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An Allegory of the Cave and the Desert Palace

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ARTICLE

AN ALLEGORY OF THE CAVE AND THE *DESERT PALACE*

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> "[W]hile his eyes are blinking and before he has become accustomed to the surrounding darkness, he is compelled to fight in courts of law, or in other places, about the images or the shadows of images of justice . . . ."[1]
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> "[T]hese are their hypotheses, which they and every body are supposed to know, and therefore they do not deign to give any account of them either to themselves or others; but they begin with them, and go on until they arrive at last, and in a consistent manner, at their conclusion?"[2]

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1. THE REPUBLIC OF PLATO, Book VII, at 218 (B. Jowett trans., Oxford Univ. Press 3d ed. 1888).

2. *Id.* Book VI, at 212.

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964, this nation's landmark employment discrimination law, reached its fortieth anniversary in 2004.[3] In the midst of anniversary celebrations, there is an issue of transcendent importance that demands imminent resolution. No issue is more crucial to the litigation of intentional discrimination cases than determining what effect the U.S. Supreme Court's 2003 decision in *Desert Palace, Inc. v. Costa*[4] has on the pretext proof structure developed by the Court in *McDonnell Douglas Corp. v. Green*.[5] For thirty years, since the Court announced it in 1973, the *McDonnell Douglas* analysis has been the colossus of employment discrimination law.[6] Is it possible that the Court unceremoniously toppled *McDonnell Douglas* in *Desert Palace* without even bothering to mention the case by name? Litigants, lawyers, and judges need an answer to that question now.

Just over a year after the Court decided *Desert Palace*, the Fifth Circuit, in *Rachid v. Jack In The Box, Inc.*,[7] became the first federal court of appeals to address the issue squarely. In an age discrimination case, the court concluded that *Desert Palace* does not abrogate *McDonnell Douglas*, but instead only requires a modification of that proof structure.[8] The court explained that the new analysis, which it called "the modified *McDonnell Douglas* approach," merges the *McDonnell Douglas* (pretext) and *Price*

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3. Pub. L. No. 88-352, 78 Stat. 66 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-15 (2000)). Although enacted in 1964, the effective date of Title VII was July 2, 1965. *See* Pub. L. No. 88-352, § 716, 78 Stat. 241, 266 (1964) (stating that the effective date shall be one year after the date of enactment).

4. 539 U.S. 90 (2003).

5. 411 U.S. 792 (1973).

6. It was dominant for thirty years, and it has been on life support for more than a year since *Desert Palace* was decided.

7. 376 F.3d 305 (5th Cir. 2004).

8. *Id.* at 307, 312. The case also is notable for its holding that the changes wrought in Title VII analysis by *Desert Palace* also are applicable to the Age Discrimination in Employment Act. *Id.* at 311. To the extent that other circuits follow the Fifth Circuit in this holding, the interaction of *Desert Palace* and *McDonnell Douglas* becomes even more important.

Waterhouse v. Hopkins[9] (mixed-motives) analyses.[10] In this modified or merged proof structure, the first two stages are good old *McDonnell Douglas*: First, the plaintiff must establish a prima facie case, and second, the defendant must "articulate a legitimate, non-discriminatory reason" for the adverse employment action.[11] Then comes the new part: The court explained that at stage three, the plaintiff must produce sufficient evidence to create a genuine issue of material fact[12] either that the defendant's articulated reason was a pretext for discrimination (the "pretext alternative") or that the defendant's reason is true but another motivating factor for the decision was discrimination based on a protected characteristic (the "mixed-motives alternative").[13] Thus, according to the Fifth Circuit, all that *Desert Palace* requires is a modification of the third stage of the *McDonnell Douglas* analysis.

The Fifth Circuit's interpretation of *Desert Palace* in *Rachid* is an important change in employment discrimination law and one that will be helpful to plaintiffs. Still, the Fifth Circuit did not go far enough in assessing the implications of *Desert Palace*. *McDonnell Douglas*, as an important analytical tool with procedural ramifications, is dead; that is a message that demands a stentorian declaration. This truth leads to the conclusion that *McDonnell Douglas* should be burned on the funeral pyre of employment discrimination law. From its inception, the pretext proof structure has been an analytical framework that has been used by courts at two procedural stages of disparate treatment cases (the "assessment of the sufficiency of the evidence" stage and the "evaluation of the weight of the evidence" stage) to make decisions about whether cases should proceed and who should win. *McDonnell Douglas*, divested of any procedural significance after *Desert Palace*, no longer serves the purpose it served during its first thirty-one years. Consequently, there is no reason, other than nostalgia, to keep it. The more compelling reason to banish it, however, is that because of its long history of procedural significance, retaining it will cause

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9. 490 U.S. 228 (1989).

10. *Rachid*, 376 F.3d at 312.

11. *Id.*

12. It is important to note that the procedural posture of *Rachid* was an appeal of the district court's granting of the defendant's motion for summary judgment. *Id.* at 308. As will be discussed below, the *McDonnell Douglas* proof structure has been intimately tied to procedure, and viewing it in the context of procedure is a key to determining its continuing viability in light of *Desert Palace*. Refer to Part IV.C *infra*.

13. *Rachid*, 376 F.3d at 312.

confusion in cases and impede recognition of the uniform proof structure that necessarily follows from *Desert Palace*.

I have been down in the cave before.[14] The case law and commentaries published in the period since the *Desert Palace* decision have convinced me that it is time to descend once again.

II. AN ALLEGORY OF THE CAVE AND THE *DESERT (PALACE)*

It is time to climb out of the cave and look at employment discrimination law in the bright light of the sun. Although it was understandable that we looked at discrimination cases and saw the shadows (the *McDonnell Douglas* pretext analysis and the mixed-motives analysis) while we were prisoners in the cave, we cannot remain so shackled. On a sunny day in June 2003, the fetters of some prisoners were taken off,[15] and we ascended out of

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14. William R. Corbett, McDonnell Douglas, *1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMPL. L. 199 (2003) (discussing the aftermath of *Desert Palace* and that case's effect on *McDonnell Douglas*).

15. With humility, I claim to be one of the freed prisoners. *See, e.g.*, Corbett, *May You Rest in Peace?*, *supra* note 14 (arguing that *Desert Palace* has eliminated *McDonnell Douglas*, even though many commentators and practitioners wish not to admit it). I am not alone, but the truth I have seen varies somewhat from that seen by my fellow pilgrims. The Honorable Paul A. Magnuson, a federal district judge, quickly announced that *Desert Palace* had shed light on the shadow of *McDonnell Douglas*. *See* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) ("The dichotomy produced by the *McDonnell Douglas* framework is a false one."). Judge Magnuson subsequently further explained his view in a concurring opinion in an Eighth Circuit decision, concluding that "it is simply impossible to reconcile the ancient *McDonnell Douglas* paradigm with the clear language of the Civil Rights Act." Griffith v. City of Des Moines, 387 F.3d 733, 747 (8th Cir. 2004) (Magnuson, J., concurring specially). Other judges followed. *See, e.g.*, Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003) (noting that although *Desert Palace* does not "necessarily spell the demise of the entire *McDonnell Douglas* burden-shifting paradigm," it does "spell the demise of the 'false dichotomy' between the *McDonnell Douglas* framework . . . and the *Price Waterhouse* framework"); Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 WL 21976027, at *12 (S.D. Iowa July 3, 2003) (agreeing that "plaintiff may bring his Title VII claim 'according to the burdens articulated in [the] Civil Rights Act of 1991,' without being confined to the strictures of the *McDonnell Douglas* burden-shifting framework" (alteration in original)), *aff'd*, 387 F.3d 733 (8th Cir. 2004). While affirming the district court's decision, the Eighth Circuit panel rejected the proposition that *Desert Palace* abrogated *McDonnell Douglas*. *Griffith*, 387 F.3d at 736 ("[W]e conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions."). Other commentators also ascended from the cave. *See, e.g.*, Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 103 (2004) (positing that in light of *Desert Palace*'s eradication of the distinction between mixed-motives cases and pretext cases, "the standardization of disparate treatment cases will essentially return disparate treatment jurisprudence to 1972, before *McDonnell Douglas v. Green* was decided"); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 907 (2004) ("*McDonnell Douglas* should retire and make a graceful retreat into history."); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert

the cave into the *Desert* and the light of the upper world. Because of the brightness of the light and the fact that our eyes were accustomed to the dark, it was too painful for us to look at the sun, and when we first saw the real object in the harsh light, we thought that perhaps the shadows were truer than the real object itself. But after growing accustomed to the light of the upper world, we saw the shadows as imperfect substitutes for the real object ("because of . . . race, color, religion, sex, or national origin").[16] After marveling at the sight of the real object, we enlightened ones must "go down to the general underground abode, and get the habit of seeing in the dark"[17] to teach what we have seen in the world above to the other prisoners who remain shackled.[18] But the prisoners in the cave, who have lived their lives watching shadows cast upon a wall, will say that we enlightened ones ascended from the cave and returned without our eyes.[19]

Who could have known that Plato saw the plight of employment discrimination lawyers, judges, and scholars so clearly in the allegory of the cave! Did the fifth century philosopher foresee the U.S. Supreme Court's decision in *Desert Palace, Inc. v. Costa* and the subsequent maelstrom? If so, the philosopher's prescience rivals that of Nostradamus. Regardless, his allegory accurately depicts the state of employment

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Palace Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 72 (2003) [hereinafter Van Detta, *"Le Roi"*] (claiming that "*McDonnell Douglas v. Green* is dead" (footnote omitted)); Jeffery A. Van Detta, *"Le Roi Est Mort" Redux: Section 703(m),* Costa, McDonnell Douglas*, and the Title VII Revolution—A Reply*, 52 DRAKE L. REV. 427, 445 (2004) (criticizing those who believe that *McDonnell Douglas* is alive and stating that "there is no more room for *McDonnell Douglas* in the world of Title VII litigation").

16. 42 U.S.C. § 2000e-2 (2000).

17. THE REPUBLIC OF PLATO, *supra* note 1, Book VII, at 220.

18. One may ask why I descend into the cave again, having already once gone down and proclaimed what I saw in the upper realm. *See generally* Corbett, *May You Rest in Peace?*, *supra* note 14. There are several answers. First, I fear that in the first year after the *Desert Palace* decision, the benighted prisoners in the cave are winning in promoting their shadows over the real objects. Refer to notes 7–13 *supra* and accompanying text (discussing Rachid v. Jack In The Box, Inc., 376 F.3d 305 (5th Cir. 2004)). This interpretation of the law must be stanched as soon as possible, as this matter is too important to allow the proper result to emerge, if at all, over a period of years. Second, to free the prisoners, I think the debate should be focused on a few principles that elucidate the relationship between the shadows (the proof structures) and the real object (employment discrimination). Third, as I understand the command of Socrates in Plato's allegory, the freed and enlightened former prisoners must not only descend into the cave, but also stay in the cave and continue teaching. Fourth, is not it time for the second generation of *Desert Palace* articles? Fifth, how many times does a law professor limit himself to one article on a topic?

19. *See* Christopher R. Hedican et al., McDonnell Douglas*: Alive and Well*, 52 DRAKE L. REV. 383, 395 (2004) (contending that the holding of *Costa* is narrow and does not overrule *McDonnell Douglas*).

discrimination law in the United States in the twenty-first century.

I apologize to both Plato and those whom I am depicting as shackled, benighted prisoners in a cave. I mean no harm. I acknowledge that I am no sagacious philosopher, and I know that those who believe that *McDonnell Douglas* survived *Desert Palace* are not intellectually inferior to me. The allegory is important, however, to show that the proof structures we use to analyze employment discrimination are not the thing itself, but are like shadows of the ultimate issue, and we have become so fixated on them that we are not able to see the thing itself and discuss it apart from the proof structures.

I refuse to be characterized by the cave dwellers as an opponent of the *McDonnell Douglas* analysis. I have loved it well,[20] I hope that I have defended it with great honor,[21] and I have almost made a career of writing about it. I cannot, however, ignore the truth that I have seen in the bright light of the *Desert (Palace)* sun, even if the cave dwellers, whom I hope not to offend, have not seen it.[22]

III. HISTORY AND HIEROGLYPHICS

The relevant history can and should be stated succinctly; it has been recounted often.[23] The Civil Rights Act of 1964 was passed, obviously, in 1964 and became effective in 1965.[24] Title VII is the employment section of that landmark civil rights law.

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20. *See, e.g.*, William R. Corbett, *The "Fall" of* Summers*, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996) (defending *McDonnell Douglas* and criticizing the Supreme Court's subsequent refinements of the analysis).

21. Was e'er so eloquent an apology written? *See, e.g.*, William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMPLOYEE RTS. & EMPL. POL. J. 361 (1998) (praising *McDonnell Douglas* for the role it has played in employment discrimination litigation). Though I do not consider myself sagacious, one may believe that I love to cite my own work—that is three citations so far. Alas, when you have been to the upper realm, you must tell what you have seen.

22. Although I attempt to treat the topic with some levity in this Article, as one must do when characterizing people with another view as prisoners in a cave, I wish to be clear that the issue is of the utmost importance in employment discrimination law. Every day of the week, courts throughout the nation are considering motions for summary judgment and jury instructions and necessarily grappling with the effect that *Desert Palace* has on the *McDonnell Douglas* pretext analysis. This is not merely an interesting debate about theory. Litigants' rights are at stake, and the issue needs to be resolved with all deliberate speed.

23. For some of the most recent recitations, refer to notes 15, 19 *supra*.

24. Refer to note 3 *supra*.

Title VII is generally understood as declaring it unlawful to discriminate in employment decisions and actions "because of [an] individual's race, color, religion, sex, or national origin."[25] In 1973, in the second Title VII case to reach the U.S. Supreme Court[26]—*McDonnell Douglas*—the Court recognized how difficult it is for plaintiffs to present evidence of discrimination "because of [their] race, color, religion, sex, or national origin." Accordingly, the Court created a proof structure (or analysis or framework, if you prefer) to be used in evaluating intentional discrimination cases.[27] Justice O'Connor would later explain that the shadow was created to aid plaintiffs, who seldom have the benefit of direct evidence, in the presentation of their evidence of discrimination.[28]

The *McDonnell Douglas*, or pretext analysis, is a three-part framework. The first step under this framework requires the plaintiff to establish a prima facie case of intentional discrimination.[29] To meet the prima facie case, a plaintiff must prove (1) the plaintiff is a member of a protected class; (2) the plaintiff applied for and was qualified for the job at issue; (3) despite the plaintiff's application and qualification, the plaintiff was rejected; and (4) the position remained open and the defendant-employer continued to seek applicants from persons of the same qualifications as the plaintiff.[30] Once the plaintiff establishes a prima facie case, a presumption is created that the defendant-employer unlawfully discriminated against the plaintiff.[31] At this point, the burden of production shifts to the defendant to rebut the presumption of intentional discrimination by producing evidence of a legitimate, nondiscriminatory reason for rejecting the plaintiff or preferring someone else.[32] Once the defendant-employer satisfies this burden of production, the burden shifts back to the plaintiff to prove that the employer's reasons are merely a pretext for discrimination.[33] The meaning

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25. 42 U.S.C. § 2000e-2(a)(1) (2000).

26. In the first Title VII case to reach the Court, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court recognized the disparate impact theory of employment discrimination.

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The critical issue before us concerns the order and allocation of proof in a[n] . . . action challenging employment discrimination.").

28. Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

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

30. *Id.*

31. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–54 (1981).

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

33. *Id.* at 804.

and procedural effect of the second and third stages were developed in subsequent Court decisions: *Texas Department of Community Affairs v. Burdine*,[34] *St. Mary's Honor Center v. Hicks*,[35] and *Reeves v. Sanderson Plumbing Products, Inc.*[36] The elements of the prima facie case have been adjusted to address different types of cases, such as various adverse employment actions (*McDonnell Douglas* involved a refusal to rehire) and "reverse discrimination" cases.[37]

It would be difficult to overstate the importance of the *McDonnell Douglas* analysis in employment discrimination law. Although developed in a Title VII case, it has been applied to intentional discrimination claims under almost all of the federal[38] and state employment discrimination laws.[39] It has been adopted (sometimes with modifications) for retaliation claims[40] and employment law claims other than employment discrimination.[41]

The Court developed an alternative proof structure for intentional discrimination cases in *Price Waterhouse v. Hopkins*.[42] The plurality's framework is commonly referred to as the "mixed-motives analysis" because it permits a finding that the adverse employment decision was taken for both lawful and

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34. 450 U.S. 248, 260 (1981) (holding that when the plaintiff in a Title VII case "has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions").

35. 509 U.S. 502, 509–11 (1993) (declaring that proof of pretext at the third stage of *McDonnell Douglas* does not require a judgment in favor of the plaintiff).

36. 530 U.S. 133, 146–47 (2000) (holding, with regard to the third stage of *McDonnell Douglas*, that a prima facie case and sufficient evidence of pretext usually will support a finding by the trier of fact of unlawful discrimination without additional, independent evidence of discrimination, though such a showing may not always be adequate to sustain a jury's finding of liability).

37. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 & n.6 (1976).

38. *See, e.g.*, West v. Nabors Drilling USA, Inc., 330 F.3d 379, 384–85 (5th Cir. 2003) (applying pretext analysis in an ADEA case); Patten v. Wal-Mart Stores E., Inc., 300 F.3d 21, 24–25 (1st Cir. 2002) (applying mixed-motives analysis to an ADA case), *cert. denied*, 539 U.S. 937 (2003).

39. *See, e.g.*, Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1113–14 (Cal. 2000) (adopting *McDonnell Douglas*'s three-stage burden-shifting test in a case decided under California law).

40. *See, e.g.*, Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 577 (5th Cir. 2004) (holding that a trial court must give a pretext jury instruction for a retaliation claim under the Fair Labor Standards Act).

41. *See, e.g.*, Grey Wolf Drilling Co. v. Perez, No. 04-02-00802-CV, 2004 WL 383328, at *1–*2 (Tex. App.—San Antonio Mar. 3, 2004, no pet. h.) (applying pretext analysis to a claim of retaliatory discharge under the state workers' compensation law).

42. 490 U.S. 228 (1989). The *Price Waterhouse* proof structure was borrowed from constitutional law analysis in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Price Waterhouse*, 490 U.S. at 248–49 (plurality opinion).

unlawful reasons.[43] The first step of this analysis required the plaintiff to show that a protected characteristic was a motivating factor in the employment decision.[44] Justice O'Connor's concurring opinion stated the measure of causation as higher than a motivating factor: Causation should be measured by determining whether a protected characteristic was a *substantial* factor in the employment decision.[45] Once the plaintiff met her burden, the burden then shifted to the defendant-employer to prove, by a preponderance of the evidence, that it would have taken the same action for legitimate, nondiscriminatory reasons.[46] This affirmative defense, often called the "same-decision defense," permitted the defendant to escape liability.[47]

In the aftermath of *Price Waterhouse*, courts were left to glean from the several opinions a standard of causation to use in the mixed-motives analysis. The plurality opinion adopted a "motivating factor" standard, but it did not have the support of a majority of the Court. Justice O'Connor's "substantial factor test" was the standard used by most courts after the *Price Waterhouse* decision. A second issue courts had to resolve after *Price Waterhouse* was the criterion to distinguish between when the *McDonnell Douglas* pretext or the *Price Waterhouse* mixed-motives analysis applied to a particular case. Courts again turned to Justice O'Connor's concurring opinion and seized upon the distinction she made: Cases involving direct evidence were analyzed under mixed motives, and cases involving circumstantial evidence were analyzed under the pretext framework.[48]

In the Civil Rights Act of 1991, Congress set about to rectify several employment discrimination decisions of the U.S. Supreme Court, and *Price Waterhouse* was among them.[49] The *Price Waterhouse* modification and codification produced a motivating factor standard of causation and a same-decision limitation of remedies in which the burden of persuasion is on the defendant.[50] Under the statutory version of that analysis, a plaintiff proves discrimination if she proves that the protected

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43. *Price Waterhouse*, 490 U.S. at 244–45 (plurality opinion).

44. *Id.* at 257 (plurality opinion).

45. *Id.* at 265 (O'Connor, J., concurring).

46. *Id.* at 252–53 (plurality opinion).

47. *Id.* at 258 (plurality opinion).

48. *Id.* at 270–71 (O'Connor, J., concurring).

49. *See* H.R. REP. NO. 102-40(I), at 45–49 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583–87.

50. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (1991).

characteristic was a motivating factor in the employer's decision.[51] At that stage, the employer is liable for a violation of the employment discrimination statute, but the employer has the opportunity to establish a partial affirmative defense: If the employer proves that it would have taken the same action absent the impermissible motivating factor, then the remedies are limited to some types of injunctive relief, declaratory relief, attorneys' fees (which are discretionary), and costs.[52] This same-decision limitation of remedies had been a complete affirmative defense under the *Price Waterhouse* version.[53]

After the emergence of the mixed-motives proof structure in 1989, the law of intentional discrimination was divided between *McDonnell Douglas* pretext and *Price Waterhouse*–Civil Rights Act of 1991 mixed motives. *McDonnell Douglas* was predominant,[54] as courts determined that most cases involved "only" circumstantial evidence rather than direct evidence.[55] One court adroitly depicted the difficulty courts faced in classifying cases: "[A]lthough the results of the analyses are significantly different, the analytic difference between these two types of cases is razor-thin, which has made the area a particularly difficult one for the courts . . . ."[56] Given the difficulties posed by classifying and analyzing cases and the important rights at stake, the two-proof-structure state of the law was criticized,[57] with *McDonnell Douglas* bearing the brunt of the criticism.[58] Some commentators

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51. 42 U.S.C. § 2000e-2(m) (2000).

52. § 2000e-5(g)(2)(B).

53. *Price Waterhouse*, 490 U.S. at 242 (plurality opinion).

54. *See The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 408–09 & n.66 (2003).

55. *See, e.g.*, Evans v. City of Houston, 246 F.3d 344, 350–51 (5th Cir. 2001) (applying the *McDonnell Douglas* analytical framework because it was specifically developed to deal with cases involving "only" circumstantial evidence of discrimination); MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437, 1441 (10th Cir. 1996) (applying the *McDonnell Douglas* analytical framework because the plaintiff failed to produce direct evidence of discrimination).

56. Russell v. Microdyne Corp., 65 F.3d 1229, 1237 (4th Cir. 1995).

57. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1219 (1995).

> [N]either the *Price Waterhouse* Court, nor the district and circuit courts which applied it, have been able to devise workable standards for delineating the respective spheres of the pretext and mixed-motives variants of disparate treatment proof. Indeed, under the current majority approach to this problem, neither the parties, the court, nor the jurors are apt to know which of the two competing variants will apply to determine liability until, at the earliest, the conclusion of the plaintiff's case.

Id.

58. *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After*

advocated a uniform analysis for intentional discrimination cases.[59]

By 2003 the stage had long been set for *Desert Palace*, in which *McDonnell Douglas* met the Civil Rights Act of 1991. The Ninth Circuit rendered an en banc decision in *Desert Palace*, holding that under the Civil Rights Act of 1991, there was no basis for requiring direct evidence to invoke the motivating factor standard of section 703(m).[60] Accordingly, the court held that

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Hicks, 93 MICH. L. REV. 2229, 2259 (1995) (commenting on burden of proof problems under *McDonnell Douglas* that were created after the *Hicks* decision); *see also* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1527 n.182 (1997) (agreeing with Malamud that it would be best to abandon *McDonnell Douglas*). *See generally* Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1 (1996) (discussing "whether the *Hicks* Court's interpretation of the *McDonnell Douglas* test increases the fairness and accuracy of the Title VII system"); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995) (calling for the abandonment of *McDonnell Douglas* because its pretext rules are unsatisfactory, its claimed benefits are "largely illusory," and it is superfluous in light of the Civil Rights Act of 1991); George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43 (1993) (criticizing *McDonnell Douglas* because its proof structure is ineffective in resolving motions for summary judgment and its constitutional law ideology complicates the practical problems in employment discrimination law); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371 (1997) (arguing for replacement of the *McDonnell Douglas* minuet with "a Restatement-like set of proof requirements" because "the *McDonnell Douglas* framework contributes about as much to the proper outcome of a discrimination case as the Star Spangled Banner contributes to the proper outcome of a baseball game").

59. Professor Michael Zimmer was the principal proponent of the uniform analysis. *See, e.g.*, Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 713 (2000) (arguing for a uniform approach that would allow the plaintiff to establish the defendant's liability by proving the defendant's employment decision was motivated by a protected characteristic and, if so proven, under which the defendant could affirmatively defend that it would have made the same decision despite the characteristic); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 625 (1996) [hereinafter Zimmer, *Emerging Uniform Structure*] (recommending that all disparate treatment cases should be analyzed under the uniform structure established by the Civil Rights Act of 1991); *see also* Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 262 (2001) (suggesting that the courts should perform a textual analysis of the Civil Rights Act of 1991 in deciding employment discrimination claims and offering some practical issues that attorneys will face in these cases). *But see* Robert A. Kearney, *The High Price of* Price Waterhouse*: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 330–32 (2003) (dividing cases by "affirmative" and "negative" evidence of discrimination and preserving *McDonnell Douglas* analysis for cases involving negative evidence).

60. Costa v. Desert Palace, Inc., 299 F.3d 838, 853–54 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003). Section 703 is part of the Civil Rights Act of 1964 and has subsequently been modified by the Civil Rights Act of 1991.

direct evidence of discrimination is not required for a court to give the mixed-motives jury instruction.[61] The Ninth Circuit also explained that *McDonnell Douglas* remains a viable analysis at the summary judgment stage, but is not relevant to jury instructions.[62] Regarding jury instructions, the Ninth Circuit opined that a court, in evaluating the evidence, can give one of two instructions: (1) if the court evaluates the evidence as supporting a finding either that a discriminatory reason was the sole reason or not a reason at all, the court should instruct the jury to decide whether the employment action was taken "because of" the illegal reason, or (2) if the court evaluates the evidence as supporting a finding that a discriminatory reason was among two or more reasons for the employment action, the court should instruct the jury regarding the motivating factor standard and the same-decision partial defense.[63]

Surprisingly (at least to me), the Supreme Court affirmed the Ninth Circuit in a *unanimous* "short and direct opinion"[64] that held that "in order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[65] With that, the Court dispensed with the circumstantial–direct evidence line of demarcation between *McDonnell Douglas* pretext cases on the one hand and mixed-motives cases on the other. The Court reiterated the point in a footnote: "[I]n light of our conclusion that direct evidence is not required under § 2000e-2(m), we need not address . . . the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed motive' cases under Title VII[.]"[66] So what did the Court say about *McDonnell Douglas*? Nothing expressly. In fact, the Court clarified what it would not say; in a footnote, the Court stated,

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61. *Id.* at 856–59.

62. *Id.* at 856.

63. *Id.* at 856–57.

64. *The Supreme Court, 2002 Term—Leading Cases*, *supra* note 54, at 404. The same commentators also described the opinion as "short in length and modest in tone." *Id.* at 410. Although brevity, directness, and modesty are usually virtues to be extolled in court opinions, I would have preferred more length and flamboyance if that was necessary to produce discussion in the Court's *Desert Palace* opinion of the vital signs of *McDonnell Douglas*.

65. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m) (2000)).

66. *Id.* at 101 n.3 (internal quotation marks omitted).

"This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context."[67]

For over a year now, lawyers, courts, and commentators have been grappling with the issue of what effect *Desert Palace* has on *McDonnell Douglas* and thus on the litigation of intentional discrimination cases under perhaps all federal employment discrimination statutes.[68] The court decisions can be divided into the following groups: (1) those taking note of the issue but determining that they do not have to decide it,[69] often because they find that the same result would be reached under either analysis,[70] (2) those holding that *McDonnell Douglas* survives *Desert Palace*,[71] and (3) those holding that *Desert Palace*

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67. *Id.* at 94 n.1.

68. As previously mentioned, the pretext and mixed-motives analyses have been applied to intentional discrimination cases under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Refer to note 38 *supra* and accompanying text. Because the *Desert Palace* decision is based on the language of the Civil Rights Act of 1991, which amended Title VII and the ADA, but not the ADEA, it can be argued that *Desert Palace* is not applicable to the ADEA. *See* Rachid v. Jack In The Box, Inc., 376 F.3d 305, 310–12 & n.8 (5th Cir. 2004). The Fifth Circuit, however, decided to apply whatever changes were made by *Desert Palace* to the ADEA. *Id.* at 312 (holding that "the mixed-motives analysis used in Title VII cases post-*Desert Palace* is equally applicable in ADEA"). Other circuits may disagree. *See, e.g.*, Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004) ("We have not had occasion to decide whether the mixed-motive provision under the Civil Rights Act of 1991 applies to the ADEA. We have previously expressed doubt that it does, and instead we have suggested that the *Price Waterhouse* framework still applies to ADEA claims."); *see also* Snik v. Verizon Wireless, No. Civ.A.03-CV-2976, 2004 WL 1490354, at *2 (E.D. Pa. July 1, 2004) (noting a possible conflict between the Fifth Circuit in *Rachid* and the Fourth Circuit in *Mereish*).

69. *See, e.g.*, Riggs v. Kan. City Mo. Pub. Sch. Dist., 385 F.3d 1164, 1167 (8th Cir. 2004) (observing that the court need not decide whether *Desert Palace* altered *McDonnell Douglas*); Roberson v. Alltel Info. Servs., 373 F.3d 647, 652 (5th Cir. 2004) (deciding, as a different panel of the Fifth Circuit than that which decided *Rachid*, that the *McDonnell Douglas* issue did not require determination because the plaintiff's claims "fail[ed] under any interpretation of *Desert Palace*"); Allen v. City of Pocahontas, 340 F.3d 551, 557–58 n.5 (8th Cir. 2003) (citing *Desert Palace* but declining to decide its effect on the *McDonnell Douglas* issue because the petitioner "provided no evidence, direct or circumstantial, from which a reasonable jury could logically infer that age or gender was a motivating factor in her termination"), *cert. denied*, 540 U.S. 1182 (2004).

70. *See, e.g.*, Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1072 (9th Cir. 2004) (holding that the plaintiff's case should have survived summary judgment under either the mixed-motives or pretext analysis); Louis v. E. Baton Rouge Parish Sch. Bd., 303 F. Supp. 2d 799, 803 (M.D. La. 2003) (determining that the defendant's motion for summary judgment "should be denied under both the *McDonnell Douglas* framework and the mixed-motives analysis").

71. *See, e.g.*, Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting the argument that *Desert Palace* overruled *McDonnell Douglas*); *Rachid*, 376 F.3d at 312 (declaring that the mixed-motives analysis survived *Desert Palace* through a merging of the *McDonnell Douglas* and *Price Waterhouse* decisions); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (construing *Desert Palace* as providing the plaintiff at the summary judgment stage with the choice of whether to invoke *McDonnell Douglas*'s presumption or simply "produce direct or circumstantial evidence demonstrating that a

struck down *McDonnell Douglas*.[72] If one were keeping score, I fear that the shadows to which we have grown accustomed are keeping us enthralled.

Surely the Court did not intend to abolish thirty years of employment discrimination case law without saying so. Fittingly, in an area of the law in which debate about motivation, causation, and intent flourishes, what the Court meant or intended may not matter. From what the Court said, it necessarily follows that *McDonnell Douglas* is gone. One can only see this, however, by climbing out of the cozy cave.

IV. BEYOND THE SHADOW OF *MCDONNELL DOUGLAS*: MOVING TO FIRST PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW

The pretext analysis is an attempt to depict the fact of employment discrimination through the shadows of evidence, torts, and procedure. The first principle, among first principles, that must be accepted to begin the journey out of the cave is that the pretext analysis is not the real object. Achieving acceptance of this principle is no small task. Thirty years of focusing on this shadow has persuaded us that Title VII and the other employment discrimination laws are all about the proof

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discriminatory reason" motivated the employment decision); Carey v. FedEx Ground Package Sys., Inc., 321 F. Supp. 2d 902, 914–17 (S.D. Ohio 2004) (analyzing the various ways that courts have applied *McDonnell Douglas* since the *Desert Palace* holding and concluding that the correct approach is a modified *McDonnell Douglas* framework); Herawi v. Ala. Dep't of Forensic Sci., 311 F. Supp. 2d 1335, 1345 (M.D. Ala. 2004) (stating that "there is nothing in *Desert Palace* to undermine the usefulness of *McDonnell Douglas*"); Higgins v. Hosp. Cent. Servs. Inc., No. CIV.A.04-CV-00074, 2004 WL 2850079, at *6 (E.D. Pa. Dec. 9, 2004) ("*McDonnell Douglas* is still valid precedent."); Rozskowiak v. Vill. of Arlington Heights, No. 01 C 5414, 2004 WL 816432, at *6 (N.D. Ill. Mar. 26, 2004) (concluding, after a review of *Desert Palace*, that "*McDonnell Douglas* remains a viable framework for evaluating summary judgment motions"); Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1197–98 (N.D. Iowa 2003) (holding that, in light of *Desert Palace*, *McDonnell Douglas* only needs modification at the final stage of the burden-shifting paradigm).

72. *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 990 (D. Minn. 2003) (interpreting *Desert Palace* as an affirmation that Congress intended to abrogate the *McDonnell Douglas* analysis with the passage of the Civil Rights Act of 1991); Griffith v. City of Des Moines, No. 4:01-CV-10537, 2003 WL 21976027, at *12 (S.D. Iowa July 3, 2003) (agreeing with the holding in *Dare*), *aff'd*, 387 F.3d 733 (8th Cir. 2004). Although the Eighth Circuit affirmed the district court in *Griffith*, it rejected the proposition that *Desert Palace* abrogated *McDonnell Douglas*. *See Griffith*, 387 F.3d at 735. Judge Magnuson, the district judge who authored the *Dare* decision, sat by designation on the Eighth Circuit panel that heard *Griffith* and specially concurred to express his disagreement regarding the continuing viability of *McDonnell Douglas*. *Id.* at 739, 745 (Magnuson, J., concurring specially).

structures.[73] Admitting that the shadow is not reality will not be easy.[74]

Title VII and the other employment discrimination laws prohibit adverse employment actions "because of" race, color, sex, disability, et cetera. What does this mean? How are courts to evaluate whether a particular adverse employment action was taken because of a protected characteristic? The statutes do not say—they do not define discrimination in a useful way—and this is not an easy matter.[75] That is why we have looked at the shadows since 1973. It will hurt our eyes to look at employment discrimination law in the bright light of *Desert Palace*.

A. Evidence

Evidence principles have helped us see the shadows and imagine what employment discrimination looks like. The courts have told us that there can be either direct or circumstantial evidence of "because of" discrimination. The proof structure developed in *McDonnell Douglas* is nothing more than a set of rules regarding presentation and evaluation of circumstantial evidence. In that respect, it is like the tort "doctrine" of res ipsa loquitur. Under res ipsa, if a plaintiff is able to establish certain predicate facts, then that circumstantial evidence may have a procedural effect on the case—such as creating a rebuttable presumption of negligence or permitting an inference of negligence.[76] Courts have cautioned, however, that res ipsa loquitur, although treated as mystical, is nothing more than a set of principles regarding the use of circumstantial evidence.[77] The

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73. *See, e.g.*, Van Detta, *"Le Roi," supra* note 15, at 84 ("*McDonnell Douglas* and *Burdine* became such an ingrained part of employment discrimination law that few remember what it was like without them or that they were not actually enacted as part of Title VII." (footnote omitted)); *cf. The Supreme Court, 2002 Term—Leading Cases, supra* note 54, at 409 ("[D]ependence on the *McDonnell Douglas* framework most likely reflects unreasoned ossification of jurisprudence rather than informed confidence in its application.").

74. *See* THE REPUBLIC OF PLATO, *supra* note 1, Book VII, at 218; *see also* Corbett, *supra* note 14, at 219 (predicting that judges and lawyers would "cling tenaciously to *McDonnell Douglas*"); Van Detta, *"Le Roi," supra* note 15, at 138 ("[I]t will take several years to adjust to the new interpretation of section 703(m).").

75. *See, e.g.*, Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 307–09 (2004) (stating that the statutes do not define "discrimination," that "Title VII law has never been easy," and that "after more than a decade of litigation under the revised [1991] Act, . . . Title VII law has never been more complex and confusing"); *see also* Davis, *supra* note 15, at 859 (describing employment discrimination law as "befuddl[ing] most of those who have attempted to master it").

76. *See* DAN B. DOBBS, THE LAW OF TORTS § 154, at 370–89 (2000) (outlining the elements of res ipsa loquitur).

77. *See, e.g.*, Cangelosi v. Our Lady of the Lake Reg'l Med. Ctr., 564 So. 2d 654, 660

real issue in a negligence analysis is whether the defendant breached the standard of care. The same warning about not mistaking the principles of circumstantial evidence for the real issue is equally applicable to the *McDonnell Douglas* pretext proof structure.

Before *Desert Palace*, the type of evidence proffered provided the line of demarcation between intentional discrimination cases that were evaluated under the pretext proof structure and those that were evaluated under the mixed-motives analysis. That divider was never a good one because there is no bright line between what is direct evidence and what is circumstantial evidence.[78] In *Desert Palace*, the Ninth Circuit reviewed the varying approaches among the circuits for distinguishing direct from circumstantial evidence and, thus, how to choose a proof structure.[79] The court described this case law as "a quagmire," a "morass," and "chaos."[80] The U.S. Supreme Court erased the chimerical dividing line in *Desert Palace,* holding that direct evidence is not required for a plaintiff to obtain a motivating factor jury instruction.[81] But the Court did not say, and in fact declined to say, whether the motivating factor standard applies to all intentional discrimination cases.[82]

We have been here before. After *Price Waterhouse*, the Court left the lower courts to work out how to apply its analysis to intentional discrimination cases. Interestingly, the several opinions in *Price Waterhouse*, with no majority on major issues, left the lower courts with plenty of discussion with which to work. *Desert Palace*, in contrast, leaves the lower courts with a unanimous opinion but little discussion with which to work. The Court's reticence notwithstanding, one conclusion necessarily follows from the Court's *Desert Palace* holding—*McDonnell Douglas* is dead.

Some courts[83] and commentators[84] insist that the two proof structures remain. For example, one commentary states, "In spite of the Court's silence, . . . it is clear that a meaningful

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(La. 1990).

78. *See, e.g.*, Kearney, *supra* note 59, at 304 (noting the lack of consensus among federal courts in defining what evidence is "direct").

79. Costa v. Desert Palace, Inc., 299 F.3d 838, 851–53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

80. *Id.* at 851–53.

81. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 & n.3 (2003).

82. *Id.* ("[W]e need not address . . . 'the appropriate standards for lower courts to follow in . . ."mixed motive" cases . . . [.]'").

83. Refer to note 71 *supra* and accompanying text.

84. Refer to note 19 *supra* and accompanying text.

distinction between mixed-motive and pretext cases still exists under Title VII after *Costa*."[85] Such insistence avails little without suggesting what new standard determines which cases are analyzed under each proof structure. Courts and commentators have suggested that the remaining distinction is that there are cases in which there is only a single motive for an adverse employment action and cases in which there are multiple motives.[86] This distinction, however, will not suffice. It assumes that single-motive and multiple-motives cases exist and that litigants, lawyers, or courts can distinguish one from the other. Under the case law that developed under *Price Waterhouse*, we first looked to the type of evidence and then on that basis we classified a case as single or mixed motive. The number-of-motives distinction was predicated on the type of evidence; it was an evidence-based shadow, and apart from that shadow it has no independent reality.[87] Even if the distinction were founded on reality, how are courts to know which cases are single motive and which are mixed?

Professor Chambers has deftly demonstrated that the types of evidence presented in pretext and mixed-motives cases do not differ and thus that "one cannot support providing a motivating-factor instruction in a mixed-motives case and refusing to provide one in a pretext case."[88] Still, he questions what quantity and quality of evidence "will trigger a motivating-factor instruction in either case"[89] and offers three possibilities.[90] Although Professor

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85. *The Supreme Court, 2002 Term—Leading Cases*, *supra* note 54, at 405.

86. *See, e.g.*, Rachid v. Jack In The Box, Inc., 376 F.3d 305, 309 (5th Cir. 2004) (positing that a different analysis applies to cases in which there is a single motive versus cases in which there are mixed motives); *The Supreme Court, 2002 Term—Leading Cases*, *supra* note 549, at 407–08 (distinguishing the "ultimate substantive issue of causation" in pretext and mixed-motives cases).

87. Judge Magnuson explained in *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987 (D. Minn. 2003),

> The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on [the] basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational.

Id. at 991; *see also* Krieger, *supra* note 57, at 1223 ("Mixed-motives theory reflects much more accurately than pretext theory the processes by which cognitive sources of bias result in intergroup discrimination. . . . Thus, in a very real sense, every case of discrimination resulting from cognitive bias is a 'mixed-motives' case.").

88. Chambers, *supra* note 15, at 99.

89. *Id.*

90. *Id.* at 101–02. The three possible amounts of evidence sufficient to trigger a motivating-factor instruction would be (1) substantially less, (2) the same as that currently required to reach a jury in a pretext case, or (3) the same as that required in any standard disparate treatment case. *Id.*

Chambers has cast light on most of the shadows, and although he recognizes the correct answer,[91] he also recognizes that courts may not be willing to overturn thirty years of employment discrimination doctrine without a clear direction from the Court.[92] Further, he states that the Court is unlikely to provide further guidance.[93] Then, by explaining the options that courts may pursue, Professor Chambers chooses to become descriptive rather than prescriptive.[94] In so doing, he does not insist upon the necessary ramification of *Desert Palace*. He is probably correct about what courts will do to accommodate *McDonnell Douglas* to *Desert Palace*, and the preponderance of court decisions to date confirm the accuracy of that prediction. My objective, however, is different: I want to let the full light into the cave and dispel the shadow of *McDonnell Douglas*'s continuing viability once and for all.

B. Torts

Professor Van Detta has argued that employment discrimination claims are tort claims.[95] Indeed, Justice O'Connor in *Price Waterhouse* prefaced a discussion of standards of causation for employment discrimination by referring to "the statutory employment 'tort' created by Title VII."[96] The tort characterization of employment discrimination claims is a big subject,[97] but I wish to examine only a small part of it. The "because of" language has been interpreted as requiring proof of causation.[98] Employment discrimination law arguably took a bad turn with this analogy to tort law because tort concepts of causation do not capture the way in which discrimination occurs.[99] Indeed, Professor Krieger has offered a cogent argument

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91. *Id.* at 100 ("If the argument is persuasive, a motivating-factor jury instruction would be appropriate in all standard, pretext, and mixed-motives cases.").

92. *Id.* at 101.

93. *Id.* at 102–03.

94. *Id.* at 101–02.

95. Van Detta, *"Le Roi," supra* note 15, at 81–83.

96. Price Waterhouse v. Hopkins, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).

97. *See, e.g.*, Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 193–97 (1993) (decrying the privatization (tortification) of Title VII).

98. Professor Van Detta decries the focus on intent and insists that the statutory language signals causation. Van Detta, *"Le Roi," supra* note 15, at 92–100. Although this may be a distinction worth pursuing, the pretext and mixed-motives proof structures have been understood as evaluating causation.

99. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed*

that the pretext and mixed-motives proof structures, focusing as they do on causation, fail to capture the cognitive process by which discrimination occurs.[100] With all of the U.S. Supreme Court opinions on causation and Congress's adoption of the motivating factor standard in the Civil Rights Act of 1991, that is not my fight here. The several opinions in *Price Waterhouse* make clear that the proof structures have been based on an interpretation of the standard of causation required by the "because of" language of the statutes. The plurality said that "the specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute."[101] The plurality rejected the idea that "because of" necessarily means but-for causation, adopting instead a motivating factor standard of causation.[102] The dissent criticized the plurality's interpretation of "because of" as not meaning "but for" and pointed out that by creating the affirmative defense, the plurality had in fact retained a but-for causation standard.[103] Concurring, Justice O'Connor joined the fray over the appropriate causation standard and expressly recognized the tort law roots of the but-for causation standard.[104] Surveying the causation standards discussed in tort law, Justice O'Connor agreed with the dissent that "because of" means but-for causation, but borrowing from tort law, she expressed the standard as a "*substantial* factor" standard.[105] Then, in the Civil Rights Act of 1991, Congress agreed with the *Price Waterhouse* plurality and defined the standard of causation as a motivating factor standard: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[106]

It is often stated that the *McDonnell Douglas* pretext analysis adopted a but-for standard of causation.[107] Indeed, I have

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Motives Problem in Employment Discrimination Law, 70 TEX. L. REV. 17, 92 (1991) ("All attempts to apply causal theories derived from tort law to human actions are doomed to failure . . . .").

100. Krieger, *supra* note 57, at 1164–65.

101. *Price Waterhouse*, 490 U.S. at 237 (plurality opinion).

102. *Id.* at 241 (plurality opinion).

103. *Id.* at 282–86 (Kennedy, J., dissenting).

104. *Id.* at 263–64 (O'Connor, J., concurring).

105. *Id.* at 265 (O'Connor, J., concurring).

106. 42 U.S.C. § 2000e-2(m) (2000).

107. *See* Chambers, *supra* note 15, at 99–100 ("The Supreme Court's pretext jurisprudence requires that a plaintiff prove but-for causation."); Malamud, *supra* note 58, at 2259 (noting that "but-for" is "the standard of proof generally required under *McDonnell Douglas–Burdine*"); Zimmer, *Emerging Uniform Structure*, *supra* note 59, at

said that.[108] I want to confess that I now have reservations about characterizing the pretext analysis as incorporating but-for causation. It may be more accurate to characterize the pretext analysis, at least as it is stated (though perhaps not as it is applied), as incorporating sole-factor causation.[109] The principal problem with characterizing the pretext analysis in causation terms is perhaps that we are discussing "apples and oranges"—we long have mixed causation, motivation, and intention when we talk about "because of" discrimination.[110] As Professor Belton has explained, there is a "potential conceptual difference between 'but for' and 'pretext' analysis."[111] That is, when a factfinder concludes at stage three of the *McDonnell Douglas* analysis that the employer's legitimate nondiscriminatory reason is pretextual, it concludes that the discriminatory reason is the sole basis for the adverse employment action.[112] Still, the Court in *Price Waterhouse* insisted on causation standards for "because of" discrimination,[113] and Congress appears to have followed the Court in passing the Civil Rights Act of 1991.[114] Although it may be mixing causes, motives, and intents to compare the standards of causation in the pretext and mixed-motives proof structures, the Court did it in *Price Waterhouse*, and I think it is important to do so here to understand why *Desert Palace* killed off *McDonnell Douglas*. *McDonnell Douglas*'s standard of causation

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607 (referring to the "'but for' test routinely applied in *McDonnell Douglas/Burdine* cases"); *cf.* Kearney, *supra* note 59, at 310 (contrasting the motivating factor causation standard with *McDonnell Douglas*, and characterizing *McDonnell Douglas* as a "determining" or "but for" factor test).

108. Corbett, *supra* note 14, at 212.

109. *See, e.g.*, Griffiths v. CIGNA Corp., 988 F.2d 457, 472 (3d Cir. 1993) ("[I]t is clear that in pretext cases *the claim is that* the discriminatory motive was the sole cause of the employment action . . . ."), *cert. denied*, 510 U.S. 865 (1993). Professor Davis argues that the pretext analysis included only a motivating factor causation standard. Davis, *supra* note 15, at 895–98. I think he is the only commentator to advocate this proposition, and I think he is incorrect. It may be that the pretext analysis cannot be properly interpreted in causation standards, but the important point is that, as all have heretofore agreed, the pretext analysis imposes a more rigorous burden on plaintiffs than does the motivating factor standard. The objective of a majority of the Court in *Price Waterhouse* was to develop a proof structure more favorable than *McDonnell Douglas* for plaintiffs who could present direct evidence. Congress further eased the burden by codifying the motivating factor standard in the Civil Rights Act of 1991.

110. Gudel, *supra* note 99, at 92 (reasoning that causal theories from tort law are "doomed to failure" and that the question of racial discrimination cannot be resolved by looking at motive or intent).

111. Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1383 (1990).

112. *See id.* at 1384.

113. Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 (1989) (plurality opinion).

114. *See* 42 U.S.C. § 2000e-2(m) (2000).

(or whatever the analysis is measuring) is higher or more rigorous (harder for a plaintiff to satisfy) than section 703(m)'s motivating factor standard. After *Desert Palace*, a plaintiff cannot be required to satisfy the higher standard of the pretext analysis.

C. Procedure

Finally, the most significant shadows in which we have seen employment discrimination are those of procedure.[115] The story of the development of intentional discrimination law is the story of U.S. Supreme Court cases discussing the procedural significance of evidence presented via the proof structures: *McDonnell Douglas*, *Burdine*, *Price Waterhouse*, *Hicks*, *Reeves*, and *Desert Palace*. There are two procedural stages at which the proof structures can be invoked to analyze a case: decisions as to whether a party (usually the plaintiff) has produced sufficient evidence to get the case to the factfinder (motions for summary judgment and judgment as a matter of law) and decisions as to whether the party with the burden of persuasion has satisfied that burden. Discussing the proof structures in the abstract—that is, not in the procedural contexts in which they are relevant—is a mistake that sometimes keeps one in the cave looking at the shadows. For example, when the Court interpreted the third stage of the *McDonnell Douglas* analysis in *St. Mary's Honor Center v. Hicks*,[116] the interpretation was characterized as a devastating loss for plaintiffs that had killed the pretext-only interpretation of the analysis.[117] *Hicks*, however, held only that a plaintiff does not necessarily satisfy the burden of persuasion and win a case by proving pretext.[118] Most of the battles over the import of proving pretext (the battle of pretext-plus versus pretext-only[119]) arose in the context of whether a plaintiff satisfies

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115. *See, e.g.*, Van Detta, *"Le Roi," supra* note 15, at 105 ("'Procedure now defines unlawful discrimination and determines the outcome of Title VII cases'—and it has been largely that way since 1973." (footnote omitted) (quoting Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Interpretation of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 220 (1992))).

116. 509 U.S. 502, 510–11 (1993).

117. *See, e.g.*, Malamud, *supra* note 58, at 2234–36; *see also* Davis, *supra* note 15, at 869 (declaring that *Hicks* "remold[ed] the framework into ineffectuality" and "thwarted the original purpose of the framework"). Professor Davis wrote his assessment after *Reeves*, and I find it surprising that he views *Hicks* as eviscerating *McDonnell Douglas* in light of *Reeves*. He views *Reeves* very differently than I, however, characterizing it as further damaging *McDonnell Douglas*. *Id.* at 869–70. I view *Reeves* as reaffirming the relevance of the pretext analysis to the burden of production (sufficiency of the evidence).

118. *Hicks*, 509 U.S. at 505–07.

119. *See generally* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses:*

the burden of producing sufficient evidence by proving pretext.[120] The Court demonstrated this when it addressed the issue of the effect of proving pretext on the burden of production in *Reeves v. Sanderson Plumbing Products, Inc.*[121]

The first procedural principle that will assist in the ascent out of the cave is to consider the proof structures in the context of procedure and, more specifically, in the context of the burden of production and the burden of persuasion. The Ninth Circuit believed this and explained its abrogation of the direct evidence requirement in *Desert Palace* by discussing it in a procedural context.[122] Although I believe the court made some mistakes, I think it was correct to evaluate the ongoing relevance of the proof structures in terms of their procedural ramifications.

The second principle regarding procedure is that if a proof structure has no procedural effect, it should be discarded. Commentators who called for the abandonment of *McDonnell Douglas* after *Hicks* grasped this point,[123] although they failed to see the continuing relevance and importance of the pretext analysis to the burden of production (sufficiency of the evidence). Because the post-*Desert Palace* pretext analysis has *no* procedural effect on evaluating either (1) the satisfaction of the burden of production (sufficiency of the evidence) on motions for summary judgment or judgment as a matter of law or (2) the satisfaction of the burden of persuasion in the court's jury instructions, the proof structure has no practical use and should be abandoned.

I will address the post-*Desert Palace* irrelevance of *McDonnell Douglas* to the burden of persuasion first, because the conclusion I reach has implications for the burden of production as well. The Ninth Circuit explained that the *McDonnell Douglas* analysis is not relevant to jury instructions (which entail burden of persuasion) but is instead relevant to the summary judgment evaluation (which entails burden of production).[124] Having

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The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 HASTINGS L.J. 57 (1991) (outlining the competing rules governing proof at the pretext stage).

120. *See* Corbett, *supra* note 21, at 381–83 (discussing the impact of the *Hicks* decision on the *McDonnell Douglas* analysis and the "pretext-plus/pretext only" debate).

121. 530 U.S. 133, 142–43 (2000).

122. Costa v. Desert Palace, Inc., 299 F.3d 838, 851 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

123. *See, e.g.*, Malamud, *supra* note 58, at 2236–37 (calling for abandonment of the *McDonnell Douglas-Burdine* proof structure because it "does nothing the normal rules of civil procedure cannot do").

124. *Costa*, 299 F.3d at 856 ("This determination is distinct from the question of whether to invoke the *McDonnell Douglas* presumption, which occurs at a separate, earlier stage of proceedings [and] involves summary judgment rather than jury

explained that the pretext analysis is irrelevant to jury instructions, the Ninth Circuit curiously (and incorrectly) explained that two jury instructions are viable. First, if the court evaluates the evidence and finds that it could support a finding of multiple motives, then the court should instruct the jury on motivating factor and the same-decision defense.[125] If, on the other hand, the court deems the evidence to support only one cause for the adverse employment action, either a discriminatory or nondiscriminatory reason, then the court should instruct the jury to determine whether the action was "because of" the discriminatory reason, and there is no same-decision defense.[126] This "because of" jury instruction resurrects pretext despite the court's insistence that *McDonnell Douglas*, or pretext, is not relevant to jury instructions.

Using the Ninth Circuit's opinion in *Desert Palace*, one can perceive that once the dividing line between pretext and mixed-motives cases is erased, *McDonnell Douglas* cannot have any effect on jury instructions and the resolution of whether the burden of persuasion is satisfied. I realize, of course, that the Ninth Circuit did not view its "because of" instruction as related to pretext, but in fact, it is. The court explained the basis for giving the instruction: "If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking . . . ."[127] That is exactly what pretext analysis does—select one reason as the cause of the action. Even before *Desert Palace*, many courts had said that pretext jury instructions were not to be given.[128] After *Desert Palace*, such a jury instruction is nonsensical.[129] Plaintiffs have

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instructions . . . ."); *id.* at 857 ("*McDonnell Douglas* and 'mixed-motive' are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation."); *see also* McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (stating that a plaintiff responding to a motion for summary judgment may choose how to present her case—either pursuant to *McDonnell Douglas* or by simply presenting direct or circumstantial evidence that discrimination motivated the defendant).

125. *Costa*, 299 F.3d at 856–57.

126. *Id.* at 856.

127. *Id.*

128. *See* Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (discussing the split but holding that under some circumstances it is reversible error to refuse to give a requested pretext instruction).

129. Professor Davis disagrees, arguing that "the Supreme Court intended the *McDonnell Douglas* framework to apply not only at the summary judgment stage but also at trial." Davis, *supra* note 15, at 903. I do not understand how one can argue for a uniform mixed-motives analysis with a motivating factor standard of causation, as Davis does, and yet maintain that "a court will frequently have to provide the jury with

always wanted the mixed-motives analysis with the lower standard of causation and the shift in the burden of persuasion on the same-decision defense. With no dividing line between types of cases, there is no basis for a court to hold a plaintiff to any standard of causation other than, or higher than, the statutory motivating factor standard. One would have to believe that there is some new divider other than direct evidence–circumstantial evidence for distinguishing cases. As discussed above, no such standard is known.[130] One may argue, however, that regardless of the pretext and mixed-motives proof structures, a "because of" instruction must be permissible because it uses the statutory language of Title VII. In light of *Desert Palace,* however, the Civil Rights Act of 1991 should be understood as clarifying the standard of causation indicated by the 1964 phrase "because of."[131] Thus, after *Desert Palace*, a jury instruction containing the motivating factor standard and the same-decision partial affirmative defense encompasses all that is needed and all that is correct in disparate treatment cases.

Suppose plaintiffs begin requesting "because of" or pretext jury instructions in order to avoid the second jury instruction in a mixed-motives analysis—the second instruction being the same-decision defense. Look at the shadows, and if you strain, you might see a plaintiff argue to the judge that her evidence of discrimination is so strong and the defendant's evidence so weak that she is entitled to a pretext or a "because of" jury instruction, which would deprive the defendant of the same-decision instruction that limits remedies if the defendant satisfies the burden of persuasion. In my last journey back into the cave, I described the foregoing argument as "fanciful."[132] Now I wish to say more: it is wrong. First, it is not the province of either party to decide what is the standard of causation applicable to the case; that is the court's job.[133] If one accepts my argument in the preceding paragraph, that after *Desert Palace* the standard of causation for all intentional discrimination cases is the motivating factor standard, then the idea that a plaintiff could

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alternative instructions." *Id.* at 904. Of course, Professor Davis and I disagree about the standards of causation, and that at least in part explains our difference on jury instructions.

130. Refer to Part IV.A *supra.*

131. Davis, *supra* note 15, at 904 ("One of the purposes of *Price Waterhouse* and § 2000e-2(m) was to explain what 'because of' means.").

132. Corbett, *supra* note 14, at 214.

133. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) ("At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives.").

request a jury instruction on a higher standard should not even be entertained. Second, even if courts permitted litigants to select their standards of causation, a residual "because of" instruction does not make sense procedurally. If a plaintiff were to gamble and argue for a jury instruction that imposes a higher standard of causation, the court should decline and instruct on the motivating factor standard. The mixed-motives analysis involves, when the same-decision defense is taken into account, a but-for standard of causation. The dissent in *Price Waterhouse* demonstrated that point.[134] Thus, the plaintiff's argument must be viewed as improvidently asking to be *permitted to bear the burden of persuasion* on at least but-for causation (or perhaps sole causation).

Yet suppose a plaintiff really wants such a "because of" or pretext jury instruction to ensure that all remedies are awarded (differently stated, to ensure that there is no possibility of a jury deciding the same-decision defense in favor of the defendant). Surely the law must account for situations in which the plaintiff has an overpowering case and those in which the defendant's case is so weak that he is not entitled to raise the same-decision defense. Furthermore, what about cases in which both sides present evidence of reasons, but only one reason or the other can be believed? The same-decision defense should not limit remedies in either of those types of cases. The mixed-motives proof structure, viewed in a procedural context, provides for both of those types of cases and should produce a full recovery for the plaintiff.

In the first type of case, if a plaintiff has such a strong case and a defendant has such a weak case (meaning insufficient evidence supporting its asserted reason for the adverse action), then the court should grant a motion for judgment as a matter of law in favor of the plaintiff.[135] The court should reach this result by finding that the plaintiff proved an impermissible motivating factor and that the defendant's evidence is so lacking on the same-decision defense that the jury could not reasonably decide in defendant's favor on that point.

Turning from cases that are ripe for decision on judgment as a matter of law, imagine the second type of case in which

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134. *Id.* at 285 (Kennedy, J., dissenting) (explaining that the same-decision defense invokes but-for causation).

135. Courts have the authority to grant such motions sua sponte. *See* FED. R. CIV. P. 50(a)(1); Aetna Cas. & Sur. Co. v. Leahey, 219 F.3d 519, 546 (6th Cir. 2000) (explaining that it is "'clearly within the [district] court's power'" to enter judgment as a matter of law "on its own initiative" (quoting Am. & Foreign Ins. Co. v. Gen. Elec. Co., 45 F.3d 135, 139 (6th Cir. 1995))).

sufficient evidence supports both the plaintiff's alleged discriminatory reason and the defendant's alleged legitimate reason. A court may evaluate the evidence in such a case as supporting a result in which only one reason can be credited, because the reasons advanced by the plaintiff and the defendant are mutually exclusive, but that decision is a credibility call for the jury to make.[136] Although a court should not dispose of such a case by judgment as a matter of law, the jury can resolve it under a mixed-motives jury instruction and award full remedies by rejecting the defendant's same-decision defense. Although a plaintiff may prefer to avoid the same-decision defense jury instruction (and the prospect that the jury may reach the wrong result under it), such avoidance is not appropriate when sufficient evidence supports the employer's asserted reason.[137] Thus, plaintiffs need not and should not resort to asking for pretext jury instructions to obtain full relief, and in any event, courts should not give such instructions. The procedural device of judgment as a matter of law and the mixed-motives jury instructions account for and produce appropriate results in cases in which plaintiffs should be awarded all remedies.

The notion that the pretext analysis should be retained to benefit plaintiffs on jury instructions is an incredible proposition. The pretext analysis was developed for cases of "weaker" circumstantial evidence. Has it now become the source of a jury instruction that is to be the "secret weapon" sought by plaintiffs with evidence so overwhelming that they should be able to avoid the same-decision defense? It takes a greater leap to read *Desert Palace* as turning employment discrimination law on its head in that way than it does to read *Desert Palace* as abrogating *McDonnell Douglas*.

Thus, pretext analysis, which many courts and commentators thought had no relevance to jury instructions and burden of persuasion before *Desert Palace*, is now certainly irrelevant. Perhaps, however, the pretext framework retains procedural relevance regarding the burden of production

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136. I am indebted to Dean Rebecca Hanner White for pointing out the need to address such cases.

137. The National Labor Relations Board has recognized that a mixed-motives analysis is adequate to address all types of discrimination cases, applying its *Wright Line* analysis to cases alleging discrimination under section 8(a)(3) of the National Labor Relations Act. *See* Wright Line, 251 N.L.R.B. 1083, 1083 (1980) (setting forth the analysis), *enforced*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also* Taylor & Gaskin, Inc., 277 N.L.R.B. 563, 563 n.2 (1985) (stating that *Wright Line* applies to both pretext and mixed-motives cases); Kelly Robert Dahl, Note, Price Waterhouse, Wright Line, *and Proving a Mixed Motive Case Under Title VII*, 69 NEB. L. REV. 869, 895 (1990) (same).

(sufficiency of the evidence). That is what the Ninth Circuit said in its *Costa* opinion,[138] and that is the context in which the Fifth Circuit found continuing viability in *Rachid*.[139]

Burden of production (sufficiency of the evidence) long has been the procedural stronghold of *McDonnell Douglas*. After the "fall" of *McDonnell Douglas* in *Hicks*, the U.S. Supreme Court reaffirmed the relevance of the proof structure on the issue of sufficiency of the evidence in *Reeves v. Sanderson Plumbing Products, Inc.*[140] Although I argued after *Hicks* that *McDonnell Douglas* still was procedurally relevant,[141] I see that it is irrelevant after *Desert Palace*. Consider the usual situation in which a defendant moving for summary judgment or judgment as a matter of law argues that under *McDonnell Douglas* the plaintiff failed to produce sufficient evidence of either the elements of the prima facie case or pretext—the two stages at which the plaintiff bears the burden of production.[142] Because the pretext analysis entails a higher (more rigorous) standard of causation than the motivating factor standard, and because there is no basis on which to divide the cases between the proof structures, a plaintiff cannot be required to meet the pretext standard on such a challenge to the sufficiency of the evidence. If I am correct in my argument that pretext is irrelevant to the burden of persuasion, it surely follows that the standard of causation invoked by a challenge to the sufficiency of the evidence must mirror the standard of causation invoked for the burden of persuasion. That is, it would be erroneous to apply the motivating factor standard for the burden of persuasion but require pretext proof for the burden of production.

Even if pretext remains relevant to the burden of persuasion, it does not follow that pretext analysis should be used for the burden of production. The Court's plurality in *Price Waterhouse* said that cases do not have to be labeled as pretext or mixed-motives from the beginning.[143] Because there is no requirement that a case be classified at the summary judgment stage, a plaintiff should be able to defeat a motion for

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138. Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). Refer also to note 124 *supra*.

139. Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

140. 530 U.S. 133, 142–43 (2000).

141. *See* Corbett, *supra* note 21, at 391 (stating that *McDonnell Douglas* "gives procedural significance to both the employer's articulation of a reason and the employer's success or failure in responding to a plaintiff's proof of pretext").

142. *See* Van Detta, *"Le Roi," supra* note 15, at 105–08 (detailing defendants' use of *McDonnell Douglas* on summary judgment motions).

143. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) (plurality opinion).

summary judgment by producing sufficient evidence that the discriminatory reason was a motivating factor.

If *McDonnell Douglas* is irrelevant to burdens of persuasion and production, one could still argue that a plaintiff may present evidence pursuant to the pretext proof structure. This essentially was the position of the Fifth Circuit in *Rachid v. Jack In The Box, Inc.*[144] Christopher Hedican, Jason Hedican, and Mark Hudson, arguing for the continuing viability of *McDonnell Douglas,* contend that a plaintiff can continue to prove discrimination under *McDonnell Douglas* and that if a plaintiff can thereby "make a submissible case . . . , then he or she is entitled to the mixed-motive instruction."[145] Indeed, it is true that, even bereft of procedural effect, the pretext analysis could be used by lawyers and courts to analyze the case and organize the evidence. The problem with this seemingly innocuous approach ("We've had it so long, can't we just keep it around and play with it?") is that *McDonnell Douglas* has not been just a playful pet. It has had procedural significance for a very long time, and it is easy to become confused and believe that it still does. Given its past, a merely "useful" *McDonnell Douglas* analysis will cause more problems than it is worth.[146] Moreover, evidence is not presented in cases pursuant to *McDonnell Douglas*, anyway. As Justice Scalia admonished the dissent in *Hicks*, defendants do not come forward at some point during a trial and say, "'Your honor, pursuant to *McDonnell Douglas* the defendant hereby formally asserts [its legitimate, nondiscriminatory reason].'"[147] Plaintiffs can present pretext evidence and any other evidence they have, and employers can present evidence of their legitimate, nondiscriminatory reasons just fine without *McDonnell Douglas.* Nothing is gained by keeping it, except the prospect that it will be reinvested with some of its procedural significance. Indeed, it is not clear in either the *Rachid* opinion or the Hedican flow chart[148] whether the pretext approach is without procedural effect.

Stripped of procedural significance and having no place in the organization and presentation of evidence at trial, what is left for *McDonnell Douglas*? It is a mere shadow of its former self,

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144. 376 F.3d 305, 312 (5th Cir. 2004).

145. Hedican et al., *supra* note 19, at 399.

146. *See* Davis, *supra* note 15, at 888–89 (arguing that the only usefulness of *McDonnell Douglas* now is forcing a defendant to articulate a reason for its action, and that is not reason enough to keep it).

147. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 522–23 (1993).

148. Hedican et al., *supra* note 19, at 426.

and one that will confuse and distract us and generally work mischief if it is permitted to linger.

V. CONCLUSION

This is my second descent into the cave. I liked the shadow that was *McDonnell Douglas*. I have been above, however, and I have seen employment discrimination law in the light of the U.S. Supreme Court's *Desert Palace* decision. Like it or not, we must abandon the shadow and learn to see in the bright *Desert* (*Palace*) light. In 1995, after the Supreme Court decided *Hicks*, Professor Deborah Malamud wrote that "the time has come to put false appearances aside and to reorient the discourse on disparate treatment cases accordingly."[149] Although I thought her call for abandonment was premature at the time, it is apt now.

149. Malamud, *supra* note 58, at 2311.