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Expert Testimony and "Subtle Discrimination" in the Workplace: Do We Now Need a Weatherman to Know Which Way the Wind Blows?

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COMMENT

EXPERT TESTIMONY AND "SUBTLE DISCRIMINATION" IN THE WORKPLACE:

DO WE NOW NEED A WEATHERMAN TO KNOW WHICH WAY THE WIND BLOWS?

INTRODUCTION

Elsayed Mukhtar v. California State University, Hayward is an employment discrimination action brought by a black professor denied tenure at Cal State Hayward.[1] The case turns on the admission of the expert testimony of sociology professor Dr. David Wellman, a racial-discrimination expert who analyzed the disputed tenure decision according to eight criteria he had developed for "decoding" white behavior.[2] Initially, the case resulted in a victory for the plaintiff, who was awarded $637,000 in damages after a nine-day jury trial.[3] On appeal, however, the Ninth Circuit overturned the jury's verdict and remanded for a new trial on the grounds that the trial judge had failed to make the requisite reliability determination con-

[1] Elsayed Mukhtar v. California State University, Hayward, 299 F.3d 1053 (9th Cir. 2002), amended, 319 F.3d 1073 (9th Cir. 2003).

[2] *Elsayed* 299 F.3d at 1062. For an account of Dr. Wellman's qualifications, see Appellee's Brief at 44-45, Elsayed Mukhtar v. California State University, Hayward, 299 F.3d 1053 (9th Cir. 2002), amended, 319 F.3d 1073 (9th Cir. 2003) (No. 01-15565). For a discussion of Dr. Wellman's decoding methodology, *see infra* notes 120-128 and accompanying text.

[3] *Id.* at 1061.

cerning Dr. Wellman's testimony.[4] This was not harmless error, held the court, as without Dr. Wellman's testimony, the case would reduce to "a mere difference of academic opinion" – not a Title VII offense.[5]

What is at stake here? From one point of view, a civil rights plaintiff has been perversely robbed of a jury verdict because of a procedural nicety: "[A] panel of this court overturned the jury's verdict because it believed that the district court had not made a procedurally proper *Daubert* ruling. ... In doing so, it acted in a manner contrary to all precedent ..."[6] And yet, much recent discourse on employment discrimination jurisprudence starts from the observation that the mainstream Title VII cases invest heavily in procedure: "It is no secret that the Supreme Court's Title VII jurisprudence cloaks substance in the 'curious garb' of procedure. When the Supreme Court talks about employment discrimination under Title VII, it generally does so by creating and refining special proof structures – different methods of proving discrimination."[7] In a general way, this intense focus on procedure is understood to have come about because discrimination is hard to prove – and never more so than in the contemporary workplace, where it has become subtle and covert, perhaps even largely unconscious:

> As traditional social norms permitting overt racism and segregation give way to a modern norm of egalitarianism, and as well-defined, hierarchical, bureaucratic structures delineating clear paths for advancement within institutions give way to a globalized workplace of flexible governance and movement between institutions, discrimination often operates in the workplace today less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement. ... It creeps into everyday impressions of worth and assignment of merit on the job, lurking constantly

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[4] *Id.* at 1068. For a discussion of the reliability determination requirement as established by the *Daubert v. Merrell Dow* line of cases, *see infra* notes 24-53 and accompanying text.

[5] *Id.* at 1067-68.

[6] *Elsayed*, amended, 319 F.3d at 1075 (Rheinhardt, J., dissenting from denial of rehearing en banc). Eleven of the Ninth Circuit judges joined in this dissent. *Id.* Thirteen votes were required for a rehearing. *Id.* at 1078.

[7] Deborah Malamud, *The Last Minuet: Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2229-2231 (1995).

> behind even the most honest belief in equality, perpetuating the very injustice that we decry.[8]

In the academic literature, such a characterization of subtle discrimination is likely to be reinforced by a proffer of social science research. Thus, in a way, *Elsayed* seems like an inevitable moment in the trajectory of Title VII discrimination jurisprudence – like a plot point on a graph. Data indicate, argued Elsayed, "that while there is an increasing trend toward verbal tolerance in relation to issues of race and racism, there is a discrepancy between such statements and the routine everyday practices of white Americans."[9] Thus Dr. Wellman's "specialized sociological knowledge" was helpful to the jury, assisting them "to identify and to analyze coded expressions of contemporary racism."[10]

Legal scholar Michael Selmi points out that "a finding of discrimination is ultimately a factual determination ... that requires drawing an inference of discrimination based on circumstantial evidence."[11] The Supreme Court crafted the special Title VII proof structures to facilitate the drawing of this inference.[12] Yet, according to Selmi, "despite its rhetoric regarding the importance of ferreting out subtle discrimination, the Court has only seen discrimination in the most overt or obvious situations – situations that could not be explained on any basis other than race."[13] If the Court has failed to see subtle discrimination despite its Title VII proof regime, legal scholar-

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[8] Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

[9] *Elsayed*, 299 F.3d at 1066 n.9.

[10] *Id.*

[11] Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 283 (1997). Michael Selmi, Professor of Law at George Washington University School of Law, has made a significant contribution to discrimination discourse. *See, e.g., Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) and *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate,* 42 UCLA L. REV. 1251 (1995), in addition to the two articles on which this Comment relies. *See* Selmi, *infra* note 14. This Comment is heavily indebted to Professor Selmi's writings.

[12] Selmi, *supra* note 11, at 283. The proof regime for individual intentional employment discrimination cases under Title VII was established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See infra* notes 57-95 and accompanying text.

[13] Selmi, *supra* note 11, at 284.

ship has not.[14] The problem of subtle discrimination has generated a complex and nuanced discourse among legal scholars and academics in the social sciences.[15] *Elsayed* represents an experiment in bringing this discourse into the courtroom to educate judge and jury.

When subtle discrimination discourse comes to court, though, another significant proof regime, the *Daubert* expert testimony jurisprudence, comes into play.[16] Under *Daubert*, trial judges must operate as gatekeepers, assuring that no expert testimony reaches the jury unless shown to be both relevant and reliable.[17] Can the academic subtle discrimination discourse pass muster under the *Daubert* regime? If it can, will civil rights plaintiffs ultimately benefit from the admission of subtle discrimination testimony by academics?

This Comment studies *Elsayed* in order to investigate these questions. The Background discussion traces the two great lines of cases whose trajectories cross in *Elsayed*, the *Daubert v. Merrell Dow* expert testimony jurisprudence under the Federal Rules of Evidence and the *McDonnell Douglas v. Green* line of cases establishing the "pretext" model of proof for individual employment discrimination claims under Title VII of the 1964 Civil Rights Act.[18] Then, turning to the opinion proper, the Analysis considers *Elsayed* under the following headings: (A) The Crux: The Court's Harmless-Error Determination,[19] (B) Decoding in the Pretext Context,[20] (C) Substituting the Mixed-Motives Regime under *Costa* for the Pretext Regime under *Reeves*,[21] (D) The Rehabilitation of Circumstantial Evidence in *Desert Palace*.[22]

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[14] *See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L.R. 657, 659 (2003) (exploring the perspective gap between scholars and the courts).

[15] *Id.*

[16] *Elsayed*, 299 F.3d at 1063.

[17] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 579-80 (1993); Kumho Tire v. Carmichael, 526 U.S. 137, 138 (1999).

[18] *See infra* notes 24-98 and accompanying text. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Fed. R. Evid. 702 (2000); McDonnell Douglas Corp. v. Green, 414 U.S. 792 (1973); 42 USC § 2000e-2(a) (2000).

[19] *See infra* notes 99-119 and accompanying text.

[20] *See infra* notes 120-173 and accompanying text.

[21] *See infra* notes 174-198 and accompanying text.

[22] *See infra* notes 199-202 and accompanying text.

Finally, based on this analysis, the Conclusion articulates a qualified endorsement of the thirty-year-old *McDonnell Douglas* "pretext" proof regime for individual employment discrimination cases.[23]

I. BACKGROUND

A. THE *DAUBERT V. MERRELL DOW* LINE OF CASES

Daubert v. Merrell Dow Pharmaceuticals, Inc., decided in 1993, made federal judges gatekeepers with respect to expert testimony under Federal Rule of Evidence 702.[24] Before *Daubert*, the reigning standard since 1923 had been the *Frye* "general acceptance" test, predicating the admissibility of expert testimony on its acceptance in the relevant scientific community.[25] The 1973 adoption of Rule 702, however, cast some doubt on the continuing validity of *Frye*.[26] The new Rule governing expert testimony did not incorporate the venerable "general acceptance" language of *Frye*, simply providing that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[27] To resolve the doubt that grew up around the unclear relationship between *Frye* and Rule 702, the Supreme Court granted certiorari in *Daubert* in 1992.[28]

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[23] *But see* Malamud, *supra* note 7, at 2229, 2230-231. "The liberal legal community has sought – and claims to have found – a set of substantive judgments embedded in the Court's procedural decisions. What is said to exist is a substantive consensus that the eradication of discrimination is a high societal priority, and that discrimination is pervasive but difficult to prove. ... When the Court's procedural decisions take a conservative, pro-defendant turn, critics decry the departure from this substantive consensus. These critiques nostalgically seek a return to what they deem the correct, liberal past in which a deep societal commitment to the eradication of discrimination shaped a plaintiff-friendly procedural jurisprudence." *Id.*

[24] *See* Gordon Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U.L. REV. 1, 31-33 (1995); John Jansonius and Andrew Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility,* 50 BAYLOR L. REV. 267, 277 (1998).

[25] *Frye v. U.S.*, 293 F. 1013 (1923).

[26] Jansonius and Gould, *supra* note 24, at 274-275.

[27] Fed. R. Evid. 702.

[28] Jansonius and Gould, *supra* note 24, at 275.

In *Daubert,* a products liability case, the minor plaintiffs claimed the anti-nausea drug *Bendectin*, used by their mothers during pregnancy, had caused their birth defects.[29] The plaintiffs offered the testimony of eight well-qualified experts to establish that *Bendectin* caused their injuries, but the trial court awarded summary judgment to the defendants.[30] The Ninth Circuit affirmed, ruling the plaintiffs' expert testimony inadmissible under *Frye*.[31] The Supreme Court, however, vacated the summary judgment order and remanded the case, holding that *Frye*'s "general acceptance" test had been superseded by the adoption of Rule 702.[32] "[T]he trial judge must ensure," said the *Daubert* court, "that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[33] The Court went on to formulate four general considerations to guide trial judges in their newly conceived gatekeeping role: 1) whether the expert's analysis derives from a scientific method that can be or has been tested, 2) whether the expert's method has been the subject of peer review and testing, 3) the actual or potential rate of error in the expert's methodology, and 4) whether the relevant scientific community generally accepts the expert's methodology.[34] Thus, "general acceptance," the *sine qua non* under *Frye,* has dwindled to just one of four factors in a nonexhaustive list.[35]

The expert testimony at issue in *Daubert* concerned scientific knowledge. The language of Rule 702, however, is more inclusive, encompassing "scientific, technical, or other specialized knowledge."[36] Six years after the *Daubert* decision, the Supreme Court granted certiorari in another products liability case, *Kumho Tire v. Carmichael*, to resolve uncertainty among the lower courts as to whether or how *Daubert* applied to *nonscientific* expert testimony.[37]

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[29] *Daubert*, 509 U.S. at 579.

[30] *Daubert*, 727 F.Supp. 570, 576 (S.D. Cal. 989). *See* Jansonius and Gould, *supra* note 24, at 276.

[31] *Daubert*, 951 F.2d 1128, 1131 (9th Cir.).

[32] *Daubert,* 509 U.S. at 587, 598.

[33] *Id.* at 589.

[34] *Id.* at 593-594.

[35] *Id.* at 593. "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.*

[36] Fed. R. Evid. 702.

[37] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

The *Kumho* plaintiffs, injured in an automobile accident when a tire blew out, offered the expert testimony of a tire-failure analyst in support of their claim against the tire manufacturer.[38] The tire analyst used his own method of visual and tactile inspection, inferring a manufacturing or design defect in the absence of at least two of a set list of tire abuse symptoms he had developed.[39] The trial court found this testimony inadmissible under the four-factor *Daubert* test.[40] On reconsideration, the trial court acknowledged that it initially applied *Daubert* too mechanically; nevertheless, even under a flexible application of the *Daubert* reliability test, the expert's methodology did not pass muster.[41] On appeal, the Eleventh Circuit reversed, remanding for non-*Daubert* proceedings after holding that *Daubert* did not apply at all outside the realm of scientific testimony.[42]

Addressing the confusion about *Daubert*'s scope, the Supreme Court made clear that the trial judge's gatekeeping obligation under *Daubert* applies not only to testimony based on "scientific" knowledge but also to testimony based on "technical" and "other specialized" knowledge.[43] Further, the gatekeeping function is to be performed flexibly.[44] The *Daubert* factors are not exhaustive or definitive, and trial judges have leeway to determine not only whether expert testimony is reliable, but also how to make the reliability determination.[45] While trial judges enjoy broad discretion in the conduct of reliability inquiries after *Kumho,* however, they do not have discretion to abandon the obligation to conduct them. Justice Scalia underscored this in a separate concurrence in *Kumho*: "I join the opinion of the Court, which makes clear that the discretion it endorses – trial court discretion in choosing the manner of testing expert reliability – is not discretion to abandon the gatekeeping function."[46]

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[38] *Kumho,* 526 U.S. at 142.

[39] *Id.* at 144, 153-154.

[40] *Id.* at 145. For four-factor test, see *supra* note 34 and accompanying text.

[41] *Id.* at 145-146.

[42] *Id.* at 146.

[43] *Id.* at 141. "The initial question before us is whether this basic gatekeeping obligation applies only to scientific testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony." *Id.* at 146.

[44] *Id.* at 138.

[45] *Id.* at 152-153.

[46] *Id.* at 158-159 (Scalia, J., concurring).

A trio of recent court of appeals decisions delineate the trial courts' post-*Kumho* obligation to make reliability determinations when expert testimony is proffered. In *United States v. Velarde*, a child sexual abuse case, the Tenth Circuit reversed and remanded where the trial judge had failed to conduct any kind of reliability determination on the record before admitting the testimony of a pediatrician and a child psychologist who had treated the victim.[47] "Well, I'm not going to hold a Daubert hearing," said the judge.[48] "I've had this testimony before in trials, and it's not new and novel."[49] Distinguishing *Velarde*, the Ninth Circuit affirmed the trial court in *U.S. v. Alatorre*, noting that while the court had denied the defendant's request for a *Daubert* hearing prior to trial, it did permit the defendant to conduct a lengthy voir dire of the government's drug-crimes expert during the trial, ultimately ruling on the relevance and reliability of the government witness's testimony.[50] And in *U.S. v. Hankey*, the trial court conducted an extensive voir dire of the government's police gang expert to assess the relevance and reliability of his testimony, which was sufficient for the Ninth Circuit to affirm.[51] Though some sort of reliability determination is clearly required by *Daubert* jurisprudence, the circuits are currently split on whether a failure to create a record of the reliability determination is an abuse of discretion.[52]

Amendments to the Federal Rules of Evidence in 2000 incorporated the holdings of *Daubert* and *Kumho*.[53] As amended, Rule 702 reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." By spelling out the elements of a

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[47] United States v. Velarde, 214 F.3d 1204, 1208 (2000).

[48] *Id.* at 1208

[49] *Id.*

[50] United States v. Alatorre, 222 F.3d 1098, 1104-1105 (2000).

[51] United States v. Hankey, 203 F.3d 1160, 1168-1169 (2000).

[52] See *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2161 n.89 (2003).

[53] *Id.* at 2144.

proper *Daubert* inquiry – from data to principles and methods to application – the Rule mandates activist gatekeepers, making it clear that no expert testimony, however seemingly familiar or arcane, will be permitted to pass by cloaking itself in the outward signs of expertise.

B. THE *MCDONNELL DOUGLAS V. GREEN* LINE OF CASES

Though trial court judges must inquire into the relevance and reliability of expert testimony under *Daubert*, they have discretion concerning the manner of the inquiry.[54] Clearly, the *Daubert* inquiry will be shaped by context, the particular type of case being tried.[55] In individual employment discrimination cases under Title VII of the 1964 Civil Rights Act, this shaping context will be supplied by the *McDonnell Douglas v. Green* line of cases, a jurisprudence already preoccupied with the question of what constitutes reliable proof.[56]

1. Pretext Analysis, McDonnell Douglas through Reeves

Title VII of the 1964 Civil Rights Act makes it an unlawful employment practice "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."[57] In the seminal *McDonnell Douglas v. Green* case, one of the first employment discrimination cases to be decided under Title VII, the Supreme Court set forth a framework for proving intentional employment discrimination that remains vital today.[58] Though the proof structure established in this case has generally been considered plaintiff-friendly in concept, in practice many seemingly deserving plaintiffs have been denied relief under the

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[54] *Kumho,* 526 U.S. at 158-159.

[55] *See, e.g., Kumho*, 526 U.S. at 139 (reviewing trial court's assessment of tire-failure analyst's testimony proffered in products liability case).

[56] *See* Malamud, *supra* note 7, at 2229-2230.

[57] Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. §2000e-2(a) (2000).

[58] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). *See* Selmi, *supra* note 14, at 666 (assessing the model's continuing viability).

McDonnell Douglas regime, an irony that has not gone unnoticed in the Title VII discourse.[59]

In *McDonnell Douglas*, Percy Green, a civil-rights activist and radio mechanic, was laid off from his job at the McDonnell-Douglas plant in St. Louis Missouri in 1964.[60] When the company rejected Green the following summer for an open mechanic's job for which he was clearly qualified, he filed an administrative action before the newly formed Equal Employment Opportunity Commission ("EEOC"), alleging racial discrimination as well as retaliation for his civil rights activities.[61] In due course, his discrimination claim came before the Supreme Court, only the second case the Court had certified under Title VII.[62]

Declaring that Title VII "tolerates no racial discrimination, subtle or otherwise," the Court identified the critical issue before it as concerning the order and allocation of proof.[63] Under Title VII, a plaintiff alleging racial discrimination in the workplace must first establish a prima facie case, showing that he belongs to a racial minority, that he applied and was qualified for the position in question, that he was rejected despite his qualifications, and that after his rejection the job stayed open and the employer continued to seek applicants from among similarly qualified individuals.[64] Once the plaintiff has established his prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action.[65] If the employer is able to make this showing, the burden shifts back to the plaintiff to show that the articulated reason is a pretext.[66] Here, the Court found that Green had made out his prima facie case, and that the com-

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[59] *See, e.g.,* Malamud, *supra* note 7, at 2229; Selmi, *supra* note 11, at 324.

[60] *McDonnell Douglas Corp.*, 411 U.S. at 794. *See* David B. Oppenheimer, *McDonnell Douglas Corp. v. Green Revisited: Why Non-Violent Civil Disobedience Should Be Protected from Retaliation by Title VII*, 34 COLUM. HUM. RTS. LR 635, 636-645 (2003) (placing this foundational case in historical context).

[61] *McDonnell Douglas Corp.*, 411 U.S. at 796. The EEOC administers and enforces Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. 29 C.F.R. §§ 1600-1691.

[62] Oppenheimer, *supra* note 60, at 641.

[63] *McDonnell Douglas Corp.* 411 U.S. at 801, 800.

[64] *Id.* at 802. The Court acknowledges that differing factual situations will require some variation in the prima facie proof as specified here. *Id.* at 802 n.13.

[65] *Id.*

[66] *Id.* at 804.

pany met its rebuttal burden with its claim that it refused to hire Green solely because of his unlawful conduct against it.[67] On remand, then, Green was to be "afforded a fair opportunity" to show that the company's stated reason was in fact pretext.[68]

If the employee can expose the employer's articulated reason as pretext, what then? In *St. Mary's Honor Center v. Hicks,* a series of disciplinary actions against Melvin Hicks, the only African American among six shift commanders at a correctional institution, culminated in his discharge after a heated exchange with his boss.[69] Hicks easily established his prima facie case under *McDonnell Douglas*: as an African American, he was a member of a protected class; he was qualified for his position, as he had recently been promoted; and he was subject to an adverse employment action in that he was demoted and then discharged while the position remained open.[70] The burden shifted, then, to St. Mary's to articulate a legitimate reason for Hick's termination.[71] St. Mary's cited the frequency and severity of Hicks' offenses.[72] By producing evidence that similar and even more serious violations by his co-workers were treated more leniently, Hicks made a classic showing of pretext.[73] Under some earlier Title VII decisions, this would have been enough to establish unlawful employment discrimination.[74] The *Hicks* court, however, ruled that a finding of pretext *permits* but does not *compel* the inference of intentional discrimination, leaving open the ultimate question of discrimination.[75]

In *Reeves v. Sanderson Plumbing Products*, an age discrimination case, the Supreme Court granted *certiorari* to correct an overly restrictive reading of *Hicks,* resolving a conflict

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[67] *Id.* at 802, 803. Note that "unlawful conduct" here signifies nonviolent civil rights demonstrations that Mr. Green participated in. *Id.* at 803-804.

[68] *Id.* at 804.

[69] St. Mary's Honor Center v. Hicks, 509 U.S. 502, 504-505 (1993). *See* Selmi, *supra* note 11, at 328-334 (placing *Hicks* in the disparate treatment employment discrimination jurisprudence).

[70] Selmi, *supra* note 11, at 329.

[71] *Hicks,* 509 U.S. at 507; Selmi, *supra* note 11, at 329.

[72] *Hicks*, 509 U.S. at 507; Selmi, *supra* note 11, at 329.

[73] *Hicks,* 509 U.S. at 508; Selmi, *supra* note 11, at 329.

[74] Selmi, *supra* note 11, at 330.

[75] *Hicks,* 509 U.S. at 511.

among the circuits.[76] The question before the Court in *Reeves* was whether a finding of liability for intentional discrimination can be sustained by a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision.[77] Shoddy recordkeeping was the legitimate, nondiscriminatory reason the employer articulated for firing Reeves.[78] Though Reeves was able to establish that this reason was pretext, the Fifth Circuit overturned the lower court's damages award, explaining that establishing pretext did not dispose of the ultimate issue of discrimination, as the plaintiff had further to establish that his age actually motivated the adverse employment action.[79]

The Supreme Court disagreed: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[80] In *Reeves*, the Court seems to have gone some distance in rehabilitating two propositions identified by Michael Selmi as crucial to the vitality of the *McDonell Douglas* regime: "that employers are generally able to offer explanations for their actions ... and that when employers are unable to provide a convincing explanation for their actions, a court may infer that the true reason was discrimination."[81]

Most individual employment discrimination plaintiffs rely on circumstantial evidence and the pretext analysis developed under *McDonnell Douglas*.[82] Since 1989, however, plaintiffs offering direct evidence of discrimination have been able to avail themselves of an alternative to the pretext analysis, argu-

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[76] Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 140, 146-147 (2000). Though age is not one of the protected classifications under Title VII, the Court explicitly applies the *McDonnell Douglas* framework. *Id.* at 142.

[77] *Reeves,* 530 U.S. at 139, 146-147.

[78] *Id.* at 138.

[79] *Id.* at 146.

[80] *Id.* at 147.

[81] Selmi, *supra* note 11, at 325-326.

[82] *Id.* at 283.

ing "mixed motives" under *Price Waterhouse v. Hopkins*.[83] And since the 2003 *Desert Palace v. Costa* decision, direct evidence is no longer required to argue mixed motives.[84]

2. *The Mixed-Motive Cases,* Price Waterhouse *through* Desert Palace

A fascinating offshoot of the *McDonnell Douglas* line of cases, the "mixed-motive" branch, has produced especially confusing and complex rulings. Instead of arguing that the employer's justification for an adverse employment action is pretextual, a mixed-motives plaintiff argues that the adverse action was partly motivated by an illegal criterion.[85] In *Price Waterhouse v. Hopkins*, the seminal mixed-motive case, the Court considered whether an adverse employment action was taken "because of" sex where both legitimate and illegitimate reasons played a part in the decision.[86] The Court concluded that the employer could avoid liability by proving that it would have come to the same decision even if it had not allowed gender to play a role, but the Justices were badly divided over the question of when the burden shifts to the employer to establish this affirmative defense.[87]

In 1991, two years after the *Price Waterhouse* ruling, Congress amended the 1964 Civil Rights Act, setting forth standards for mixed-motive cases.[88] Under the 1991 amendments, an employee establishes an unlawful employment practice by demonstrating that race, color, religion, sex, or national origin was a motivating factor, even though other factors also motivated the practice.[89] The employer has a limited affirmative

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[83] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[84] Desert Palace v. Costa, Inc., 539 U.S. 90 (2003).

[85] *See* Christopher Chen, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motive Discrimination Claims*, 86 CORNELL L. REV. 899 (2001). "In *Price Waterhouse v. Hopkins*, the United States Supreme Court augmented the existing framework for establishing employer liability in disparate treatment discrimination claims. This decision recognized the shortcomings of pretext analysis as outlined in *McDonnell Douglas v. Green* and *Texas Department of Community Affairs v. Burdine*, and enunciated mixed-motives analysis which enables plaintiffs to hold employers liable whenever an illegitimate criterion, such as race, sex, or national origin, is a motivating factor in an adverse employment decision." *Id.*

[86] *Price Waterhouse,* 490 U.S. at 239-240.

[87] *Id.* at 244. *Desert Palace*, 539 U.S. at 90.

[88] *Desert Palace*, 539 U.S. at 91.

[89] 42 U.S.C. § 2000e-2(m).

defense under the new provisions, restricting remedies but not removing liability, if it can show that it would have taken the same action in the absence of the impermissible motivation.[90]

The 1991 amendments to Title VII did not entirely straighten out the mixed-motive jurisprudence descended from *Price Waterhouse*. Relying on Justice O'Connor's concurring opinion in *Price Waterhouse,* a number of circuits have held that direct evidence of discrimination is required to establish liability under the 1991 provisions.[91] In a sex discrimination case arising in the Ninth Circuit in 2002, however, the Supreme Court provided much-needed clarity and simplification.[92] Agreeing with the appeals court that the enactment of the 1991 amendments abrogated Justice O'Connor's *Price Waterhouse* references to direct evidence, the Court in *Desert Palace v. Costa* turned to the language of the statute itself.[93] Finding no requirement in the statute for a heightened showing in mixed-motive employment discrimination cases, the Court held that in order to obtain a jury instruction under the 1991 provisions, the plaintiff need only present sufficient evidence for a reasonable jury to conclude, by preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."[94] The Court went beyond the immediate holding in *Desert Palace* to rehabilitate circumstantial evidence in general in Title VII cases: "We have often acknowledged the utility of circumstantial evidence in discrimination cases. ... The reason for treating circumstantial evidence and direct evidence alike is both clear and deep-rooted ..."[95]

In sum, both the *Daubert* expert testimony line of cases and the *McDonnell Douglas* employment discrimination line of cases are actively evolving, with significant decisions emerging in each line within the last few years. *Kumho Tire v. Carmichael* was decided in 1999, and the circuits are currently split

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[90] 42 U.S.C. § 2000e-5(g)(2)(B).

[91] *Price Waterhouse,* 490 U.S. at 276; *Desert Palace*, 539 U.S. at 91.

[92] *Desert Palace,* 539 U.S. at 90. "The question before us in this case is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 (1991 Act). We hold that direct evidence is not required." *Id.*

[93] *Desert Palace,* 539 U.S. at 93-94.

[94] *Id.* at 95-96 (quoting 42 U.S.C. § 2000e-2(m)).

[95] *Id.* at 94.

concerning the implications of its reliability determination requirement.[96] *Reeves v. Sanderson Plumbing*, revitalizing the *McDonnell Douglas* pretext analysis, was decided in 2000, the same year the *Kumho* holding was incorporated by amendment into Evidence Rule 702.[97] The *Desert Palace* ruling came down just last year, opening the way for mixed-motives cases based on circumstantial evidence.[98] This complex and shifting background is largely what makes *Elsayed Mukhtar v. California State University, Hayward* worth examining.

II. ANALYSIS

As a matter of legal precedent, *Elsayed Mukhtar v. California State University, Hayward* is not a significant case. It can be cited only for the relatively narrow proposition that the trial court commits reversible error when it admits expert testimony without making a *Daubert* reliability determination on the record.[99] Nevertheless, situated as it is at the juncture of two active fault lines of cases, the *Elsayed* opinion provides a good site for analysis, yielding rich material for critical speculation. The question most immediately presented is whether the academic "subtle discrimination" discourse has a future in the courtroom.

A. THE CRUX: THE COURT'S HARMLESS-ERROR DETERMINATION

Daubert doctrine requires the trial judge, as gatekeeper under the Federal Rules of Evidence, to ensure that all expert testimony admitted is not only relevant but reliable.[100] The gatekeeping inquiry is a flexible one and must be tied to the

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[96] See *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2144-2147 (2003).

[97] *Reeves*, 530 U.S. at 133; Fed. R. Evid. 702. *See supra* notes 76-81 and accompanying text (discussing *Reeves*' place in Title VII individual employment discrimination jurisprudence).

[98] *Desert Palace*, 539 U.S. at 90. *See supra* notes 91-95 and accompanying text (placing *Desert Palace* in Title VII individual employment discrimination jurisprudence); *infra* notes 174-198 and accompanying text (discussing substitution of *Desert Palace* for *Reeves* as *Elsayed's McDonnell Douglas* authority).

[99] *Elsayed*, 299 F.3d at 1068. "[T]he district court's erroneous admission of Dr. Wellman's testimony without the proper reliability determination was not harmless, and CSUH is entitled to a new trial." *Id.*

[100] *Daubert*, 509 U.S. at 589; *Kumho*, 526 U.S. at 147.

facts of the particular case.[101] Though the trial court has a great deal of latitude in deciding how to conduct the gatekeeping inquiry, it does not have the latitude to abandon the obligation altogether.[102] In *Elsayed*, the trial court evinced awareness of its *Daubert* obligations, ordering both parties to produce *Daubert* briefs before ruling on the defendants' motion to exclude Dr. Wellman's testimony.[103] Before admitting the testimony, the court reviewed two briefs by the defendants and three briefs by the plaintiff, as well as two declarations from Dr. Wellman, excerpts from Wellman's deposition, his preliminary report, and his curriculum vitae.[104] Nevertheless, the Ninth Circuit found the trial court had abdicated its gatekeeping role because it failed to make a reliability determination on the record before admitting Wellman's testimony.[105] "[T]he only indication we have that the district court found Dr. Wellman's testimony reliable is the fact that it was admitted over CSUH's reliability objections. Surely *Daubert* and its progeny require more."[106]

The circuits are currently split as to whether the failure to make a record of the reliability finding constitutes an abuse of discretion.[107] Here, the court cited two other Ninth Circuit cases in which expert testimony was admitted only after extensive voir dire of the witness, as well as a Tenth Circuit case where the district court was overturned for failing to make any sort of reliability determination.[108] Thus far, the court seems to be on relatively solid ground. Requiring a formal reliability finding of some kind seems in keeping with *Kumho*, which emphasizes the flexibility of the *Daubert* inquiry but also reaffirms the importance of the gatekeeping function.[109]

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[101] *Kumho,* 526 U.S. at 150.
[102] *Id.* at 152, 158-159.
[103] *Elsayed,* 299 F.3d at 1064.
[104] *Id.* at 1064.
[105] *Id.* at 1066.
[106] *Id.*
[107] See *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2161 n.89 (2003).
[108] *Elsayed*, 299 F.3d at 1066.
[109] *Kumho*, 526 U.S. at 152.

A trial court's failure to make a reliability determination is reversible error, however, only if it is not harmless – that is, if it is more probably than not the cause of the outcome.[110] Here, the court held the error was not harmless:

> Dr. Wellman drew the inference of discrimination for the jury in a case otherwise based entirely on less-than-convincing circumstantial evidence. Thus it is hard for us to see how Dr. Wellman's testimony, which addressed the central issue of Elsayed's case, was harmless; rather it "more probably than not was the cause of the result reached."[111]

This is a surprising statement. Not only did the *Elsayed* jury find unlawful employment discrimination in the University's tenure denial, they also awarded punitive damages.[112] To award punitive damages, the jury had to attribute conscious discrimination to the decision makers in Elsayed's tenure case.[113] This was not an inference drawn for the jury by Dr. Wellman, whose testimony centered on "subtle discrimination" – that is to say, largely unconscious discrimination.[114] Thus, the court's sweeping dismissal of all the other evidence in the case as less-than-convincing circumstantial evidence,[115] indicating at most a mere difference of academic opinion,[116] seems unwarranted.

What is more, insofar as Dr. Wellman did draw the inference of discrimination for the jury, he drew this inference from the same set of facts that was before the jury, evidence the Ninth Circuit characterizes as "less-than-convincing circumstantial evidence."[117] It is hard to see how a convincing inference can be drawn from unconvincing evidence. Though the court claims not to express an opinion on the merits of

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[110] *Elsayed*, 299 F.3d at 1066.

[111] *Id.* at 1068 (quoting Jauregi v. City of Glendale, 852 F.2d 1128, 1133 (1988)).

[112] *Id.* at 1061.

[113] *Id* at 1068 n.15.

[114] *See* Appellee's Brief at 44-45, Elsayed Mukhtar v. California State University, Hayward, 299 F.3d 1053 (9th Cir. 2002), amended, 319 F.3d 1073 (9th Cir. 2003) (No. 01-15565). "The university portrayed Dr. Rees as an advocate of diversity. Dr. Wellman's decades of research decoding subtle racism assisted the jury in understanding that you do not have to be a bigot to make an employment decision on such impermissible factors as race and religion." *Id.*

[115] *Elsayed*, 299 F.3d at 1068.

[116] *Id.* at 1067.

[117] *Id.* at 1068.

Wellman's testimony or on its reliability,[118] it is not hard to infer one from this statement. The error is harmful only on the premise that Dr. Wellman's testimony is actually inadmissible; otherwise the substantial rights of the parties are unaffected by the trial court's error. [119] Implicitly, the court here decided on the admissibility of Dr. Wellman's testimony under cover of ruling on the mere formality of the trial court's failure to make a proper record. Thus, in order to predict how Dr. Wellman's testimony will fare on retrial and, more generally, how subtle discrimination testimony will fare in Title VII employment discrimination cases under the *Daubert* expert testimony requirements, we must ferret out and make explicit what the court states only indirectly.

B. DECODING IN THE PRETEXT CONTEXT

1. The Decoding Methodology: Dr. Wellman's Testimony

On direct examination at trial, Dr. Wellman summarized his qualifications, described his assignment and the materials he reviewed for the case, explained the criteria he developed through his research to detect the presence of racial factors in decision-making, and applied the criteria to the facts of the case.[120] Dr. Wellman explained that he systematically investigates the racial worldview of Americans, conducting a type of qualitative research related to anthropological-ethnographic methods.[121] The results of such research are not quantifiable, he explained, as the method focuses on the actor's understanding of the world and attempts to get inside people's thinking.[122] Relying on in-depth interviews, focus groups, ethnographic ob-

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[118] *Id.* at 1068 n.12

[119] The dissent from the court's denial of an en banc hearing argues that the majority has misapplied the harmless error rule: "The district court's 'error' could have affected the verdict in a way that was prejudicial to the State University *only* if the testimony the jury heard could not have been admitted by means of a proper procedural ruling. In the absence of a determination that the expert testimony did not qualify for admission under Daubert, its admission cannot be deemed to have constituted 'harmful' error or to have affected the substantial rights of the parties." *Elsayed*, amended, 319 F.3d at 1076 (emphasis in original).

[120] Appellee's Brief at 55, Elsayed Mukhtar v. California State University, Hayward, 299 F.3d 1053 (9th Cir. 2002), amended, 319 F.3d 1073 (9th Cir. 2003) (No. 01-15565).

[121] *Id.* at 46.

[122] *Id.*

servation, and institutional document review, the methodology can be tested for validity, reliability and reproducibility.[123]

In the course of his research, Dr. Wellman developed eight criteria, or "alarm bells," for detecting the presence of race as a hidden factor in decision making.[124] Dr. Wellman explained that he uses these criteria in the classroom to help his sociology students see the discrepancies between stated principles and everyday practices when it comes to race.[125] He also uses them regularly in lectures, finding them "effective in helping Americans understand practices that otherwise would go unnoticed."[126] Applying his criteria to the facts of the *Elsayed* case, Dr. Wellman gave it as his opinion that "race played a very important factor in the decision to deny Professor Elsayed tenure."[127]

Dr. Wellman's application of his eight decoding criteria to the tenure decision is set forth in the opinion as follows:

a. The University's justification for denying tenure lacked "credence";

b. Tenure criteria were applied inconsistently;

c. Inconsistent tenure criteria advantaged whites and disadvantaged blacks;

d. Tenure criteria shifted when challenged;

e. Statistical evidence showed disparate treatment;

f. Procedural violations occurred in the tenure process;

g. University officials trivialized and dismissed Elsayed's qualifications and accomplishments; and

h. University officials failed to follow procedures for reducing racial inequality.[128]

Anyone versed in the *McDonnell Douglas* jurisprudence will likely be struck by the seeming familiarity of Dr. Wellman's criteria. Comparative treatment of blacks and whites, including statistical evidence, grounds for the tenure decision that shift under challenge, procedural irregularities in the tenure process – such evidence goes to the classic "pretext"

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[123] *Id.*
[124] *Id.* at 48.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 55.
[128] *Elsayed,* 299 F.3d at 1062.

analysis under *McDonnell Douglas*.[129] Even some of the particular terms Dr. Wellman uses – lack of credence, disparate treatment – are salient as terms of art in Title VII jurisprudence. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination," said the *Reeves* court, explaining the reasoning from pretext under the *McDonnell Douglas* regime, "and it may be quite persuasive."[130] As a sociology professor studying racial discrimination since the seventies,[131] Dr. Wellman has very likely been influenced by the significant Title VII legal opinions and the writing of legal scholars, adopting and adapting legal evidence-processing schemes to his own purposes.

This mirroring between Title VII jurisprudence and Dr. Wellman's methodology creates some curious difficulties in the courtroom under the *Daubert* regime and the Federal Rules governing admissibility of expert testimony. Issues arise under both the relevance and the reliability prongs of the *Daubert* doctrine, and the court's skepticism toward the enterprise of drawing the inference of discrimination from circumstantial evidence, implicit in its harmless error determination, ultimately implicates Dr. Wellman's testimony along with all the other evidence in the case.

2. *The Methodology Encounters the Rules*

a. The Relevance Requirement under Evidence Rule 702 and *Daubert*

Expert opinion evidence is admissible under Rule 702 if it will assist the trier of fact to understand the evidence or determine a fact in issue.[132] This helpfulness requirement, encompassed in the *Daubert* relevance determination, is the central concern of Rule 702, according to the *Elsayed* court.[133] Noting that the relevance issue was not properly before it, as defendants conceded in oral argument that Dr. Wellman's testi-

[129] *McDonnell Douglas*, 411 U.S. at 804. See Selmi, *supra* note 11, at 666-668 (applying *McDonnell Douglas* pretext analysis to the case of a black law professor).

[130] *Reeves*, 530 U.S. at 147.

[131] Appellee's Brief at 44.

[132] Fed. Rule Evid. 702 (2000).

[133] *Elsayed*, 299 F.3d at 1063 n.7.

mony was "absolutely" relevant,[134] the court nevertheless carefully bracketed the issue in two substantive footnotes citing extensive authority.[135]

If the case is retried, this issue may well be resurrected. The defendants pressed the point vigorously in their appellate brief, despite having apparently conceded the issue at trial.[136] The plaintiff took the position that Dr. Wellman's testimony helped the jury in analyzing "coded expressions of contemporary racism."[137] Ferreting out subtle discrimination, however, is essentially what the *McDonnell Douglas* proof regime is designed to do, and the pretext analysis under Title VII is no less applicable to contemporary racism than it was to the facts of Percy Green's case in *McDonnell Douglas*.[138] The jury in this case did in fact receive jury instructions based on pretext analysis.[139] Since Dr. Wellman's decoding method significantly resembles *McDonnell Douglas* pretext analysis, the question arises whether Wellman's application of his method to the evidence in the case was not simply redundant in the courtroom and thus not helpful to the trier of fact.

b. The Reliability Requirement under Evidence Rule 702 and *Daubert*

The reliability analysis produces even more vexed results than the relevance inquiry. What emerges is that, in order to pass the as-applied reliability test under Rule 702 and the *Daubert* regime, Dr. Wellman's testimony must come perilously close to violating the rule against drawing legal conclusions for the jury.

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[134] *Id.* (quoting Defendants).

[135] *Id.* at 1063 n.7, 1066 n.9.

[136] Appellant's Opening Brief at 41-43, Elsayed Mukhtar v. California State University, Hayward, 299 F.3d 1053 (9th Cir. 2002), amended, 319 F.3d 1073 (9th Cir. 2003) (No. 01-15565).

[137] *Elsayed,* 299 F.3d at 1066 n. 9.

[138] See Selmi, *supra* note 11, at 290.

[139] Appellants' Opening Brief at 43.

i. Admissibility of ultimate issue testimony: Under the Federal Rules of Evidence, testimony in the form of an opinion or inference is not inadmissible because it embraces an ultimate issue of fact.[140] An ultimate issue of law, however, is another matter; an expert witness may not give an opinion as to a legal conclusion.[141] Here, in the context of ruling against the plaintiff on the standard for review, the court stated that the trial court clearly admitted Dr. Wellman's testimony subject to this prohibition against legal conclusions, and also that Wellman stayed within the permitted parameters with his testimony.[142] Subsequently, however, the court exposed the uncertainty underlying the trial court's decision to admit the testimony, quoting the trial court's analysis in full:

> Well, I see Wellman and [CSUH's expert witnesses on Elsayed's academic qualifications] as essentially parallel, and I would prefer that none of them express their own opinion about whether this decision was right or wrong. But if any of them are going to, then I guess all of them have to. And since both sides have prepared on the basis that they all will, I suppose you would prefer that I let all of them do it, rather than downplay as much as possible any of them substituting their judgment for what the jury ultimately has to find, which is whether, in fact, this decision was based on race discrimination or based on legitimate academic concerns. They each have their own opinion, which is essentially what the jury will have to decide, so I don't exactly know how we're going to avoid having each of them go through all of the evidence and essentially deliberate as jurors and argue about which – what means what and what factor goes which way. It's not really appropriate, so I guess we'll just have to try to keep it as brief as possible, in Dr. Wellman's case, on general factors that would lead to such decisions, and likewise in [CSUH expert's] case, on general factors that would lead to such decisions, as opposed to their trying to convince the jury of their own view

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[140] Fed. Rule Evid. 704(a) (1984).

[141] McHugh v. United Serv. Auto. Ass'n., 164 F.3d 451, 454 (9th Cir. 1999).

[142] *Elsayed*, 299 F.3d at 1063. At issue here was whether defendants' motion in limine was sufficient to preserve their objection to Dr. Wellman's testimony, making contemporaneous objection unnecessary and thus warranting review under the abuse of discretion standard rather than for plain error. *Id.*

> of what the truth is of what the underlying state of mind was. So that's about all the guidance I can give on that.[143]

The court quoted this passage ostensibly to establish that the lower court made no reliability determination.[144] What is most evident, though, is the difficulty the trial judge had in locating the line between ultimate issue of fact and legal conclusion in the type of testimony being proffered.[145]

In the event, Dr. Wellman did not hew to "general factors that would lead to such decisions"; rather, he applied his eight criteria for decoding white behavior to the particular facts of the university's tenure decision in Dr. Elsayed's case.[146] Since Dr. Wellman's decoding criteria do the same kind of work as the *McDonnell Douglas* proof regime, under which discrimination is established by exposing an employer's justification for an adverse action as pretext, Wellman surely came close to reaching a legal conclusion when he applied his criteria. It is not hard to understand the uncertainty expressed in the lower court's analysis of the defendants' exclusion motion. Indeed, the Ninth Circuit opinion itself seems internally inconsistent on this point: in deciding an initial matter, the court held that Wellman's testimony stayed on the right side of the ultimate fact/ legal conclusion boundary,[147] and yet ultimately the court concluded that "Dr. Wellman drew the inference of discrimination for the jury."[148]

Perhaps the key to the difficulty here is that there are no elements to an employment discrimination cause of action under *McDonnell Douglas*.[149] Legal scholar John Valery White posits that the *McDonnell Douglas* court deliberately created an empty structure, purposefully avoiding any definition of either discrimination or the protected categories under Title VII,

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[143] *Elsayed*, 299 F.3d at 1064-1065. I have not included the entire passage quoted by the Court.

[144] *Id.* at 1065.

[145] The academic experts' testimony was apparently not contested and is not memorialized in the opinion. It might have made a useful point of comparison.

[146] *Elsayed*, 299 F.3d at 1062.

[147] *Id.* at 1063. *See supra* note 128.

[148] *Id.* at 1068.

[149] John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward a Unified Approach to Civil Rights Law.* 53 MERCER L.REV. 709, 797 (2002).

so that the law could accommodate the many forms of both.[150] Instead of a cause of action with elements, there is an evidence-ordering device. This blurs the line between issues of fact and issues of law. "For better or for worse, the Court in McDonnell Douglas seemed to want the fact-finder to be king, transforming all questions into at least mixed questions of law and fact."[151] Thus, in drawing the inference of discrimination, Dr. Wellman was truly taking away the jury's work, leaving nothing further for the factfinder to do.

ii. *Kumho*'s Catch-22: If Dr. Wellman's testimony did cross the line between ultimate fact issue and legal conclusion, could he have avoided this by sticking to "general factors," as the trial court suggested in giving guidance on the issue?[152] The 2000 amendments to Evidence Rule 702 specify that, in addition to sufficient facts or data and reliable principles and methods, the admissibility of expert testimony depends on the reliable application of the witness's principles and methods to the facts of the case.[153] In *Kumho Tire*, which centered on the reliability of a tire-failure analyst's testimony, the Court made clear that the reasonableness of the expert's method in general would not suffice to establish the admissibility of his testimony.[154] For the testimony to be admissible under *Daubert* and the evidence rules, what had to be established was the reasonableness of the expert's particular method of gathering and analyzing data in order to reach a conclusion on the particular matter to which his testimony was relevant.[155] "The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation."[156]

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[150] *Id.* at 720.

[151] *Id.*

[152] *Elsayed,* 299 F.3d at 1065.

[153] Fed. Rule of Evid. 702 (2000). Note that the case was tried in September 2000, before these amendments became effective. *See* Fed. Rule of Evid. 702, 28 U.S.C.A.; Appellee's Brief at 30. However, *Kumho*, a 1999 decision, imposes this requirement, and the amendments apparently represent an incorporation of existing law rather than a departure from it. *See Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2144 (2003).

[154] *Kumho*, 526 U.S. at 153-154.

[155] *Id.* at 154.

[156] *Id.* Emphasis in original.

Thus, on the one hand, Dr. Wellman's testimony was in danger of impinging on the jury's province and reaching a legal conclusion if it didn't limit itself to general factors[157] -- but on the other hand, the testimony was apparently in danger of being found unreliable if it didn't go beyond general factors to determine the cause of *this particular* adverse employment action. The *Elsayed* court makes clear that the reliability determination the trial court failed to make was not a matter of Dr. Wellman's qualifications.[158] "[T]he issue left unresolved at trial was whether his research and opinions were sufficiently reliable so that the trial judge would permit him to apply his theories to the facts and tell the jury that Dr. Rees' decision must have been racially motivated."[159] If Dr. Rees' decision was racially motivated, then she has unlawfully discriminated against Dr. Elsayed under Title VII. To pass the as-applied reliability test under *Kumho*, Dr. Wellman needed to draw the inference for the jury, usurping its function as factfinder. When the *Kumho* expert drew the inference of defect, he testified to an ultimate fact, in order to establish an element of the products liability cause of action. But in an intentional discrimination action under Title VII, there are no elements and there is only one ultimate fact, the fact of discrimination itself.

3. *Drawing the Inference from Circumstantial Evidence*

Both Dr. Wellman's decoding methodology and the standard pretext analysis under *McDonnell Douglas* proceed by drawing the inference of discrimination from circumstantial evidence.[160] Delivering its harmless error determination, the *Elsayed* court characterizes the evidence in the case, aside from Wellman's testimony, as "less-than-convincing circumstantial evidence."[161] This raises the question – a constant theme in Title VII jurisprudence and the legal scholarship – of what it takes for circumstantial evidence to be convincing where discrimination is concerned.

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[157] *Elsayed*, 299 F.3d at 1065.

[158] *Id* at 1066 n.11. "Indeed, his curriculum vitae is quite impressive," says the court. *Id.*

[159] *Elsayed* as amended, 319 F.3d at 1074.

[160] Appellee's Brief at 48; *McDonnell Douglas*, 411 U.S. at 802-804.

[161] *Elsayed*, 299 F.3d at 1068.

Michael Selmi points out that the *McDonnell Douglas* proof model is essentially binary: "Within the framework developed by the Court in McDonnell Douglas and its progeny, once an employer articulates the reason for its decision, the legal battle becomes one between discrimination, on the one hand, and the employer's asserted rationale on the other."[162] The first stage of the proof regime – the prima facie case – achieves this binary construct by introducing race into the process as a possible explanation for the employment decision and eliminating the two most likely alternative explanations, that there was no job available or that the candidate was unqualified.[163] In conducting the discrimination inquiry under this construct, a court is not concerned with the real reason for the contested action in an absolute sense, but rather with whether discrimination can be established under the standard of proof for a civil lawsuit.[164]

Kumho once more provides an instructive comparison. *Kumho* turned on the reliability of expert testimony based on circumstantial evidence, but in the products liability context.[165] Where there was no direct evidence of a defect in the tire that caused the plaintiffs' accident, a tire failure expert, using his own method of visual and tactile inspection, drew the inference of defect in the absence of at least two of a set list of four tire abuse symptoms he had developed.[166] Like the *McDonnell Douglas* pretext analysis, the tire expert's method sets up a binary proposition initially: under the *Kumho* construct, if not abuse, then defect; under the *McDonnell Douglas* construct, if not the employer's proffered justification, then discrimination. Both are essentially presumption-driven. If abuse is disproved, then defect stands; if employer justification is disproved, then discrimination stands. "A prima facie case ... raises an inference of discrimination only because we presume these acts, if

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[162] *See* Selmi, *supra* note 11, at 326.

[163] *Id.* at 324-325.

[164] *Id.* at 327.

[165] See *Kumho*, 526 U.S. at 153-154.

[166] *Id.* at 144, 154. "Nor was the basis for Carlson's conclusion simply the general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation. Rather, the expert employed a more specific theory to establish the existence (or absence) of such abuse. Carlson testified precisely that in the absence of at least two of four signs of abuse ... he concludes that a defect caused the separation." *Id.* at 154.

otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[167]

The limitation of the analogy, and the point of the comparison, lies in the crucial difference between the founding presumptions of these two interpretive devices. Whereas the presumption of defect in tire-failure analysis is quite innocuous, merely a matter of empirical plausibility, the discrimination presumption in the legal analysis of employment decisions is highly charged, a matter of our continuing relationship to and experience of our own history of racial oppression. According to Selmi, this presumption is essential to the *McDonnell Douglas* regime: "[T]he entire *McDonnell Douglas* proof structure was premised on a belief in the power of discrimination as an explanatory variable – a belief that is central to the Court's entire antidiscrimination doctrine."[168] Clearly, it is not circumstantial evidence per se that is the problem. Insofar as the use of circumstantial evidence seems unobjectionable and commonsensical in the *Kumho* products liability context – but suspect and difficult in the discrimination context – perhaps this is because, as Selmi suggests, the presumption of discrimination has lost its explanatory power.[169]

This is where Dr. Wellman's testimony comes in. Wellman's testimony can be seen as an attempt to resettle pretext analysis – of which his decoding methodology can now be seen as a variant – on a new empirical foundation supplied by his ethnographic studies of the racial attitudes of white Americans. To make the preliminary presumption of discrimination more persuasive, Dr. Wellman would substitute explicit sociological information for the implicit historical consciousness underlying Title VII pretext analysis.

Can such a project ultimately succeed in the courtroom, assuming subtle discrimination testimony can gain admission under the relevance and reliability requirements? The answer to this question is, of course, purely speculative. That beliefs can be impervious to information, however, is well known. Here, the jury clearly saw something different from what the appeals court saw, having made an award of damages that sug-

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[167] Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).
[168] Selmi, *supra* note 11, at 328.
[169] *Id.* at 283-284.

gests they saw more than what Dr. Wellman showed them.[170] The court, on the other hand, was not persuaded.[171] The court -- at best carelessly and at worst disingenuously -- set Dr. Wellman's testimony over against the rest of the evidence in the case and dismissed this artificial remainder as less-than-convincing circumstantial evidence. What you believe is largely what you see – or, as Michael Selmi has said, it's a matter of perspective: "[T]he difficulty of proving subtle discrimination does not stem principally from its unconscious nature, but rather from the gap in perspectives that exists between African Americans and whites over the continued relevance of discrimination."[172] Something like this gap, as Selmi also points out, has stubbornly and persistently divided legal academics from the courts in individual employment discrimination cases under Title VII.[173]

C. SUBSTITUTING THE MIXED-MOTIVES REGIME UNDER *COSTA* FOR THE PRETEXT REGIME UNDER *REEVES*

The actual deployment of the Title VII proof structure is almost perfunctory in *Elsayed*, taking up just one paragraph toward the end of the opinion. "To establish racial discrimination in the employment context, Elsayed must demonstrate that the reason CSUH gave for denying Elsayed tenure – lack of scholarly achievement – is a mere pretext for illegal racial discrimination."[174] Since we've heard this before, or something

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[170] See Erin Texeira, *The Subtle Clues to Racism A white sociologist's nine* [sic] *criteria for spotting veiled bias become key to a lawsuit over tenure. Hanging in the balance is a black professor's career.* LOS ANGELES TIMES, January 11, 2001. This news-feature account of Dr. Wellman's testimony and the jurors' reactions is truly intriguing – and utterly inconclusive. According to the report, the jury foreman, Daniel Coppock, said Dr. Wellman was "probably the best witness on either side. He gelled the case for everyone." *Id.* Coppock said further that Wellman's "theories of hidden racism" didn't work until he applied them to himself, reflecting on the times he'd feared a black man on the street, despite his tolerant upbringing. *Id.* But Coppock then went on to say he thought the university administrators were biased against Professor Elsayed not because he is black but because he conducts research on militant Muslim communities – religious politics. *Id.* Other jurors reported feeling the university administrators came across in their testimony as smug, sure of victory – and the defendants' lawyer said she felt the jurors had found Elsayed "more personable" than her clients. *Id.*

[171] "We are not persuaded." *Elsayed*, 299 F.3d at 1067.

[172] Selmi, *supra* note 11, at 663.

[173] *Id.* at 659-660.

[174] *Elsayed*, 299 F.3d at 1067.

very like it, in the preceding consideration of Wellman's "decoding" testimony, the actual Title VII rhetoric seems merely an attenuated echo. But when the opinion was amended in February of 2003, a very suggestive substitution occurred in this paragraph: "To establish racial discrimination in the employment context, Elsayed must demonstrate that CSUH denied him tenure 'because of' his race. While race need not be the sole factor in CSUH's decision, it must be a 'motivating factor.'"[175] At this juncture, the *Costa v. Desert Palace* mixed-motive case is substituted for the *Reeves v. Sanderson Plumbing* pretext case as the authority supplied by the court under Title VII.[176]

The opinion in *Costa v. Desert Palace,* a gender discrimination case, was filed in the Ninth Circuit just five days before *Elsayed.*[177] Like Professor Elsayed, plaintiff Catharina Costa won a jury verdict; unlike Elsayed, Costa prevailed on appeal. The U.S. Supreme Court, Justice Thomas writing, unanimously affirmed the judgment in Costa's favor in June of 2003.[178] This decision has generally been greeted with qualified excitement by the plaintiffs' employment discrimination bar and with some consternation by employers' attorneys.[179] In *Desert Palace,* the Court settled a long-running debate among the circuits, finding that a plaintiff need not present direct evidence of discrimination in order to prevail in a "mixed-motive" employment discrimination case under Title VII.[180] All that is required is 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 adverse action by an employer.[181]

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[175] *Elsayed* as amended, 319 F.3d at 1074 (citing *Costa v. Desert Palace, Inc.*, 299 F.3d 838 – slip op. at 10993 (9th Cir. 2002)).

[176] *Elsayed*, 299 F.3d at 1067; *Elsayed* as amended, 319 F.3d at 1074.

[177] Costa v. Desert Palace, 299 F.3d 838 (9th Cir. 2002).

[178] Desert Palace v. Costa, 539 U.S. 90, 96 (2003).

[179] See Mark Spognardi, *Supreme Court Opens Gates to Plaintiff "Mixed-Motive" Employment Discrimination Lawsuits*, EMPLOYMENT, LABOR AND BENEFITS NEWSLETTER, 13:3 (September 2003) *at* http://www.hklaw.com/Publications/Newsletter.asp? ID=394& Artlcle=2270; Shannon P. Duffy, *High Court Paves Easier Road to Jury for Discrimination Plaintiffs*, THE LEGAL INTELLIGENCER (June 11, 2003) *at* http://www.law.com/jsp/article.jsp?id=10524408674001

[180] *Desert Palace v. Costa*, 539 U.S. at 90.

[181] *Id.* at 94-95.

This short, unanimous opinion, clearly reasoned and plainly written, seems like a sudden release into straightforwardness and good sense after all the convolutions of the thirty-year-old Title VII employment discrimination jurisprudence. In the abstract and intuitively, it would seem easier to show that race or gender, for example, was one motivating factor among others than to establish that it was the one true reason masquerading behind a pretextual justification for an employment action. Thus, it is tempting to speculate that mixed-motive cases will become the preferred vehicle for plaintiffs alleging employment discrimination, now that the artificial hobble of the direct evidence requirement has been removed. Indeed, this was a prospect that worried the Ninth Circuit dissenters:

> [A]part from our duty to abide by precedent, policy concerns favor adhering to Justice O'Connor's view of mixed motives analysis. ... To keep the mixed motive framework from overriding in all cases the McDonnell Douglas rule and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases. Justice O'Connor's direct evidence requirement meets this need: It requires the plaintiff to produce highly probative, direct evidence before she may utilize the more lenient, mixed motives test. As a practical matter, without this or some similar constraint on when a plaintiff may invoke the mixed motives test, any plaintiff would opt for the Hopkins framework to avoid having to show pretext.[182]

This language is striking for its ruthless practicality: "without this or some other similar constraint" suggests that the content of the constraint is a matter of relative indifference, so long as whatever it is truly works to keep the mixed-motives framework from overrunning the *McDonnell Douglas* regime and, by implication, the employment discrimination plaintiffs from flooding into the courts.[183] If the dissenters are right

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[182] *Costa v. Desert Palace*, 299 F.3d 838 at 867. (Gould, J., dissenting).

[183] Counterbalancing the perceived lenience of the mixed motives regime is an affirmative defense affecting the remedies available to mixed-motive plaintiffs. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii) (2000). Under what is sometimes called the "same decision" defense, an employer who can show that it would have reached the same decision even without the impermissible motivation can avoid all but equitable remedies. *Id. See also* Kelly Pierce, Comment, *A Fire Without Smoke: The Elimination of the*

about the relative attractions of the mixed-motive and pretext regimes, then the apparent casualness with which the *Elsayed* court substitutes *Costa v. Desert Palace* for *Reeves* in amending its opinion suggests that plaintiffs will have little trouble retooling pretext cases as mixed-motive cases.

However, this apparent easing of the way for employment discrimination plaintiffs may prove deceptive. It is difficult to see, for example, how Professor Elsayed will be any better off in the retrial of his case under *Desert Palace* than he would have been under *Reeves*. Though he can now prevail without showing his race was *the real* reason for the tenure decision against him, he will nevertheless need to demonstrate that his race was a motivating factor, and the causal link may prove just as difficult to establish as pretext.[184] He will still need to rely on circumstantial evidence to make his case, and presumably without the aid of the *McDonnell Douglas* device for framing the question and ordering the evidence. Deficient scholarship was the reason the University offered for its tenure denial, and Professor Elsayed argued this reason was pretextual. It is far from clear that he would have an easier time proving his race played a motivating part in the tenure decision though his scholarship was deficient, even if he would be willing to concede as much. In *McDonnell Douglas*, where the company's proffered reason for refusing to rehire Percy Green was his "unlawful, disruptive acts" against it, would Green have been better off arguing on remand that his race played a motivating part than that the employer's concern was pretextual? As applied to facts of cases, pretext and mixed-motive analysis often come out about the same.[185]

Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace, Inc. 87 MINN. L. REV. 2173, 2198 (2003).

[184] Causation in mixed motive cases bristles with its own interpretive difficulties, as anyone who has ever tried actually to read the famously fractured *Price Waterhouse* opinion will attest. *See* Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases,* 1995 UTAH L. REV. 1029 (1995) (demonstrating the difficulties entailed in analyzing the facts of particular cases under a mixed motive regime).

[185] "It is ... possible to say that all cases are mixed motive ones: even McDonnell-Burdine cases are predicated on the existence of discriminatory motivations, and the employer's articulation of a nondiscrimintory reason does not negate the possibility that discrimination motivated the decision. It merely offers an alternative motivation that may (or may not) be more plausible than the inference of discrimination." Charles Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOKLYN L. REV. 1107, 1162 (1991).

When Dr. Wellman gave his opinion in *Elsayed*, drawing the inference of discrimination for the jury, he actually phrased his conclusion in mixed-motive language rather than pretext language: "[R]ace played a very important factor in the decision to deny Professor Elsayed tenure."[186] If, as this suggests, Dr. Wellman would be comfortable applying his decoding methodology in a mixed-motive context, the question arises whether his testimony would fare better with the court on retrial under a mixed-motive regime. More generally, will the mixed-motive context prove friendlier to subtle discrimination testimony than the pretext context has shown itself to be in *Elsayed*?

No expert testimony was offered in *Desert Palace* itself. In *Price Waterhouse*, however, which was the seminal mixed-motive case, psychology professor Dr. Susan Fiske testified as an expert on sex stereotyping.[187] The admissibility of her testimony was not at issue, as the defendants did not object to it. Still, it is possible to infer from the opinion that the testimony might have had trouble passing muster if it had been at issue. Justice Brennan, writing for the plurality, seemed to question the relevance of Dr. Fiske's testimony, though benignly disposed toward it. Brennan was "tempted," as he said, to say that Dr. Fiske's testimony was "merely icing on [plaintiff] Hopkins' cake," since "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course in charm school.'"[188] Justice Kennedy, dissenting, patently found Fiske's testimony unreliable: "The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision."[189]

Nevertheless, it seems clear that in a mixed-motive context, testimony such as Dr. Fiske's, which focused on the written statements of decision-makers and drew only the inference of sexism, would not necessarily trigger the *Kumho* Catch-22 discussed above.[190] That is, unlike Dr. Wellman in *Elsayed*, Dr. Fiske in *Price Waterhouse* could satisfy the as-applied reliabil-

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[186] Appellee's Brief at 55. Defendants note that Dr. Wellman "misstated this legal principle." Appellants' Opening Brief at 44.

[187] Charles Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*. 56 BROOKLYN L. REV. 1107, 1148 (1991).

[188] *Price Waterhouse*, 490 U.S. at 256.

[189] *Id.* at 294 n.5.

[190] See *supra* notes 152-159 and accompanying text.

ity test under *Kumho,* applying her method to particular facts of the case, without triggering the rule against offering legal conclusions to the jury.[191] This is because the causal link remains to be drawn between the sexism present in the employer's statements and the actual decision in the adverse employment action at issue. The *Price Waterhouse* court showed how the causal inference could be drawn:

> Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on these particular comments, either in Hopkins' case or in the past. Certainly a plausible ... conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.[192]

Though the difference may at first seem simply to be a difference between Dr. Fiske's methodology and Dr. Wellman's methodology, a more fundamental difference can be located in the departure of the mixed-motive regime from the traditional *McDonnell Douglas* pretext regime. Discussing *Miles v. M.N.C. Corp.*, a precursor to the *Price Waterhouse* case, legal scholar Charles Sullivan analyzes the way the mixed-motive cases came to branch off from the *McDonnell Douglas* regime.[193] In *Miles*, there was "direct evidence" of discriminatory intent where a manager said the company did not hire blacks because "half of them weren't worth a shit."[194] In cases like *Miles*, explains Sullivan, where intent is first found by direct evidence, it becomes important to establish the causal link between discriminatory intent and the plaintiff's injury.[195] These cases became known as "mixed motive" cases "because the issue was whether permissible or impermissible motives 'caused' the de-

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[191] Note that *Price Waterhouse* was decided ten years before *Kumho. See Price Waterhouse,* 490 U.S. at 228; *Kumho*, 526 U.S. at 137.

[192] *Price Waterhouse,* 490 U.S. at 1794.

[193] Sullivan, *supra* note 187, at 1118.

[194] Miles v. M.N.C. Corp., 750 F.2d 867, 874 (11th Cir. 1985).

[195] Sullivan, *supra* note 187, at 1118.

cision at issue."[196] In *McDonnell Douglas*, on the other hand, where employer conduct is the basis of the inference of discrimination, the question of causation is "subsumed" in the question of whether to draw the inference.[197]

As Sullivan's analysis suggests, mixed-motive cases have tended to feature incriminating statements by the employer.[198] Such statements can be decoded, if decoding is required, without reaching the ultimate legal conclusion of discrimination. Where the inference of discrimination is drawn from the employer's conduct, as in *Elsayed*, it will prove much more difficult to perform the decoding without offering a legal conclusion. Thus, even though *Desert Palace* has withdrawn the direct-evidence requirement imposed by the courts under *Price Waterhouse*, permitting cases like *Elsayed* to be framed as mixed-motive cases, subtle discrimination testimony based on employer conduct will still have trouble passing muster under the expert testimony rules without triggering the legal conclusion prohibition.

D. THE REHABILITATION OF CIRCUMSTANTIAL EVIDENCE IN *DESERT PALACE*

In lifting the direct-evidence requirement for mixed-motive Title VII employment discrimination cases, *Desert Palace* de-

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[196] *Id.*

[197] *Id.*

[198] According to Kelly Pierce, most courts determine whether a case will proceed as a mixed-motive case or as pretext case based on whether the plaintiff can produce direct evidence. Kelly Pierce, Comment, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace, Inc.* 87 MINN. L. REV. 2173, 2185-2186 (2003). However, Pierce points out that the circuits are thoroughly split on a definition of direct evidence. *Id.* at 2186. Charles Sullivan declares "direct evidence" a "misnomer," pointing out that even in *Miles*, an inference must be drawn to find that the employer's obvious animus motivated the employment decision. Sullivan, *supra* note 187, at 1119. In a general way, though, it is safe to say that "direct evidence" is used to characterize statements rather than conduct: "[T]estimony of employers or their admissions are analyzed under Price Waterhouse; inferences of bad thoughts drawn from conduct are treated under McDonnell Douglas and Burdine. Where admissions are concerned, the plaintiff must convince the fact-finder that bad thoughts not only existed but also influenced the decision maker. To the extent that the plaintiff's proof rests on inferences drawn from the employer's conduct, however, all three stages collapse into one: does the conduct which, by definition, affects the plaintiff, reveal the existence of prohibited considerations?" *Id.* at 1157.

livered a short lesson concerning the use of circumstantial evidence in discrimination cases generally:

> We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in Reeves v. Sanderson Plumbing Products, Inc. [citation omitted], we recognized that evidence that a defendant's explanation for an employment practice is 'unworthy of credence' is 'one form of *circumstantial evidence* that is probative of intentional discrimination.' [citation omitted]. The reason 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."[199]

The Court went on to point out that circumstantial evidence has always been considered sufficient in court, even in criminal cases, where proof beyond a reasonable doubt is required.[200] It is not surprising, then, said the Court, that neither the employer in this case nor its amici curiae can point to any other circumstance in which the Court has required a showing of direct evidence without an affirmative statutory directive.[201]

It is worth speculating about why and how such a mystification has uniquely grown up around and enshrouded discrimination jurisprudence. As suggested above, one reason for the unwillingness to draw inferences from circumstantial evidence in employment discrimination cases may be a growing reluctance to embrace the explanatory presumption of discrimination on which the *McDonnell Douglas* regime is founded.[202] If this is so, then the brisk demystifying language of the *Desert Palace* dictum concerning circumstantial evidence may prove to be limited to its rhetorical effect.

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[199] *Desert Palace,* 539 U.S. at 94.
[200] *Id.* at 95.
[201] *Id.*
[202] Selmi, *supra* note 11, at 328.

III. CONCLUSION

In *Elsayed Mukhtar v. California State University Hayward*, the experiment of introducing sociological "subtle discrimination" research into the courtroom has yielded ambiguous results. Under the two-prong *Daubert* test for expert testimony, questions were raised both about the relevance and about the reliability of Dr. Wellman's testimony that the court declined to address directly, ostensibly wishing to leave to the trial court the issue of admissibility proper. Nor is it clear how much of the difficulty encountered in this case had to do with the specific structure of Wellman's methodology, his decoding device. Given the unusual character of employment discrimination under *McDonnell Douglas* as a cause of action without elements, it seems desirable not to have a racial-discrimination expert draw the inference of discrimination for the jury. And yet, in the post-*Kumho* world – where it is necessary for an expert to demonstrate not only why tires fail but also why *this particular* tire failed – it is difficult to see how this trap can be avoided.

The Supreme Court decision in *Desert Palace* arose out of a Ninth Circuit case, virtually contemporaneous with *Elsayed,* which was introduced into the *Elsayed* opinion by amendment. *Desert Palace* has aroused a good deal of speculation as to whether the *McDonnell Douglas* pretext regime is simply obsolete and due to expire.[203] Of course, it is much too early to tell whether, in fact, the mixed-motive analysis will come to displace pretext analysis, now that the direct evidence hobble has been removed. For Professor Elsayed, as argued above, it certainly is not clear that the mixed-motives route would provide an advantage over the pretext route.

In her influential 1995 article, Professor Malamud called for an end to the *McDonnell Douglas* regime in the name of "intellectual honesty" and for the sake of encouraging "a more subtle and creative understanding of discrimination in its many forms."[204] She noted, however, that to abandon *McDonnell Douglas* would be to remove a constraint on the appellate

[203] See, e.g., Pierce, *supra* note 198, at 2207-2209.
[204] Malamud, *supra* note 7, at 2320.

courts, empowering them to "attempt to expand their own role by establishing 'rules' about the kinds of evidence that will and will not suffice to prove intentional discrimination as a matter of law."[205] Given the way the appellate court performed its role in *Elsayed*, perhaps we are not ready for the greater openness *Desert Palace* seems to promise. For *McDonnell Douglas* itself once promised openness. John Valery White claims that "the Court's plan in McDonnell Douglas was to avoid defining both discrimination and the protected categories so that the law might accommodate the many forms of both, while creating a structure within which justice could be administered."[206] If this characterization is persuasive, then it casts a cautionary light back over the convolutions and mystifications of Title VII employment discrimination jurisprudence.[207] If the *Elsayed* court is representative, then we will not do well to invite the federal appellate courts to start over again with a clean slate. The mystification is not in the doctrine but in the doctrine's keepers.

DEBORAH DYSON*

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[205] *Id.* at 2323.

[206] White, *supra* note 149, at 720.

[207] "For better or for worse, the traditional disparate treatment model, relied on by the courts for the last thirty years, remains the best model for proving claims of discrimination," says Michael Selmi, "though by labeling it the best model I do not mean to suggest that it is a perfect model." Selmi, *supra* note 11, at 666.

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