry from the current Court's articulation of the matter in *Reeves*, a case that was tried to a jury: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if the disbelief is accompanied by the suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."[52] Thus, even when focusing on the ultimate question of discrimination, the Court seems inevitably to return to the prima facie case and the potential that inheres in its coupling with a showing of pretext.

This necessarily raises the question of how to square the Court's continuing resort to *McDonnell Douglas*'s prima facie case/pretext analysis with the Court's equally clear statements that in disparate treatment cases the *McDonnell Douglas* formulation is irrelevant after the second stage because the operative question is the existence of "discrimination *vel non*."[53] Certainly the Court's post-*McDonnell Douglas* jurisprudence reflects that juries need not be made to understand the machinations of the tripartite burden-shifting analysis. But at the same time, the Court continues to teach that when attempting to discern discriminatory intent, particular attention must be paid to the prima facie case/pretext formulation. It is only sensible to assume that the Court keeps returning to this formulation not because pretext gives rise to just another permissible inference, but rather because in cases where pretext is an issue, this formulation is the right tool to employ in assessing whether a particular plaintiff's ultimate burden of proof has been met.[54]

Those who have taken introductory physics know that light seen by the naked eye as merely white, or simply bright, is actually comprised of the entire

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51. *Burdine*, 450 U.S. at 255 n.10.

52. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting *Hicks*, 509 U.S. at 511).

53. *See id.* at 142–43 (stating that, after the employer articulated its legitimate nondiscriminatory reason, the *McDonnell Douglas* framework disappeared "and the sole remaining issue was 'discrimination *vel non*'"); *Hicks*, 509 U.S. at 518–19 (explaining that once the defendant offers evidence of the reason for its decision, what remains for the fact finder is the "ultimate" question of "discrimination *vel non*"); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983) (stating that the ultimate question is one of discrimination *vel non*).

54. Of course, the court need not specifically instruct the jury on the prima facie case and its connection to pretext. This is not because the prima facie case is unimportant, however, but rather because its existence is implicitly subsumed in the pretext instruction and probably in the instruction on the plaintiff's burden as well.

color spectrum. When directed through a prism, the light is broken into its component parts and its true colors are revealed. A pretext instruction plays much the same role. It does not counsel a finding of discrimination when discrimination is not revealed. It merely equips the jury with the tools it needs to fully assess the possible legal implications of the facts they have discerned.

At bottom, an intuitive understanding of the implications of *McDonnell Douglas*'s prima facie case/pretext linkage is essential to the fact-finder's understanding of the law that applies in a disparate treatment case. The Third Circuit in *Smith v. Borough of Wilkinson*[55] was correct: "[T]he jury must be given the legal context in which it is to find and apply the facts."[56] So long as *McDonnell Douglas* and its third step prima facie case/pretext linkage retains vitality, it is difficult to see why the jury should not be enlightened to the same extent the courts are, so that the jury may apply the law to the facts with the same degree of discernment.[57]

IV. Arguments of Counsel Cannot Substitute for a Pretext Instruction

While conceding that the inference of discrimination flowing from a finding of pretext often plays a "primary role" in the location of discriminatory intent,[58] Mr. Vollmer is ultimately persuaded that it warrants no special treatment at least in part because, to the extent that it is necessary to convey to the jury the potential significance of a showing of pretext, counsel can argue the inference.[59] Mr. Vollmer is not alone in reaching this conclusion—distinguished members of the Courts of Appeals for the Seventh, Eighth, and (in dissent) Tenth Circuits have embraced the same view.[60] And yet, when

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

56. *Id.* at 280.

57. *See id.* (observing that "[i]t is difficult to understand what end is served by reversing 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").

58. *See* Vollmer, *supra* note 10, at 437 ("[T]he veracity of the defendant's explanation should merely play a role, albeit often a primary role, in determining the existence of intentional discrimination.").

59. *See id.* at 442 ("A jury will likely understand the common sense foundation on its own, especially after hearing argument on the issue from plaintiff's counsel.").

60. *See* Townsend v. Lumbermens Mut. Ins. Co., 294 F.3d 1232, 1246–47 (10th Cir. 2002) (Brorby, J., dissenting) (stating that Townsend's attorney's arguments were enough to inform the jury that they could infer discrimination if they thought Kemper's explanation was pretext); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 791 (8th Cir. 2001) (rationalizing that refusal to submit a pretext instruction to the jury was not prejudicial because Moore had the opportunity to raise the issue in opening and closing statements); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (noting that rather than describing each permissible inference, the

viewed critically, it is possible to conclude that even these jurists may be overstating the role that the arguments of counsel can actually play in educating the jury about the potential impact of a finding of pretext.

Although a plaintiff's counsel may be permitted in closing to argue that the defendant's stated reason for it decision is demonstrably false,[61] it is not at all clear that, in the absence of a pretext instruction, counsel will be permitted to argue that, as a matter of law, the conclusion that the defendant is lying can be sufficient to support a finding of the ultimate fact in the case. It is well-established that it is the role of the court, not counsel, to instruct the jury as to the applicable law.[62] In fact, courts differ widely on the propriety of counsel arguing law to the jury at all.[63]

Moreover, federal trial courts inform counsel of their proposed action upon requested instructions prior to closing arguments.[64] A plaintiff who has been denied a pretext instruction would argue the potential legal effect of the defendant's mendacity at her peril. At a minimum, she could be seen as directly flouting the court's ruling, drawing the court's ire and risking rebuke in front of the jury.[65] Indeed, a number of federal courts hold that counsel's argument *must* be limited to the instructions given and that it is error for the

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judge may, and usually should, leave it to the argument of counsel).

61. In closing arguments, counsel is certainly afforded "wide latitude" to draw inferences from the evidence. JACOB A. STEIN, CLOSING ARGUMENT: THE ART AND THE LAW § 15, at 43 (1996). Thus, counsel can suggest that because the proffered reason has been contradicted the jury can legitimately infer that the proffered reason is false, or "pretextual," and in some courts plaintiffs may be permitted to go so far as to state outright that the defendant is lying. *See id.* ("[I]f the evidence suggests it, counsel may infer that one of the two sides is lying.") (citing United States v. Molina, 934 F.2d 1440 (9th Cir. 1991)).

62. *See, e.g.*, United States v. Snyder, 189 F.3d 640, 648 (7th Cir. 1999) ("If [the defendant] felt that the district court had not adequately and fairly instructed the jury then he should have challenged the court's instructions at the appropriate time rather than resorting to self-help during closing arguments. Only the judge may instruct the jury.")

63. STEIN, *supra* note 61, § 20, at 68.

64. FED. R. CIV. P. 51. Proposed amendments to FRCP 51 make the point even more emphatically, correcting the current rule's failure to account for the fact that the court itself may propose instructions in addition to or other than those proposed by counsel: "The court . . . must inform the parties of its proposed instructions and proposed action on the requests [by counsel for instructions] before instructing the jury and before final jury arguments . . . ." *See* 2003 U.S. ORDER 20 (C.O. 20), FEDERAL RULES OF CIVIL PROCEDURE, AMENDMENTS TO RULES 23, 51, 53, 54, 71A; FORMS 19, 31 AND 32 (Mar. 27, 2003) (effective Dec. 1, 2003) (introducing proposed FRCP 51(b)(1)).

65. *See, e.g.*, WILLIAM E. WEGNER ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL TRIALS AND EVIDENCE ¶ 13.51 (2003) ("Make sure your argument tracks the exact language of the instruction. Any material deviation is likely to draw rebuke from the court and undermine your credibility with the jury.").

district court to permit argument on issues of law for which it has refused instructions.[66]

In light of these constraints on parties' ability to argue law not encompassed in the instructions, the fact that a court permits counsel to suggest that the defendant's articulated reason is a pretext is small solace. The refusal of a court to instruct on pretext leaves the plaintiff able to point out the lie, but foreclosed from explaining to the jury that if they deem the lie sufficiently revelatory, they need no more evidence to locate discriminatory intent.

V. Conclusion

The issue that Mr. Vollmer raises in his excellent Note is difficult and quite subtle. The role of pretext in discrimination cases is both central and masked. As a result, the question of how (or if) to charge the jury on pretext presents no obvious answer. Ultimately, its resolution will require locating the wavering line between fundamental principals of law and those principals that are more in the nature of judicial gloss; balancing the need to preserve courts' discretion in overseeing the conduct of trials with the need to empower juries to make informed decisions; and, perhaps most importantly, crafting an approach that will ensure that the policies that undergird Title VII are manifest through an orderly and credible jurisprudence of the law of discrimination. Although I advocate for a position different from the one that Mr. Vollmer advocates, his clear exegesis brings home the fact that the question is a very close one. Mr. Vollmer's Note is eminently deserving of the award it received.

66. *See, e.g.*, United States v. Hall, 77 F.3d 398, 401 (11th Cir. 1996) ("For arguing points of law, we have held that counsel is confined to law that is included in the judge's charge to the jury."); United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983) ("In arguing the law to the jury, counsel is confined to principles that will later be incorporated and charged to the jury."); United States v. Sawyer, 443 F.2d 712, 714 n.11 (D.C. Cir. 1971) ("Before stating a legal principle, counsel should be sure that it will in fact be included in the charge. If there is any question about the accuracy or relevance of counsel's proposed statement of law, he should seek a ruling on the point before going forward with the argument.").