THE UNBEARABLE LIGHTNESS OF *BATSON*: MIXED MOTIVES AND DISCRIMINATION IN JURY SELECTION

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The Equal Protection Clause prohibits the use of peremptory challenges to exclude jurors on account of protected characteristics such as race and sex. Mixed-motive problems arise where the proponent of a strike confesses to have been motivated by a combination of proper and improper purposes. In other contexts, so-called "mixed-motive analysis," which provides the challenged party an opportunity to prove that the "same decision" would have been made absent the improper motive, has been permitted. The United States Supreme Court has not yet ruled, however, on whether "mixed-motive" analysis is consistent with the governing framework set forth in Batson v. Kentucky*, and those state and federal courts that have addressed the issue have reached different conclusions. This Article argues that the mixed-motive defense should not be permitted under* Batson*. That tool was developed in a very different context, serves purposes not relevant to discrimination in jury selection, and undermines* Batson*'s basic goals. The Article proposes adoption instead of a "motivating" or "substantial" factor test, as currently used in Title VII mixed-motive cases, to determine when peremptory strikes based on mixed motives violate the Constitution.*

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INTRODUCTION

The lawfulness of both state and private conduct frequently depends on the purposes that motivated the conduct, and a wide range of statutory and constitutional law renders otherwise lawful actions unlawful if they are motivated by an illicit purpose. Title VII of the 1964 Civil Rights Act, for instance, prohibits employers from making employment decisions on the basis of race, sex, religion, or nationality,[1] and the First Amendment bars the government from firing an employee because of her exercise of protected speech

[1] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-1 to 2000e-17 [hereinafter "Title VII"]).

rights.[2] Whenever such actions are the subject of legal challenge, courts ultimately must determine what purpose or motive caused the actor to pursue the challenged course of action. Motivations, however, are complex; decisions are often made for multiple purposes. Sometimes, the purposes motivating those actions reflect a mixture of legitimate and illegitimate objectives, raising what has frequently been referred to as the "mixed motive" problem.

The mixed-motive problem raises especially troubling implications in the context of jury selection. The Supreme Court long ago recognized that the exclusion of jurors from the venire because of their race violates the Equal Protection Clause of the Fourteenth Amendment.[3] As with employment decisions under Title VII, the lawfulness of a peremptory strike to exclude a juror from the venire turns on the proponent's purpose. Although peremptory strikes traditionally have permitted the parties to exclude any juror for any reason, or for no reason, in *Batson v. Kentucky*, the Supreme Court held that a peremptory strike is unconstitutional if it is used to exclude a juror on account of race.[4] Not surprisingly, courts adjudicating *Batson* disputes have encountered the same mixed-motive problem that arises in other kinds of disputes the resolution of which turns on the purposes of the actor.

In other areas of law, the Supreme Court has sanctioned what is often referred to as "dual-motive" or, as here, "mixed-motive" analysis.[5] Mixed-motive analysis provides a party that has been proven to have acted from an unlawful motive an affirmative defense to demonstrate that it would have chosen the same course of action, or made the "same decision," entirely from other lawful

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[2] Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-287 (1977).

[3] Strauder v. West Virginia, 100 U.S. 303 (1880). At least since 1954, the Court has acknowledged that the "constitutional command" of the equal protection clause prevents prosecutors from excluding not only blacks from jury service, but any "identifiable group in the community which may be the subject of prejudice." Swain v. Alabama, 380 U.S. 202, 204 (1965) (citing Hernandez v. Texas, 347 U.S. 475 (1945)) (holding that equal protection clause prohibits discrimination on the basis of ancestry and national origin as well as race).

[4] 476 U.S. 79 (1986).

[5] *See* Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-287 (1977)), Village of Arlington Heights v. Metro. Housing Devel. Corp., 429 U.S. 252 (1977), Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also infra* Parts I.A-B.

motives.[6] Depending on the specific area in which the same-decision defense is asserted, success in showing that the unlawful motive was not the "but-for" cause of the challenged action can result in anything from a mere limitation on damages to complete vindication on the merits. Although the first state courts to encounter the mixed-motive problem in *Batson* rejected the use of mixed-motive analysis, and several state courts continue to bar its use, a small but steadily growing number of courts, including all six federal circuit courts of appeals that have ruled on the issue, have permitted or affirmatively endorsed its use.[7] The Supreme Court, however, has not yet sanctioned the use of mixed-motive analysis in the *Batson* context.

In this Article, I argue that the turn to mixed-motive analysis in jury selection is a serious mistake, one that threatens to undermine the fragile foundations upon which *Batson* stands. The argument proceeds as follows. Part I sets out the origins of mixed-motive analysis, showing how the Supreme Court crafted that analysis from a variety of disparate sources as an analogue to two doctrines of criminal procedure: the fruit of the poisonous tree doctrine, and the doctrine of harmless error. The standard was chosen as an express alternative to more traditional tort-law causation standards, notwithstanding the Court's frequent reliance on basic tort constructs in its equal protection jurisprudence. After considering the general origins and functions of mixed-motive analysis, the Article discusses three ways state and federal courts have responded to the mixed-motive problem in the jury-selection context. First, some courts have held that a prosecutor's admission of any improper bias "taints" a strike and requires invalidation under *Batson*.[8] Second, other courts have in effect disregarded the improper reason and utilized the regular *Batson* framework in an attempt to determine whether the permissible reasons were legitimate or "pretextual."[9] Third, a growing number of courts have invoked mixed-motive analysis to assess whether such mixed explanations are consistent with *Batson*.[10]

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[6] *See infra* Part I.A (discussing mixed-motive defense).
[7] *See infra* nn. 111-116 (citing cases).
[8] *See infra* notes 94-100.
[9] *See infra* note 179.
[10] *See infra* notes 105-116.

Part II assesses the propriety of these various responses under the formal *Batson* framework. It establishes that, given the governing equal protection standards, a peremptory strike is facially invalid where the strike's proponent attempts to justify it with a mixed-motive explanation. Part II further demonstrates that once a finding of mixed-motives has been made, it is erroneous to proceed any further under the conventional *Batson* framework.

Some courts that have relied on mixed-motive analysis, however, have treated the mixed-motive defense as a supplement to the *Batson* framework. Part III shows how and why supplementing *Batson* with mixed-motive analysis is inappropriate and destructive of *Batson*'s purposes. *Batson* serves important symbolic, deterrent, and diversity-enhancing functions. The use of mixed-motive analysis undermines each of these functions. Mixed-motive analysis also detracts from *Batson*'s important evidentiary function of easing the crippling burden of proof that, prior to *Batson*, had prevented practical enforcement of equal protection doctrine in jury selection. Rather than make it easier to prove discrimination, mixed-motive analysis encourages obfuscation, fails to recognize subconscious bias, and substantially complicates an already highly speculative and easily-evaded inquiry.

The better solution, Part IV argues, is stringent enforcement of *Batson*'s narrow neutrality requirement through application of the same causation test that Congress has relied upon to resolve the mixed-motive problem in the Title VII context. As Congress recognized, to determine whether an equal protection violation has occurred in a mixed-motive case, the question to ask is whether an improper criterion was a "substantial" or "motivating" factor for the challenged strike. This standard has long been used in tort cases involving multiple sufficient causes. As in those cases, the more restrictive "same-decision" test's insistence on "but-for" causation leads to unjust results and permits wrongdoers to escape liability for their concededly wrongful conduct. Because the primary concerns that motivated the creation of the mixed-motive defense – windfall protection and harmless error review – are not relevant in the unique context of peremptory challenge regulation, the use of that defense in *Batson* cases is not appropriate, and should not be permitted.

Instead, *Batson* and its progeny are best read to bar any peremptory strike in which race, ethnicity, or gender was a "substantial" or "motivating" factor for its exercise; permitting such race-based strikes under the guise of "mixed-motive" would render *Batson*'s already meager protections "unbearably" light.

I. MIXED-MOTIVE ANALYSIS AND *BATSON*

With *Batson*, the Court attempted to impose meaningful prohibitions on the use of race-based peremptory challenges for the first time. Several subsequent cases, handed down in quick succession, broadened and deepened the core principle of *Batson* that peremptory strikes may not be used to mask or advance invidious discriminatory purposes. The *Batson* rule now applies not only to the exclusion of jurors on account of race, but also to exclusions on account of gender and ethnicity; [11] it may be invoked by the prosecutor as well as the defendant;[12] it applies in civil actions as well as criminal prosecutions;[13] and it can be invoked regardless of whether the excluded jurors are of the same race, ethnicity, or gender as the objecting party.[14]

Although there is no shortage of critics to point out that *Batson* has not eradicated discrimination in jury selection,[15] it is

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[11] *See* Hernandez v. New York, 500 U.S. 352, 364-366 (1991) (recognizing applicability of *Batson* prohibition to ethnic minorities (hispanics); United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (citing *Hernandez* as involving challenges based on "ethnic origin"); J.E.B. v Alabama ex rel. T. B., 511 U.S. 127 (1994) (applying *Batson* to strikes based on gender). At present, it is unclear whether *Batson* also prohibits the use of peremptories based on religion. *See* John H. Mansfield, Peremptory Challenges to Jurors Based Upon or Affecting Religion, 34 SETON HALL. L. REV. 435 (2004) (arguing that *Batson* should be extended to bar religion-based challenges).

[12] *See* Georgia v. McCollum, 505 U.S. 42 (1992).

[13] *See* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).

[14] *See* Powers v. Ohio, 499 U.S. 400 (1991).

[15] *See, e.g.*, Daniel M. Hinkle, Peremptory Challenges Based on Religious Affiliation: Are They Constitutional? 9 BUFF. CRIM. L. R. 139, 199 (stating that "most commentators and practicing lawyers feel that *Batson* and its progeny have not only stopped short of destroying peremptory challenges but have been so ineffective that they have rarely stopped peremptory challenges based only on unambiguously unconstitutional criteria such as race or gender"); Albert W. Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. CHI. L. REV. 153, 209-210 (1989); David Cole, NO EQUAL JUSTICE 120 (The New Press 1999) (arguing that "*Batson* .. is generally ineffective at stopping even blatant racists"); Lonnie T. Brown, Jr.,

beyond dispute that it has had a major impact on criminal procedure. Litigation under *Batson* has proliferated, and *Batson* objections are now an important weapon in the defense lawyer's arsenal, both at trial and on appeal.[16] Moreover, there is reason to believe that *Batson* has succeeded, at least at the margins, in eliminating the most overt forms of racial, ethnic, and gender discrimination from jury selection.[17]

There is also reason to believe the Court will continue to attempt to advance *Batson*'s basic goals. Its decision last term in *Miller-El v. Dretke*,[18] for instance, displayed a remarkable impatience with the Fifth Circuit's willingness to overlook quite pronounced discriminatory practices. Capping a protracted struggle with the Fifth Circuit that required not one but two decisions, the Court invoked *Batson* to reverse Thomas Miller-El's 20-year-old murder conviction, overriding state and federal court findings that the convictions were not tainted by racial discrimination.[19] But if *Miller-El* raises hope that courts at the highest levels will no longer abide overt discrimination in jury selection, another development in the lower federal courts' *Batson* jurisprudence – the slow but steady advance of "mixed-motive" analysis – threatens to undermine that promise.

Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy, 22 REV. LITIG. 209, 213 (2003) (arguing that *Batson* "has, in practice, been decidedly ineffective in achieving its original goals").

[16] A Lexis-Nexis search for the words "*Batson*" and "jury" limited to state and federal cases cases reported during the calendar year of 2005 alone produced 556 hits.

[17] *See, e.g.*, David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, Barbara Broffitt, Symposium: The Use Of Peremptory Challenges In Capital Murder Trials: A Legal And Empirical Analysis, 3 U. PA. J. CONST. L. 3, 123 (2001) (concluding that empirical study of jury selection practices in Philadelphia shows that Supreme Court's "prohibitions against the use of race and gender as the basis for the use of peremptories have had, at best, only a marginal impact on the peremptory strike strategies of each side").

[18] 125 S. Ct. 2317 (2005).

[19] The Court found the state court's conclusion to be an unreasonable determination of the facts in light of the evidence, indicating a rare willingness to overturn factual findings on habeas review, and emphasizing that "[t]he standing is demanding but not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief'") (quoting Miller-El v. Cockrell, 537 U.S. 322 (2002)).

A. Origins of Mixed-Motive Analysis

Mixed-motive analysis originated in two Supreme Court cases: *Mt. Healthy City Board of Education v. Doyle*,[20] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[21] These cases suggest that the mixed-motive test was devised primarily for two seemingly disparate purposes: to establish a remedial limitation in tort-like actions against the government, and to limit the ability of plaintiffs to challenge legislative and administrative actions based on evidence that some members of the governing body harbored some type of illicit bias. As will be discussed below, there is a conceptual link between these functions. In both instances, the problem motivating the use of mixed-motive looks like a kind of "harmless error" review.

Mt. Healthy, which has been described as a "mixed-motives constitutional tort case,"[22] illustrates mixed-motive analysis' remedial limitation focus. The case involved an untenured teacher named Doyle, who during a period in which there were substantial tensions between Doyle and the school board regarding, *inter alia*, the teacher dress code, reported the contents of a school memorandum on the teacher dress code to a radio disk jockey, who in turn promptly reported it as news.[23] One month later, the school board decided not to renew Doyle's contract. When Doyle requested an explanation, the school superintendent gave several reasons, including Doyle's call to the radio station.[24] Doyle challenged the school board's decision not to rehire him, arguing that the decision to terminate his contract was an act of retaliation for his exercise of his First Amendment rights. The District Court held that Doyle was entitled to reinstatement, reasoning that "Doyle's telephone call to

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[20] 429 U.S. 274 (1977). *See* Robert Belton, Causation in Employment Discrimination Law, 34 WAYNE L. REV. 1235, 1260 (1988) (identifying *Mt. Healthy* as "[t]he doctrinal genesis of the 'same decision' test of causation).

[21] 429 U.S. 252 (1977).

[22] Mary Ellen Maatman, Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law, 60 U. PITT. L. REV. 1, 65 (1998) (quoting Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1225 n.6 (3d Cir. 1994), *vacated*, 514 U.S. 1034 (1995).

[23] 429 U.S. at 282.

[24] *Id*. at 282-283 and n.1.

the radio station was 'clearly protected by the First Amendment,' and … played a 'substantial part' in the decision of the Board not to renew Doyle's employment."[25] The Court of Appeals affirmed.[26]

The language used by the District Court suggests that it analyzed the causation issue borrowing principles from tort law. In tort, an act normally is considered a legal cause of a harm only if it is the "but-for" cause, that is, an act may be a legal cause of the "plaintiff's damage if but for its commission the damage would not have happened."[27] But the common law of torts recognizes an exception to the strict requirement of but-for causation in cases of multiple sufficient causes, where the wrongful conduct was sufficient to bring about the harm but there was another separate and independent force that would have brought about the same harm.[28] In that instance, even though the harm would have occurred anyway as a result of the other cause, as long as the actor's wrongful conduct was a "substantial factor" in bringing about the harm, the actor may be held liable.[29] Mixed-motive cases can be analogized to multiple

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[25] *Id*. at 283 (quoting unpublished opinion of district court).

[26] *See* Doyle v. Mt. Healthy City School District Board of Education, 529 F.2d 524 (6th Cir. 1975) (table decision).

[27] Charles E. Carpenter, Concurrent Causation, 83 U. PA. L. REV. 941, 946 (1935). Of course, normally, but-for causation is not enough; there must also be proximate causation. Traditional tort law principles thus further require that the wrongful conduct not only was the but-for cause of the harm, but also was a "substantial factor" in causing the harm to occur. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

[28] The exception is longstanding. *See*, *e.g.*, Jeremiah Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 109 n.20 (noting exception to proposition that liability requires but-for causation "where two or more tortious causes are simultaneously operating, each being independent of the other, and each being alone sufficient to produce the damaging result"); Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902).

[29] RESTATEMENT (SECOND) OF TORTS, §432 (2), at 430. The "substantial factor" test was first developed by Judge and tort-scholar Jeremiah Smith. See Jeremiah Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103 , 303, 309-314 (1912). Recognition of the exception has been noted in numerous cases. *See, e.g.*, McElwee v. Wharton 7 Fed.Appx. 437, 438 (6th Cir. 2001) (noting that "Michigan law is clear that when multiple factors contribute to a plaintiff's injury, liability may be imposed when a defendant's conduct was a substantial factor in causing the injury."); Sementilli v. Trinidad Corp., 155 F.3d 1130, 1136 (9th Cir. 1998) (noting that "[t]he substantial factor standard … has been embraced as a clearer rule of causation [than the 'but for' test]-one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact"). *See infra*, Part IV.B (discussing the substantial factor test in tort law).

sufficient causation cases, in that two concurrent "forces" – a legal motive and an illegal one – both "cause" an actor to follow a particular course of action. The district court apparently applied this tort-law causation principle, and upon finding that the Board's consideration of protected conduct played a "substantial part" in its decision not to renew the contract, concluded that Doyle had carried his burden of proof on the causation issue.

In an opinion authored by then-Justice Rehnquist, the Supreme Court unanimously rejected the tort-based approach used by the District Court in which proof that the exercise of first amendment rights played a "substantial part" in the board's decision mandated judgment in the plaintiff's favor. Such a standard, the Court indicated, could bestow an undeserved windfall on Doyle. The Court reasoned that "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[30] Although it recognized that the board had acted unlawfully in considering Doyle's protected conduct, it apparently believed that Doyle was not entitled to reinstatement if the Board would have terminated his contract regardless of the scuffle over his exercise of First Amendment rights.[31]

Instead of relying on tort causation standards to determine whether the constitutionally-protected conduct was a "cause" of the decision to terminate Doyle's contract, as the district court did, Justice Rehnquist looked for guidance to analyze the problem of mixed motives in an unlikely source: constitutional criminal procedure. Reviewing a variety of confession and exclusionary rule cases in which the admissibility of evidence turned on whether the evidence was obtained "because of" unlawful police conduct,[32]

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[30] *Id.* at 285-286.

[31] *Id.* at 286 (reasoning that reinstatement would not be commensurate with the harm if the Board were "precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.").

[32] *See id*. at 286 (noting that "[I]n other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused," and that "those are instructive in formulating the test to be applied here," and citing Lyons v. Oklahoma, 322 U.S. 596, 64

Rehnquist cobbled together a causation standard that permits the defendant to argue, as a functional affirmative defense, that there was not a sufficient causal link between the constitutional violation and the adverse action. Under this so-called "same decision" defense,[33] once the plaintiff establishes that his constitutionally protected conduct "was a 'substantial' ... or ... 'motivating factor' in the [alleged wrongdoer]'s decision not to rehire him," the defendant retains the opportunity to show, "by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the protected conduct."[34] In invoking these criminal procedure precedents in *Mt. Healthy*, the Court established a causation defense, the breadth of which was not then made clear, but which operated in *Mt. Healthy* to award the benefit of a causally overdetermined result to the governmental entity. This narrow causation doctrine provides that if the permissible motivations for the government's action constituted an "independent source" of the adverse result, then that result cannot be fairly blamed on the impermissible motive, and no remedy is warranted.

Arlington Heights v. Metropolitan Housing Development Corporation, which utilized the same burden-shifting framework and which was decided the same day, illustrates a second and seemingly quite different function of the mixed-motive test: the development of a methodology to review claims of unconstitutional motivation in legislative or administrative decisionmaking. In *Arlington Heights*, the plaintiffs sought a zoning variance from the Village to permit construction of a low-income housing project that was expected to benefit minorities. After the application was denied, the plaintiffs brought an equal protection challenge against the Village, and presented proof that some zoning board members were in fact motivated by racially-discriminatory purposes. That proof alone, however, was insufficient to overturn the zoning board's decision. As the Court explained:

S.Ct. 1208, 88 L.Ed. 1481 (1944); Wong Sun v. United States, 371 U.S. 471, 491 (1963); Nardone v. United States, 308 U.S. 338, 34 (1939); Parker v. North Carolina, 397 U.S. 790, 796 (1970)).

[33] *See* Belton, *supra* note 20, at 1369-1370 (describing *Mt. Healthy* framework as creating the "'same decision' defense").

[34] 429 U.S. at 287.

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.[35]

The framework adopted in *Arlington Heights*, in which the burden of proof shifts to the defendant upon proof that an illicit criteria was a motivating factor in the decision, was lifted directly from *Mt. Healthy*. Its application in this very different context, however, reflects a rejection of the approach to the review of legislative motive embodied in the Court's controversial decision in *Palmer v. Thompson*.[36] In *Palmer*, the Court refused to overturn the city of Jackson, Mississippi's decision to shut down its public swimming pools rather than operate them on an integrated basis,[37] reasoning that motive was irrelevant to the question of whether state action violated the Equal Protection Clause. In *Arlington Heights*, the Supreme Court reconceptualized the role that motive should play in the constitutional inquiry along the lines sketched out by Professor Paul Brest in his influential article on the problem.[38]

There are three types of responses to a scenario in which evidence shows that a decisionmaker harbored an illicit motive. First, one could ignore the evidence, as the Court did in *Palmer*. Second, one could find a *per se* equal protection violation. Third, one might require one of the parties to prove that the illicit motive "mattered." Decrying any "blanket refusal to inquire into legislative and administrative motivation," but acknowledging the difficulties of judicial review of motivation that arise regarding "proof, appropriate relief, and respect for political processes," Brest urged

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[35] 429 U.S. at 271 n.21.
[36] 403 U.S. 217 (1971).
[37] *Id*. at 218-19.
[38] *See* Arlington Heights, 492 U.S. 266 n.11 (citing Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95, 116-118).

the third course.[39] Although equal protection doctrine accords decisions based on race the strictest level of scrutiny, courts are nonetheless expected to exercise great restraint in reviewing legislative enactments, and when they do, to grant such enactments the presumption of regularity.[40] But that deference must end where the decisionmaker acts from a flatly unconstitutional motive. As Professor Brest had argued, "[I]f the decisionmaker gave weight to an illicit objective, the court should presume that his consideration of the objective determined the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary."[41] Because it is reasonable to presume that an illicit motive had a causal influence on the outcome, such proof "rebuts whatever presumption of regularity otherwise attaches."[42] Furthermore, it is fair to "place on the decisionmaker a heavy burden of proving that his illicit objective was not determinative of the outcome."[43] Accordingly, legislative or administrative enactments can withstand challenge where the state can demonstrate that even though the illicit purpose infected the decisionmaking process, it was not the "but-for" cause of the decision.

The "same-decision" test functions much like a "harmless error" doctrine for purposes of evaluating legislative motive.[44] Under the harmless constitutional error doctrine, a trial marred by constitutional error does not *per se* mandate reversal of a conviction. As set forth in the leading constitutional harmless error case, *Chapman v. California*, "there may be some constitutional errors which in the setting of a particular case are so unimportant and

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[39] *See id.* at 134-135.

[40] *See*, *e.g.*, Miller v. Johnson 515 U.S. 900, 915 (1995) (explaining that "[a]lthough race-based decisionmaking is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed") (internal quotations omitted).

[41] *See* Brest, *supra* note 38, at 117-118.

[42] *Id*.

[43] *Id*. at 118.

[44] *See, e.g.*, Jones v. Alexander, 609 F.2d 778, 782 (5th Cir.1980) (characterizing same-decision test as "harmless error" test). Indeed, if the Court found support for the mixed-motive framework in the theoretical approach advocated by Professor Brest, he in turn looked to harmless constitutional error doctrine as a model. *See* Brest, *supra* note 38, at 118 n.114 (citing Chapman v. California, 386 U.S. 18 (1967).

insignificant that they may, consistent with the Federal Constitution, be deemed harmless."[45] However, because of the potential for injustice, a more stringent standard of review is required where a conviction is tainted by constitutional error. Whereas under the conventional harmless error rules, a conviction may be affirmed merely upon a showing that the error did not affect the defendant's substantial rights,[46] where a constitutional right has been breached, an error can be found harmless only if the prosecutor carries the higher burden of proving that the error "was harmless beyond a reasonable doubt."[47] As Professor Brest reasoned, proof that the decisionmaker "is known to have taken account of constitutionally illicit objectives, together with the probability that the objectives were outcome-determinative," justify shifting this "heavy burden" of proof to the decisionmaker.[48] In invoking the same-decision test, the Court in *Arlington Heights* fairly faithfully followed Brest's approach.

In the equal protection context, the *Mt. Healthy/Arlington Heights* "same decision" test has been used primarily as a tool to evaluate legislative motive. In fact, the Supreme Court's only two equal protection cases in which it has invoked the *Mt. Healthy* same-decision test have arisen in this context.[49] In those cases, the mixed-motive defense has functioned like a harmless error test for collective decisionmaking, whereby the Court has declined to invoked a *per se* rule of invalidation. Instead, it has indicated that the normal deference owed the decisionmaker upon finding that the decisionmaking process was marred by consideration of an unconstitutional objective would be withdrawn. Evidence that a decision was tainted by discriminatory motive creates a presumption of error that can be overcome, however, if the government can demonstrate that the discriminatory motive was causally "harmless."

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[45] Chapman, 386 U.S. at 22.
[46] *See* Kotteakos v. United States, 328 U.S. 750 (1946).
[47] Chapman, 386 U.S. at 24.
[48] Brest, *supra* note 38, at 118 n.114.
[49] *See Arlington Heights*, 429 U.S. 252 (1977) (considering challenge to denial of re-zoning request alleged to have been motivated by race discrimination); Hunter v. Underwood, 71 U.S. 222 (1985) (holding that felon disenfranchisement law was the product of discriminatory purpose, notwithstanding additional "neutral" purpose of disenfranchising poor whites).

Although the purposes of mixed-motive analysis in the two cases appear distinct, there is a common thread that ties them together. In both cases, the availability of the defense provides the court with a tool to deny relief notwithstanding evidence that the decisionmaker harbored an unlawful motive, where the effect of judicial intervention would be costly to the government and largely futile. In constitutional tort cases such as *Mt. Healthy*, a court order requiring a government employer to reconsider its decision to withhold tenure is likely to be ineffective if there are other, reasonable grounds for the decision, and awarding him damages would simply result in a windfall. In legislative motive cases, invalidation of the legislative enactment would likely be futile if the legislature can simply repass the same statute by rephrasing its intended goals.

B. Mixed-Motive and Title VII

Although originally crafted in the constitutional context described above, mixed-motive analysis quickly found a home in employment discrimination law,[50] and particularly in the adjudication of claims brought under Title VII of the Civil Rights Act of 1964.[51] Mixed-motive analysis received its most extensive treatment in the Title VII context in *Price Waterhouse v. Hopkins*.[52] Prior to *Price Waterhouse*, there was widespread disagreement among the lower courts regarding the proper causation standards to apply in mixed-motive Title VII cases.[53] Although some Circuits had applied the *Mt. Healthy* causation rule, others held that a

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[50] *See* N.L.R.B. v. Trans. Management; East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 404 n.9 (1977) ("Even assuming, arguendo, that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event" (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 369 n. 53 (1977), and Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 285-287 (1977)).

[51] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-1 to 2000e-17 [hereinafter "Title VII"]). *See* Sheila A. Skojec, Effect of Mixed or Dual Motives in Actions Under Title VII (Equal Employment Opportunities Subchapter) of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.); 83 A.L.R. Fed. 268 (collecting cases).

[52] 490 U.S. 228 (1989).

[53] *Id*. at 238 n.2 (citing cases).

violation of Title VII was complete for liability purposes upon proof that it had been motivated, at least in part, by a discriminatory purpose.[54]

The *Price Waterhouse* case resolved that dispute. Ann Hopkins, who had been nominated for partnership at the accounting firm Price Waterhouse, was the only female candidate of the 88 persons proposed for partnership that year. Although Hopkins performance at the firm compared favorably with the other partnership candidates, there were some legitimate criticisms of her performance and ability.[55] At the same time, there was substantial evidence that some Price Waterhouse partners held Hopkins to a higher standard because she was a woman.[56] In short, the evidentiary record demonstrated that both legitimate and illegitimate factors motivated the decision to reject her partnership bid.

The case squarely raised the issue of what "standard of causation" under Title VII was sufficient to establish a statutory violation in a mixed-motive case. The defendant advocated a standard that would have required Hopkins, who had shown that her gender played a part in an employment decision, to prove but-for causation – that "the decision would have been different if the employer had not discriminated."[57] Hopkins, on the other hand, argued for a per se rule – that liability should be complete upon a showing that an impermissible criterion played "any part in an employment decision."[58]

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[54] *See, e.g.*, Fadhl v. City and County of San Francisco 741 F.2d 1163, 1166 (9th Cir. 1984) (Kennedy, J.) (distinguishing between liability and remedial standards in Title VII cases, and holding as to former that "where employment discrimination affects the applicant's score or the evaluative process, it suffices to impose initial liability to find that sex was a significant factor in the decision not to process an application further or in the decision to terminate an employee," but as to latter, "an award of back pay or an order of reinstatement is appropriate only if the discrimination is a but for cause of the disputed employment action, and it follows that a showing of nonqualification would bar such relief").

[55] 490 U.S. at 234.

[56] *Id*. at 235-236.

[57] *Id*. at 237-238.

[58] *Id*. at 238. Hopkins further argued that the employer should, at most, be permitted to prove that "it would have made the same decision in the absence of discrimination," which would merely limit equitable relief. Id.

In a splintered opinion, the Court rejected both positions. Writing for a plurality, Justice Brennan crafted a compromise approach, which he attempted to defend using the language of tort law.[59] Invoking the multiple sufficient cause doctrine in tort, Brennan argued that it makes no sense to say that a causally overdetermined outcome, for instance, one in which two forces operate on an object and both forces are sufficient to disturb the object – has no cause. Instead, Brennan reasoned, it makes more sense to say that both forces were "causes" of the outcome.[60] As noted above, in the case of multiple sufficient causation, tort law has long held that proof that the defendant's wrongful conduct was a "substantial factor" in the outcome is sufficient to warrant holding the defendant liable for the harm, even if his wrongful conduct was not "strictly speaking" the but-for cause of the harm. Like the district court in *Mt. Healthy*, the plurality indicated that the substantial factor test was the proper standard, and that "[t]he question is not whether the other causes would have been sufficient without the defendant's wrong, but whether the defendant's wrong was actually a material factor in producing the injury."[61] Applying that logic, Brennan asserted that a Title VII plaintiff carries her burden on the issue of causation if she establishes that a discriminatory criterion was a substantial factor relied upon by the employer in reaching its decision.[62] That other motives also influenced the employer's decision does not negate the causal significance of the illicit motive, since "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[63] The plurality reasoned that the plaintiff is not required to prove "but-for causation" because the statute focuses on the actual conduct of employers. In a case where an adverse employment decision was motivated in fact by an illicit criterion – in other words, where the improper criterion was actually

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[59] *See* Maatman, *supra* note 22, at 18 (noting that plurality in *Price Waterhouse* case employed legal language borrowed from tort law "to justify its causation standard").
[60] 490 U.S. at 241.
[61] Carpenter, *supra* note 27, at 952.
[62] *Price Waterhouse*, 490 U.S. at 241-242.
[63] *Id*. at 241.

in the heads of the decisionmaker – the purposes of the statute have been contravened.

The plurality's adherence to the tort multiple sufficient causation model, however, ended there. In an analytical move rightly criticized by the dissent as internally inconsistent, the plurality, joined by Justices White and O'Connor, went on to hold that although the plaintiff has carried her burden on the causation issue by proving that an illicit criteria was a "substantial" or "motivating factor" in the decision, the defendant could nonetheless avert an ultimate determination of liability if it could establish, under the "mixed-motive" standard set forth in *Mt. Healthy* and *Arlington Heights*, that the illicit criteria was not the "but-for cause" of the decision.[64] But-for causation, the *Price Waterhouse* court indicated, was a necessary ingredient in a Title VII liability determination, but the Court agreed that the burden to prove lack of but-for causation should shift to the defendant, a wrongdoer who "knowingly created the risk" that but-for causation cannot be proven one way or the other, "not by innocent activity but by his own wrongdoing."[65] A majority of justices agreed that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by

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[64] *Id*. at 247 n.12 (noting dissent's failure to explain why the evidentiary scheme endorsed in *Mt. Healthy* was not workable in Title VII cases); id. at 258 (White, J., concurring) ("to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy*"); *id*. at 268 (O'Connor, J., concurring) (relying on *Arlington Heights*). The Court also relied heavily on a case arising under federal labor law, NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), which also utilized the same mixed-motive framework set forth in *Mt. Healthy*. *See id*. at 403. According to the Court, once the factfinder establishes that the challenged action was motivated in part by discriminatory animus, the burden shifts to the challenged party to "carry the burden of justifying its ultimate decision." *Id*. at 248. The challenged party, "if it wishes to prevail, must persuade" the factfinder "by a preponderance of the evidence that it would have reached the same decision" even absent the impermissible motive. *Id*. at 249.

[65] *Id*. at 250 (plurality opinion) (quoting NLRB v. Transportation Mgmt., 462 U.S. at 403). *See also id*. at 261 (O'Connor, J., concurring) (arguing that allocation of burden of proof with respect to causation was appropriate "where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion").

proving that it would have made the same decision even if it had not allowed gender to play such a role."[66]

As the dissent noted, the plurality's simultaneous assertions that an adverse employment decision is "because of" sex as long as sex was considered by the employer in making the decision and that an employer is not liable if it 'can prove that sex was not a but-for cause of the decision' cannot both be true."[67]

Although the Court faltered in carrying through with the logical parallel with the multiple sufficient causation doctrine in Title VII mixed-motive cases, Congress moved swiftly to correct it. In response to *Price Waterhouse*, Congress amended Title VII in 1991 to clarify that a plaintiff who establishes that an adverse employment decision was made because of mixed-motives has proven discrimination.[68] Underlying the 1991 Civil Rights Act was a recognition that whenever an improper criterion is a motivating factor in an employment decision, Title VII's statutory prohibition is contravened. As amended, Title VII now provides that proof that the employer would have made the same decision notwithstanding the improper motive, under the mixed-motive test, may be introduced by the defendant, but the effect of prevailing is merely to limit the obligation to pay compensatory damages and backpay.[69] A plaintiff who establishes that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other

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[66] *Id*. at 244-245. Of some significance to the argument pursued here, in affirming the propriety of shifting the burden of persuasion to the defendant, Justice O'Connor invoked earlier jury selection cases as precedent. *See Price Waterhouse*, 490 U.S. at 268 (O'Connor, J., concurring) (citing Alexander v. Louisiana, 405 U.S. 625, 632 (1972) ("once the consideration of race in the decisional process had been established, we held that 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially netural selection criteria and procedures have produced the monochromatic result'").

[67] 490 U.S. at 285 (Kennedy, J., dissenting). Believing that but-for causation was an essential element of proof of a violation, the dissent went even further and argued that the plaintiff, rather than the defendant, should carry the burden in a mixed-motive case on that issue. *Id*. at 286 (arguing that plaintiff should retain burden of proof, as under conventional *Burdine*-type case).

[68] *See* P.L. 102-166, Nov. 21, 1991, 105 Stat 1071. For a discussion of the 1991 Amendments, see Michael J. Zimmer, The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation, 30 GA. L. REV. 563, 584-588 (1996).

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

factors also motivated the practice," may be awarded declaratory relief, injunctive relief, and attorney's fees and costs.[70] With respect to the liability determination, Title VII now operates under a *per se* rule, and the statutory scheme thus expressly acknowledges that a plaintiff's proof that an employer's improper purpose was a "motivating factor" in an adverse employment action against her is sufficient to establish a violation.

C. Mixed motive in *Batson* cases

Batson was decided in 1986, nine years after *Mt. Healthy* and *Arlington Heights*. It was only a matter of time, and a short time at that, before the mixed-motive problem emerged in the *Batson* context. *Batson* employed a three-step framework to resolve allegations regarding the discriminatory use of peremptory challenges in jury selection. That framework provides that, at step one, a party challenging a strike has the burden to make out a prima facie case that the strike was exercised for a discriminatory purpose.[71] Once the defendant makes a prima facie showing, the burden shifts to the prosecutor to offer a neutral explanation for striking the juror.[72] If the prosecutor meets that minimal burden, the analysis then proceeds to a third step, in which the court must decide, in light of the totality of the facts and evidence, whether the

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[70] *See* 42 U.S.C. §§ 2000e-2(m) & 2000e-5(g)(2)(B).

[71] *Batson*, 476 U.S. at 93-94 (holding that defendant can make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose") (citing *Washington v. Davis,* 426 U.S. 229, 239-242 (1976)); Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (same). At this stage, the defendant need not prove discriminatory intent but only point to facts consistent with such illicit intent as to fairly put the issue into play. Evidence relevant to support a prima facie case includes the fact that the strike was used against a member of a protected class, the pattern of strikes exercised by the challenged party, and any other evidence that might support an inference of discrimination. Once the defendant makes a "prima facie showing that a peremptory challenge has been exercised on the basis of race, . . . the prosecution must offer a race-neutral basis for striking the juror in question." Johnson v. California, 125 S. Ct. 2410, 2416 (2005).

[72] 476 U.S., at 94, (once defendant establishes prima facie case, "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes.); Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (explaining that at step two, "the prosecution must offer a … neutral basis for striking the juror in question").

neutral reason proffered by the challenged party was pretextual and the challenged strike a product of discrimination.[73]

The framework shares many features with several earlier jury selection cases that also employed a burden-shifting framework.[74] In *Neal v. Delaware*,[75] for example, the Court found that the fact that no black jurors had been ever been summoned to serve as a juror in the State "presented a prima facie case of denial" of equal protection rights, and the State's response – that there was not a single black juror in all the state who possessed the qualifications to serve as a juror, was a "violent presumption" unworthy of credence. Once a prima facie case is established, it was recognized, "[t]he burden falls to the State to refute it."[76] The Court's jury selection cases have adhered to this basic analytical structure, holding that statistical or circumstantial evidence that blacks were being systematically excluded from jury service constituted "prima facie proof" of a constitutional violation, and sufficient evidence of a non-discriminatory purpose must be adduced by the government to rebut the prima facie case.[77] *Batson*'s three-step framework extends and elaborates upon this procedural structure and marks a continuity rather than a break in approach.

The mixed-motive problem, of course, arises in *Batson* when the proponent of a challenged strike, at step-two, proffers an explanation that includes both legitimate and illegitimate reasons. Trial courts facing a mixed-motive explanation have responded in three different ways. Some have held that when a discriminatory reason is included among the reasons proffered by the prosecutor to justify a strike, the prosecutor has failed to satisfy his step two

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[73] Miller-El v. Dretke, 125 S. Ct. at 2324; Johnson, 125 S.Ct. 2410, 2416 (2005) (explaining that if the prosecution tenders a neutral explanation, then the issue is properly joined, and the trial court must proceed to the third step of the inquiry and decide "whether the opponent of the strike has proved purposeful racial discrimination") (quoting Purkett v. Elem, 514 U.S. at 767)

[74] *See Batson*, 476 U.S. at 93-96 & nn. 18-19 (citing McDonnell Douglas and Burdine, as well as Casteneda v. Partida, 430 U.S. 482 (1977); Alexander v. Louisiana, 405 U.S. 625 (1972)).

[75] 103 U.S. 370, 397 (1881).

[76] Swain v. Alabama, 380 U.S. at 233 (Goldberg, J., dissenting) (quoting Harper v. Mississippi, 251 Miss. 699, 707 (1965)).

[77] *See* Norris v. Alabama, 294 U.S. 587 (1935); Hernandez v. Texas, 347 U.S. at 480.

burden.[78] These courts have reasoned that *Batson*'s framework commands that the proponent of a strike come forward with a neutral explanation, and that any explanation that includes race or gender simply fails that standard. Under that reasoning, the proper response to a mixed-motive explanation is to terminate the inquiry and sustain the objection.[79] Other courts have acknowledged the mixed nature of the explanation, but because not all of the articulated reasons were improper, have nonetheless proceeded to step three to conduct a conventional *Batson* pretext analysis.[80] Finally, a third group of courts have refused to find that an admission of discriminatory animus constitutes a *per se Batson* violation. Instead, they have invoked "mixed motive" or "dual-motivation" analysis, either at the second step or at the third, to determine whether the strike violates the Equal Protection Clause.[81]

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[78] *See, e.g.*, McCormick v. State, 803 N.E.2d 1108, 1112-13 (Ind. 2004); State v. Lucas, 199 Ariz. 366, 18 P.3d 160, 163 (2001) (holding that dual motivation analysis in the *Batson* context is "inconsistent with the 'facially valid' standard announced by the Supreme Court in *Purkett*"); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205, 210 (S.C.1998) (expressly rejecting "dual motivation" analysis and holding that articulation of one racially-motivated reason requires invalidation); Rector v. State, 213 Ga.App. 450, 444 S.E.2d 862, 865 (Ga.App.1994) (same); *Wisconsin v. King,* 215 Wis.2d 295, 572 N.W.2d 530, 535 (Wis.Ct.App.1997) ("[W]here the challenged party admits reliance on a prohibited discriminatory characteristic, we do not see how a response that other factors were also used is sufficient rebuttal under the second prong of *Batson.*"). *cf.* Robinson v. United States, 878 A.2d 1273, 1284 (D.C.,2005) (holding that "even if the prosecutor acted from mixed motives, some of which were non-discriminatory, his actions deny equal protection and violate *Batson* if race or gender influenced his decision. A peremptory challenge may not be based even partially on an unlawful discriminatory reason;" but refusing to decide whether "same decision" defense is available to prosecutor).

[79] *See, e.g.*, Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205, 210 (1998) (holding that regardless of how many other nondiscrimiantory factors are considered, any consideration of a discriminatory factor directly conflicts with *Batson*'s purposes and taints entire jury selection process).

[80] *See, e.g.*, Leahy v. Farmon, 177 F.Supp.2d 985 (N.D. Cal. 2001) (holding, on habeas review, that state court decision "that the second step of the *Batson* analysis can be met by articulating both race-based and race-neutral reasons for a strike is not contrary to or an unreasonable application of, United States Supreme Court precedent") (*aff'd*, Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2004); *rehearing en banc granted,*425 F.3d 1230 (9th Cir.2005)); Kesser v. Cambra, 2001 WL 1352607 (N.D.Cal. Oct 26, 2001) (*aff'd*, Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2004); *rehearing en banc granted,*425 F.3d 1230 (9th Cir.2005)).

[81] *See* cases cited *supra* nn. 111-116.

The early court decisions that grappled with the mixed-motives problem generally concluded that a mixed-motive explanation did not satisfy *Batson*'s step two requirement to proffer a "neutral explanation" for a strike. The Alabama Court of Criminal Appeals was the first court to expressly confront it, at least in a published decision.[82] In *Owens v. State*,[83] the prosecutor, after having used fifteen of his 23 strikes against blacks, initially explained with respect to one of the jurors that the primary reason for striking the juror was "age and single status."[84] When pressed for additional reasons by the trial judge, however, he admitted that the fact that the juror "was the same race as the defendant was a factor."[85] Based on this admission, the Court concluded that the prosecutor had not come forward with the neutral explanation required by step two of the *Batson* framework, and held that the trial court's finding to the contrary was "clearly erroneous."[86] In reaching this conclusion, the court described the problem as one of "mixed motive," but did not directly address the Supreme Court's mixed motive cases or the framework suggested in those cases to resolve the *Batson* problem.

Shortly after the Alabama Criminal Court decided the *Owens* case, two justices of the United States Supreme Court also rejected the use of mixed motive analysis in the *Batson* context.[87] In *Wilkerson v. Texas*, the Texas Court of Criminal Appeals had refused to find a *Batson* violation despite the prosecutor's admission that "race was a factor" in his peremptory strike of an African-American juror, where race was merely "[o]ne of many considerations," and "nothing major."[88] In a dissent to a denial of a petition for certiorari joined by Justice Brennan, Justice Marshall

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[82] The Texas Court of Criminal Appeals, in an unpublished decision, also apparently invoked mixed motive analysis to uphold a conviction in the face of a *Batson* challenge around the same time. The Supreme Court denied certiorari in that case. *See Wilkerson v. Texas*, 493 U.S. 924 (1989).

[83] 531 So.2d 22, 26 (Ala.Cr.App. 1987) ("We fail, at this juncture, to see how any explanation can meet the four articulated requirements if it is based, in part, on race.…")

[84] *Id*. at 24.

[85] *Id*. at 24.

[86] *Id*. at 26.

[87] *See* Wilkerson v. Texas (1989) (Marshall, J., dissenting from denial of certiorari).

[88] *Id*.

argued that a mixed motive explanation "cannot be squared with *Batson*'s unqualified requirement that the state offer 'a neutral explanation'" for its peremptory challenges.[89] In Justice Marshall's view, a neutral explanation can only be understood as one based "wholly on nonracial criteria."[90] Adaptation of the mixed motive defense in the *Batson* context, in Justice Marshall's view, is also inappropriate "because of the special difficulties of proof" that would arise.[91]

At the same time, other Texas courts interpreted *Batson* to require strict neutrality.[92] As early as 1987, an intermediate appellate court in Texas concluded that although a prosecutor might articulate one or more race-neutral reasons along with a non-neutral reason for striking a minority juror, "a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure."[93] In 1991, the Texas Supreme Court affirmed that approach and declared that any consideration of an improper criterion in jury selection violates equal protection.[94] Several state courts, including Indiana,[95] Arizona,[96] Georgia,[97] South Carolina,[98] and Wisconsin,[99] have endorsed this "taint approach" and held that the inclusion of a discriminatory reason in an explanation,

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[89] *Id*. at 926.
[90] *Id*. at 926.
[91] *Id*. at 926.
[92] The Texas Court of Criminal Appeals has not followed the State Supreme Court's lead, and has rejected the taint approach in favor of mixed-motive analysis. *See* Guzman v. State, 85 S.W.3d 242 (Tex. Ct. Crim. App. 2002) (en banc). For a discussion of the battle among Texas's courts over the mixed motive issue, see Ross P. Brooks, Mixed Messages: Texas' Two Highest Courts Deliver Conflicting Opinions Regarding The Fourteenth Amendment Mixed Motive Doctrine As Applied In The Context Of *Batson*/Edmonson Juror Exclusion Hearings, 6 SCHOLAR 311 (2004); Geoffrey A. Gannaway, Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defenses to *Batson* Challenges, 21 REV. LITIG. 375 (2002) (reviewing Texas law prior to the en banc decision in *Guzman*).
[93] *Speaker v. State,* 740 S.W.2d 486, 489 (Tex.App.--Houston [1st Dist.] 1987); *McKinney v. State,*761 S.W.2d 549, 551 (Tex.App.--Corpus Christi 1988) (quoting *Speaker,* 740 S.W.2d at 489).
[94] *See* Powers v. Palacios, 813 S.W.2d 489 (Tex. 1991).
[95] McCormick v. State, 803 N.E.2d 1108 (2004).
[96] Arizona v. Lucas, 199 Ariz. 366, 18 P.3d 160, 163 (Ariz. Ct. App. 2001).
[97] Rector v. Georgia, 213 Ga. App. 450, 444 S.E.2d 862, 865 (1994).
[98] South Carolina v. Shuler, 344 S.C. 604, 545 S.E.2d 805, 811 (2001).
[99] Wisconsin v. King, 215 Wis.2d 295, 572 N.W.2d 530, 535 (Wis. Ct. App. 1997).

"regardless of how many other nondiscriminatory factors" are also proffered, "taints the entire jury selection process."[100]

This early momentum came to an abrupt halt, however, with the Second Circuit's decision in *Howard v. Senkowski*.[101] For better or worse, the *Howard* case has proved tremendously influential in shaping the debate over mixed motive. The facts in *Howard* are similar to those in *Owens* and *Wilkerson*. Howard was tried in a New York state court for various charges, including robbery, in 1984, prior to the *Batson* decision. During jury selection, defense counsel moved for a mistrial after the prosecutor used peremptory strikes to remove the only two black jurors from the venire. The motion was denied and Howard was convicted by an all-white jury. While his appeal was pending, *Batson* was decided. Finding that a prima facie case of discrimination was established, the state appellate court remanded Howard's case for an evidentiary hearing to determine the reasons for the strikes.[102]

At the hearing, the prosecutor candidly admitted that race was a factor in his decision to strike the black jurors. He contended, however, that "race had not been an 'overriding' or a 'major' factor,"[103] and stated that he also took into account several neutral factors, including that one of the jurors seemed to lack a sufficient education, and the other juror had limited work experience, expressed no views on an important issue in the case, had no connection to law enforcement, and because of her five children, might be sympathetic to the defendant.[104] Applying the three-step pretext analysis from the Title VII case *Texas Department of Community Affairs v. Burdine*,[105] the state courts concluded that Howard failed to establish purposeful discrimination.[106] Although

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[100] Arizona v. Lucas, 199 Ariz. 366, 18 P.3d 160, 163 (Ariz. Ct. App. 2001). The theory was developed in several intermediate Texas appellate court opinions. *See* Moore v. Texas, 811 S.W.2d 197, 200 (Tex.Ct.App. 1991) (holding that "[e]ven though the prosecutor may have given one racially neutral explanation, the racially motivated explanation "vitiates the legitimacy of the entire [jury selection] procedure").
[101] 986 F.2d 24 (2d Cir. 1993).
[102] *Id*.
[103] 986 F.2d at 25.
[104] *Id*. at 25.
[105] 450 U.S. 248, 248 (1981)
[106] *Id*. at 26.

the Second Circuit found the state court's analysis too forgiving, it also declined to endorse the taint approach to mixed motive cases.

On the one hand, it reasoned, the state applied the wrong legal standard because the question in such a case is not about pretext; it is not "the all-or-nothing question of whether or not an impermissible consideration motivated the challenged action."[107] Because the challenger has satisfied his burden to prove improper motivation, *Burdine*'s three-step framework is moot. On the other hand, the court declined to observe a per se rule. Invoking *Mt. Healthy* and *Arlington Heights*, the court held that "[o]nce the claimant has proven improper motivation, dual motivation analysis is available to the person accused of discrimination to avoid liability by showing that the same action would have been taken in the absence of the improper motivation that the claimant has proven."[108] Accordingly, the Second Circuit held, "Howard was entitled to prevail unless, under dual motivation analysis, the prosecutor could sustain *his* burden of showing that he would have exercised his challenges solely for race-neutral reasons"[109] and remanded the case for analysis under that standard. [110]

The approach endorsed by the Second Circuit in *Howard*[111] has subsequently been adopted by several other federal circuit courts of appeals, including the Third,[112] Fourth,[113] Eighth,[114] Ninth,[115] and Eleventh.[116] Although the current trend unmistakably favors an embrace of mixed motive analysis, an equal number of federal

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[107] *Id*.
[108] *Id*. at 27.
[109] *Id*. at 30 (emphasis in original).
[110] *Id*. at 30.
[111] The Second Circuit affirmed *Howard* in two subsequent cases. *See* U.S. v. Brown, 352 F.3d 654 (2d Cir. 2003); U.S. v. Taylor, 92 F.3d 1313 (2d Cir. 1996).
[112] Gattis v. Snyder, 278 F.3d 222 (3rd Cir. 2002)
[113] Jones v. Plaster, 57 F.3d 417 (4th Cir. 1995)
[114] U.S. v. Darden, 70 F.3d 1507 (8th Cir. 1995); Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001);
[115] Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2004) (opinion vacated and en banc rehearing held).
[116] King v. Moore (11th Cir. 1999); U.S. v. Tokars (11th Cir. 1996); Wallace v. Morrison (11th Cir. 1996). Although the Seventh Circuit has not yet adopted mixed motive analysis, Judge Cudahy opined that it should in a concurring opinion. *See* Holder v. Welborn, 60 F.3d 383 (7th Cir. 1995).

circuit courts, numerous state courts,[117] and the Supreme Court itself have all yet to address its permissibility.[118] In this Article, I argue that the turn to mixed motive in the *Batson* context is a mistake that threatens to undermine whatever safeguards *Batson* provides against discriminatory jury selection. As I argue below, a different approach is necessary to safeguard the minimal gains achieved in *Batson*'s two-decade reign.

II. *BATSON*, NEUTRALITY, AND EQUAL PROTECTION

More than 100 years before *Batson* was decided, the Supreme Court declared that the Constitution prohibits the exclusion of jurors on account of race,[119] and in case after case, the Court has reaffirmed that principle.[120] Thus, jurors may not be excluded from jury service *because of* an illicit criteria. But what does the slippery term "because of" mean in the peremptory strike context, in which traditionally jurors can be excluded "for any reason, or no reason"?[121] What if a juror was struck because of neutral and improper criteria?[122] Can such an explanation be considered "neutral"? Does

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[117] *See, e.g.*, People v. Schmeck, 37 Cal.4th 240, 276, 118 P.3d 451, 476 (2005) (noting that California state courts have not resolved "whether a mixed-motive peremptory challenge could constitute a violation of the defendant's constitutional rights").

[118] In addition, some of those that have affirmed, under the highly deferential habeas review standards mandated by 28 U.S.C. §2254(d)(1), a state's use of mixed motive, have either implicitly or expressly reserved any judgment regarding whether *Batson* is best read to permit mixed motive, should the issue arise on direct review. *See*, *e.g.*, Gattis v. Snyder, 278 F.3d 222, 225 (holding that "state courts' application of 'dual motivation' analysis to Gattis' *Batson* challenge did not result in a decision that was 'contrary to, or involved an unreasonable application of, Federal law").

[119] Strauder v. West Virginia, 100 U.S. 303, 305 (1880).

[120] *See*, *e.g.*, Strauder v. W. Virgina, 100 U.S. 303 (1880); Ex parte State of Virginia, 100 U.S. 339 (1879), Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Neal v. Delaware, 103 U.S. 370 (1880); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Swain v. Alabama, 380 U.S. 202, 204 n.1 (1965) (collecting cases); *Batson*, 476 U.S. at 84 n.3 (collecting cases).

[121] U. S. ex rel. Darcy v. Handy 351 U.S. 454, 462 (1956) (noting that peremptory challenges give each party "discretion to exclude jurors deemed objectionable for any reason or no reason."). For a historical overview of the evolution of jury selection challenges, see William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 AM. CRIM. L. REV. 1391, 1406-1416 (2001) (tracing history beginning with English law from 1100s and early 1200s through contemptory American practice).

[122] As a review of the mixed motive cases indicates, the mixed motive problem has arisen where prosecutors have admitted that race or sex was a "factor," or where they struck a

the fact that at least one of the reasons proffered by the proponent of the strike suffice to satisfy the step two burden? As will be discussed below, fundamental equal protection principles preclude that conclusion.

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juror because they "preferred" a jury with a different racial or gender composition, or where they feared that a common racial or sex characteristic between the juror and the defendant might create bias. In *Howard v. Senkowski*, for instance, the prosecutor admitted that race was "a factor" in the decision to strike, because he believed it "made them sympathetic to the defendant," but alleged that other factors, including the prospective jurors' education and intelligence, limited work experience, and five children, were more important considerations. 986 F.2d at 25. In *Gattis v. Snyder*, the prosecutor exercised a peremptory challenge against an elderly African-American male. The prosecutor there gave two reasons for the strike, one of which was based on gender. First, the prosecutor pointed to what he considered to be "very conservative" views regarding "application of the death penalty."278 F.3d at 232. Second, he stated that the juror was "an older gentleman," and noting the presence of several other older gentlemen on the jury panel, stated that "we would prefer to have some more women on the jury." *Id*. at 232. In *United States v. Darden*, the prosecutor gave two reasons for striking a female African-American juror. First, he stated his belief that "young black females … tend … to be more sympathetic toward individuals who are involved in narcotics." 70 F.3d at 1530-1531. He also stated that he struck the juror because she "said virtually nothing" during the voir dire and thus he believed her to be "either naïve or withholding information," or to have "virtually no experience with the criminal justice system." 70 F.3d at 1530-1531. In *Weaver v. Bowersox*, the prosecutor stated that he struck an African-American female juror "for a number of reasons," including her hesitation in answering questions about the death penalty and lack of eye contact. He also added that, "in any event, I was not persuaded that she could give the death penalty, particularly to a fellow black person," and observed that she was "cutting up and talking to the black gentleman next to her." 241 F.3d at 1027. In *King v. Moore*, 196 F.3d 1327, 1332 (11th Cir. 1999), the prosecutor proffered the following explanation for striking an African-American female: "Okay. She is a young black female[;], the Defendant is a young black male. Her response to the Court's inquiry with regard to her feelings aobut the death penalty we felt were sufficient for us to have concern about how she would apply the law." In *Wallace v. Morrison*, 87 F.3d 1271, 1273 (11th Cir. 1996), the prosecutor was asked by the trial judge if he "consider[ed] race in striking these ones that you struck, the black ones you struck?" The prosecutor responded by explaining that he used a rating system to assign numbers to prospective jurors, and added "[r]ace was a factor that I considered just as I considered age, just as I considered their place of employment and so on." In *Kesser v. Cambra*, 392 F.3d 327 (9th Cir. 2004), the prosecutor exercised peremptory strikes against all three native Americans on the venire. When called to explain his strike of the first juror, he stated that "[m]y experience is that native Americans who are employed by the tribe are a little more prone to associate themselves with the culture and beliefs of the tribe than they are with the mainstream system," and "they are sometimes resistive" and "suspicious" of the criminal justice system. He also gave several additional, neutral reasons for striking the juror, including that she seemed to him to be pretentious, emotional, from a dysfunctional family, and "fairly weak."

A. The Meaning of "Neutrality" at *Batson*'s Step Two

In *Hernandez v. New York*, the Court made clear that the question at step two is narrow: an explanation is "neutral" as long as there is no literal admission of purposeful discrimination. A strike may be exercised for reasons that closely correlate with race, as long as the reason is not itself race, and a strong conceptual linkage between the reason and the race or ethnicity of the juror is not enough. A step two explanation is legally "neutral," according to *Hernandez*, "unless a discriminatory intent is inherent in the prosecutor's explanation."[123] Because the explanation offered by the prosecutor did not literally turn on the race or ethnicity of the bilingual jurors, the proffered explanation satisfied the neutrality requirement.

The Court revisited the step-two inquiry four years later in *Purkett v. Elem*,[124] where two black men were struck purportedly because of their beards and goatees.[125] In reversing the Eighth Circuit's finding that the prosecutor had failed to adduce a reason that satisfied *Batson*'s second step, the Court underscored that the burden at step two was purely one of production, not persuasion. *Elem* interpreted the step-two burden as setting forth what is in effect a pleading standard rather than an evidentiary standard. To satisfy its burden of production, the proponent of a strike need not proffer an explanation that is credible to survive scrutiny, and at step two, the trial court should not be concerned with whether the tendered explanation is "persuasive, or even plausible."[126] That evaluation takes place at step three.[127] In construing step two in this manner, the Court did no more than follow its Title VII jurisprudence, where it already had declared that, at step two of the comparable *McDonnell-Douglas/Burdine* framework, a Title VII "defendant need not persuade the court that it was actually motivated by the [proffered]

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[123] *Id*.
[124] 514 U.S. 765 (1995) (per curiam).
[125] 514 U.S. at 766.
[126] *Id*. at 768.
[127] The Supreme Court recently reiterated that proposition in Johnson v. California, 125 S. Ct. 2510 (2005) (noting that "even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three").

reasons."[128] After *Elem*, courts are not authorized to terminate a *Batson* inquiry as long as the prosecutor provides a facially-neutral explanation. But *Hernandez* and *Elem* did not eliminate step two altogether, nor as some commentators argue, did they necessarily kill *Batson*.[129]

The Court in *Elem* was quick to point out that although facially-neutral explanations satisfy the step two burden, "implausible or fantastic explanations may (and probably will) be found to be pretexts for purposeful discrimination."[130] *Elem*, in other words, defers scrutiny rather than prohibits it. Such a reading is consistent with *Batson*'s obvious intent to create practically enforceable evidentiary rules. After all, *Batson* was handed down largely in recognition that the *Swain* regime[131] had failed effectively

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[128] Tex. Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 248 (1981). In *McDonnell Douglas*, the Court devised a set forth a three-step burden-shifting framework to help lower courts resolve the evidentiary inquiry mandated by Title VII. The purpose of this procedural mechanism was to determine whether the plaintiff has established that the adverse employment action was taken "because of" a discriminatory purpose. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003). Under *McDonnell Douglas*, the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." McDonnell Douglas, 411 U.S. at 802. If the complainant succeeds in establishing a prima facie case, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, if the employer comes forward with a legitimate, nondiscriminatory reason, the Court must determine whether the complainant can show that the employer's stated reason for rejection "was in fact pretext." *Id*. at 804. This framework was affirmed again in *Burdine*. 450 U.S. 248. As a matter of logic, a finding that the proffered explanation was pretextual does not necessitate a conclusion that the challenged action was the product of discrimination. It is entirely possible that the defendant will articulate a false explanation for a challenged action to hide a permissible (although embarrassing or irrational) purpose rather than an impermissible one. Acknowledging this possibility, the Supreme Court held in concluded in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993), that the plaintiff in a Title VII case bears a greater burden than merely proving pretext; she must also prove that the pretextual explanation masked a discriminatory purpose. Explaining that its Title VII "decisions concerning 'disparate treatment'" have "explained the operation of prima facie burden of proof rules," *Batson*, 476 U.S. at 94 n.18, *Batson* adapted the formal structure of Title VII to the jury-selection context.

[129] *See*, *e.g.*, Jose Felipe Anderson, Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection, 32 NEW ENG. L. REV. 343, 372 (1998) (asserting that "[t]he Elem opinion in many ways renders useless the ten years of *Batson* jury selection jurisprudence").

[130] 514 U.S. 765, 768.

[131] *See* Swain v. Alabama, 380 U.S. 202 (1965).

to stop the discriminatory use of peremptory challenges, and its authors no doubt intended courts to apply its requirements to provide effective enforcement of the non-discrimination principle.[132] Although *Elem* bars any searching credibility determinations at step two with respect to the plausibility of the explanation offered, *Elem* does not disturb the conditional nature of the *Batson* framework, which has always required the state to carry its burden of production before the inquiry may properly proceed to step three.[133] Although a neutral explanation remains legally sufficient even if it is "silly or superstitious,"[134] it must nonetheless be free of any inherent discriminatory intent,[135] that is, the proponent of a challenged strike still must come forward with an explanation for the strike that does not violate the Equal Protection Clause as a matter of law.[136] *Elem*'s creation of a strict pleading standard heightens the importance of the criteria used to assess the legal neutrality of a proffered explanation. Ultimately, whether or not an explanation proffered at step two is sufficient depends on the governing equal protection standards. It is to those standards we now turn.

B. Neutrality and Equal Protection

Modern equal protection law is grounded in the requirement, established in *Washington v. Davis*,[137] that an equal protection

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[132] *Batson*, 476 U.S. at 92-93 (noting that decision to overturn Swain was necessary because the Swain's requirement that challengers adduce proof of repeated striking of blacks over many cases had erected a "crippling burden of proof" that rendered "prosecutors' peremptory challenges … largely immune from constitutional scrutiny").

[133] 514 U.S. at 767 (explaining that "*if* a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination") (emphasis added).

[134] *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

[135] *Id*. at 768, citing *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion) (neutral explanation is one "based on something other than the race of the juror"); *id*. at 374 (O'Connor, J., concurring opinion) ("*Batson*'s requirement of a race-neutral explanation means an explanation other than race.")

[136] *Hernandez*, 500 U.S. at 360 ("At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation."). *Cf.* Burdine, 450 U.S. at 255 (explaining that in Title VII case, a defendant only carries his burden of production at step two if "[t]he explanation provided … [is] legally sufficient to justify a judgment for the defendant.")

[137] 426 U.S. 229 (1976). The *Davis* decision has been described by commentators as "the most important equal protection case of the last quarter-century." *See* Ian F. Haney

violation can not be established absent proof of purposeful discrimination.[138] Arguably the most important equal protection decision of its time, *Davis* definitively established that disparate impact evidence alone is insufficient to establish an equal protection violation.[139] But government decisions, whether made by a group or an individual, are often made for multiple reasons. If a government action does not violate the equal protection clause unless it can be tied to a discriminatory purpose, how important must that purpose be? Must it be the sole, or dominant, aim or purpose?[140]

Relying largely on tort standards,[141] *Arlington Heights* supplied an answer, clarifying that *Davis*'s requirement that disparate impact be linked to a discriminatory purpose does not mean that the discriminatory purpose must be the "sole" motivation for the challenged action before a violation will be found. A long line of precedents utilized language that suggested that discrimination only occurs where the sole purpose of the actor was

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Lopez, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 YALE L.J. 1717, 1832 (2000); K.G. Jan Pillai, Shrinking Domain of Invidious Intent, 9 WM. & MARY BILL RTS. J. 525, 538 (2001).

[138] In *Swain* itself, the Court had emphasized this point. *See* 380 U.S. at 205 (noting that "purposeful discrimination may not be assumed or merely asserted. It must be proven.") (internal cites omitted).

[139] In *Davis*, a group of unsuccessful black applicants to the District of Columbia police department alleged that a qualifying test administered to applicants disproportionately disqualified blacks and therefore ran afoul of equal protection. The Court rejected the claim. *Id*. at 240 (basic equal protection principles require "that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

[140] *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (arguing against judicial review of legislative motives in part because it is "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators"). The Supreme Court's equal protection cases reflect a longstanding attempt to cabin the reach of the clause by targeting only state action that is intended "solely" to disadvantage minorities.

[141] The rule established in *Washington v. Davis* itself, that precludes an equal protection violation from prevailing absent evidence of "invidious intent," might itself be understood as based on common law tort principles. *See* Pillai, *supra* note 142, at 530 ("It may be argued plausibly that the Davis rule reflects the venerable common law tradition of not subjecting a party to liability without establishing causation and culpability," thereby operating in a manner analogous to "rules of criminal law or tort litigation."). *See Price Waterhouse*, 490 U.S. at 241 & n.7 (noting that the words in Title VII "'because of' do not mean 'solely because of," and that Congress had expressly rejected an amendment to the statute that would have accomplished precisely that).

invidious.[142] But the Equal Protection Clause does not require such a strong showing. As the Court explained, "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."[143] The reasoning mirrors language from the Second Restatement of Torts, which states that "[i]t is not necessary that it be *the* cause, using the word 'the' as meaning the sole and even the predominant cause."[144]

If the discriminatory purpose need not be the "sole" or predominant purpose, then to what extent must the discriminatory purpose factor in the decision? The Court's answer again tracked general causation principles borrowed from the law of tort. According to the Restatement, an actor's conduct is a legal cause of harm to another where that conduct is a "substantial factor in

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[142] *See, e.g*., Strauder v. West Virginia, 100 U.S. 303, 309 (1880) (explaining that it is a violation of the equal protection clause to compel "a colored man to submit to a trial for his life by a jury drawn from the panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects"); (Carter v. Texas, 177 U.S. 442, 447 (1900) holding that "[w]henever by any action of a state, whether through its Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment"); Norris v. Alabama, 294 U.S. 587 (1935) (quoting *Carter*); Hale v. Kentucky, 303 U.S. 613, 616 (1938) (same); *Swain*, 380 U.S. at 830 (denying that "purposeful discrimination *based on race alone* is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%") (emphasis added)

[143] 429 U.S. at 265.

[144] REST 2d TORTS § 430 (d) ("In order that a negligent actor may be liable for harm resulting to another from his conduct, it is only necessary that it be a legal cause of the harm. It is not necessary that it be the cause, using the word "the" as meaning the sole and even the predominant cause. The wrongful conduct of a number of third persons may also be a cause of the harm, so that such third persons may be liable for it, concurrently with the actor."). *See also* Jeremiah Smith, *supra* note 28, at 311 (explaining that causal liability should be sufficient upon a showing that tortious conduct was a substantial factor in causing the harm, it need not be "the sole factor, nor the predominant factor"). The Court has invoked this principle repeatedly in its anti-discrimination jurisprudence, reiterating that "[d]iscrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision." *Price Waterhouse*, 490 U.S. at 1808 (Kennedy, J., dissenting) (citing McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 282 n.10 (1976).

bringing about the harm."[145] A "substantial factor" is one which would lead "reasonable men to regard it as a cause" of the plaintiff's harm.[146] Professor Brest similarly had argued that the proper test in cases in which an unconstitutional motive is alleged requires the complainant to "establish by clear and convincing evidence that such an objective played an affirmative role in the decisionmaking process," but agreed that he need not "establish that consideration of the objective was the sole, or dominant" cause of the decision.[147]

The *Arlington Heights* Court adopted a comparable standard, but perhaps because the issue is not, strictly speaking, causation but purpose, adopted the term "motivating" in lieu of the Restatement's "substantial" and Brest's "affirmative,"[148] but with no indication that the motivating factor test differed materially from the substantial factor test.[149] Although generally "courts refrain from reviewing the merits" of legislative decisions "absent a showing of arbitrariness or irrationality, … [w]hen there is proof that a discriminatory purpose has been *a motivating factor* in the decision, this judicial deference is no longer justified."[150] Proof of discriminatory purpose, according to *Arlington Heights*, is established upon a showing that an "invidious discriminatory purpose" was "a motivating factor" for the decision – the plaintiff need not prove that such purpose was the sole motivating factor, nor even that such purpose had "primacy."[151]

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[145] Restatement (Second) of Torts, § 431(a), at 428 (1965).
[146] *Id*. at Comment (a) to § 431(a), at 429.
[147] Brest, *supra* note 38, at 130-131.
[148] In *Mt. Healthy*, the court used the terms interchangeably. *See* 429 U.S. 274, 285. *See also Price Waterhouse*, 490 U.S. 228, 238 n.2 (1989) (noting that lower courts had employed a variety of tests, including "motivating," "substantial," and "discernible" factor tests); *id*. at 259 (White, J., concurring) (quoting Mt. Healthy language using both terms as synonyms).
[149] *See* Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 GEO. L.J. 489, 503-510 (2006) (noting that various opinions in *Price Waterhouse* used the terms interchangeably, and that there is no logical distinction between terms).
[150] *Id*. at 265-266.
[151] *Id*. at 265 n.11. *See also* Howard v. Senkowski, 986 F.2d at 29 (concluding that the use of the word "solely" in the *Batson* opinion should not be read as an indication that a defendant carried a higher burden of proof in the peremptory challenge context than he did in any other context in which proof of purposeful discrimination is necessary to prevail on a claim brought under the equal protection clause). *Cf*. Brest, *supra* note 38, at

These principles were further explicated in *Personnel Administrator of Massachussetts v. Feeney,*[152] a case involving an equal protection challenge to a Massachussetts' law that accorded a civil service hiring preference to veterans. On its face, the veterans preference was gender-neutral; female veterans were equally entitled to the preference.[153] However, because the vast majority of veterans are male, the preference clearly had a disparate impact on female job applicants.[154] Conceding that the disparate impact of the preference was readily apparent to lawmakers, the Court, again consistent with general tort principles, rejected a standard that would equate knowledge of disparate impact with purpose to discriminate. Under general tort principles, it often is "held not to be sufficient that the actor knew that his conduct was substantially certain to produce the injury, and it may be necessary that he desired to bring it about."[155] Likewise, the *Feeney* court acknowledged that given the foreseeability of the disparate impact on women from the veterans preference, "[I]t would … be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable."[156] But discriminatory purpose implies "more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action *at least in part* 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[157] Because Feeney could not demonstrate that the Massachussetts' preference was the product, even in part, of a discriminatory purpose, her claim failed.[158]

Although the plaintiffs in *Arlington Heights* and *Feeney* both failed to prove that legislative or administrative classifications were intentionally designed to effect a discriminatory purpose, these cases have been regularly invoked by the Court for the proposition that the

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119 n.123 (arguing that rule motivated by legitimate and illegitimate objectives "should be invalidated if the illict objective played any material role in the decision").

[152] 442 U.S. 256 (1979).

[153] *Id*. at 268.

[154] *Id*. at 271.

[155] RESTATEMENT (SECOND) OF TORTS § 870 (i).

[156] *Id*. at 278.

[157] *Id*. at 279 (emphasis added).

[158] *Id*. at 280.

plaintiff's proof of discriminatory purpose under *Washington v. Davis* does not require the plaintiff to prove that a discriminatory purpose was the sole or predominant factor in the decision.[159] The relevant question is not whether the challenged action was taken in part, even in large part, for *legitimate* motives, but instead whether the decision was motivated, *even in part, by an improper purpose*; that is, whether an invidious discriminatory purpose was "a motivating factor" in the decision.[160]

These principles clarify the question of what constitutes an improper purpose for a peremptory strike, and the Supreme Court has in fact invoked them for that purpose in its *Batson* jurisprudence. In *Hernandez*, for instance, the Court cited both *Washington v. Davis*'s injunction that proof of disparate impact is not enough to establish an equal protection violation and *Feeney*'s teaching that the showing necessary to establish a violation is that the course of action was at least in part chosen because of the invidious purpose.[161] More recently, in the first of the two *Miller-El* decisions, the Court explicitly stated that an objecting party will satisfy his burden under *Batson* by demonstrating that race was "a motivating factor" for the exercise of a peremptory strike.[162] *Miller-El* quite clearly did not

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[159] *See*, *e.g.*, Wards Cove Packing Co., Inc. v. Atonio 490 U.S. 642, 672-673 (1989) (Stevens, J., dissenting) ("It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. *E.g.,* Restatement § 430. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. §§ 431-433; cf. *Price Waterhouse v. Hopkins,*490 U.S. 228, (1989)"); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 272 (1993) (holding that civil rights statute providing cause of action for deprivation of equal protection, as applied to anti-abortion protesters, requires proof that invidious purpose "at least in part" motivated their action in preventing women from obtaining abortions at clinic).

[160] Although the general equal protection causation test only requires evidence that the illicit motive was "a motivating factor," the Court has not followed this reasoning in its redistricting cases. In those cases, the Court has required a showing that race was "the predominant factor" that led to a particular outcome. *See* Miller v. Johnson, 515 U.S. 900, 916 (1997); Bush v. Vera, 517 U.S. 952, 959 (1996).

[161] *Hernandez,* 500 U.S. at 360 (quoting Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) (emphasis added).

[162] Miller-El v. Cockrell, 537 U.S. 322, 346 (2003) ("Even though the practice of jury shuffling might not be denominated as a *Batson* claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection."); *id*. at

demand any proof that the strikes exercised at Miller-El's trial have been solely or predominantly the product of invidious intent. In addition, the lower courts that have sanctioned mixed-motive analysis have also acknowledged that these principles define neutrality. Chief among them, the Second Circuit in *Howard v. Senkowski* acknowledged that a discriminatory purpose is established by proof that such a purpose is even a "part of a motivation,"[163] and rejected the proposition that *Batson* must be read to require proof that the improper purpose was the "sole motivation" for the peremptory strike.[164]

Given that the burden of proving discriminatory purpose is satisfied upon a showing that an illicit factor was even a partial consideration by the actor, the contention is foreclosed that a mixed-motive explanation – one that admits that a discriminatory purpose was part of the motivation for exclusion of the juror – can be deemed facially valid.[165]

C. Mixed-Motive Explanations Are Not Neutral

Like Justice Marshall, the state courts that have adopted the "taint approach" to the mixed-motive problem have recognized that any approach to a mixed-motive explanation that "does not prohibit a prosecutor from striking a juror even when the decision is based in part" on an improper reason "cannot be squared with *Batson*'s unqualified requirement that the state offer 'a *neutral* explanation' for its peremptory challenge."[166] A mixed-motive explanation is not a neutral explanation under the applicable equal protection standards

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347 ("The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards.").

[163] 986 F.2d 24, 29 (2d Cir. 1993).

[164] *Id*.

[165] *See*, *e.g.*, Hill v. State, 827 S.W.2d 860, 874 (Tex. Crim. App. 1992) (concurring opinion) (arguing that "No "neutral explanation" can serve to rebut the presumption that the condemned practice of exclusion based on race occurred when the prosecutor admits that such an exclusion did occur. . . .") (quoting McKinney, 761 S.W.2d at 551);

[166] Wilkerson v. Texas, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of cert.) (emphasis in original).

because the prosecutor has in effect admitted that an improper purpose was "a motivating factor" in her decision to strike a juror.[167]

The conclusion that a mixed-motive explanation is not neutral is strengthened by consideration of the nature of the step two inquiry. As the Court has strongly underscored, step two does not involve, or even allow, any credibility assessment.[168] The strict injunction on factual assessment at step two virtually eliminates a court's discretion to disregard a discriminatory admission. Just as a court may not dismiss a facially neutral justification as "implausible," neither may it pick and choose which among several proffered reasons to believe, nor choose to credit one articulated reason but disregard another. To do so would require it prematurely to weigh the evidence and make precisely those credibility assessments that the Supreme Court has unambiguously stated are not appropriate at step two. Instead, the court must assume "that the proffered reasons for the peremptory challenges are [all] true," and only then determine if "the challenges violate the Equal Protection Clause as a matter of law."[169]

As noted above, the *raison d'etre* of the *Batson* framework is to answer the question whether the conduct that has a disparate impact (in this case, the peremptory strike) can be traced to a discriminatory purpose. An explanation that includes an impermissible motive as one of several motives evinces that the peremptory strike was exercised "at least in part" for a discriminatory purpose."[170] Such a reason is not neutral – that is, it is facially inconsistent with equal protection.[171]

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[167] *See* Owens v. State, 531 Slo.2d 22, 26 (concluding that given *Batson*'s requirements that a neutral explanation be neutral, related to the case to be tried, clear and reasonably specific, and legitimate, that it could not "see how any explanation can meet the four articulated requirements if it is based, in part, on race"). Wilkerson, 493 U.S. at 926 (Marhall, J. dissenting from denial of cert.) ("To be "neutral," the explanation must be based *wholly* on nonracial criteria.") (emphasis in original).

[168] *See Johnson*, 125 S.Ct. 2418 n.7; *Purkett v. Elem*, 514 U.S. at 768 (holding that Court of Appeals erred by combining *Batson*'s second and third steps into one").

[169] *Hernandez*, 500 U.S. at 359.

[170] That conclusion does not follow only if the improper motive was not actually a "motivating factor" at all in the actual decision. Given the context, that conclusion seems implausible. After all, when asked to explain why she struck a juror, a prosecutor's answer that she did so, in part because of race, is strong evidence that she viewed race as

Given that a mixed-motive explanation necessarily fails the step-two neutrality requirement, what is the appropriate response when such an explanation is proffered? If a "mixed-motive" explanation is not neutral under the *Batson* framework, should the inquiry come to an end? If not, is it necessary, or even permissible, to move on to step three notwithstanding that the proponent of the strike has failed to carry her burden?

D. Conventional Pretext Analysis in Mixed Motive Cases

Proceeding to step three in a mixed-motive *Batson* case, as some courts have,[172] is an error because *Batson*'s framework was designed to elucidate whether a discriminatory purpose was a motivating factor in the decision to exercise peremptory strikes. Whether the explanation provided by the prosecutor to justify the strike was truthful or "pretextual," as *Batson*'s third step is designed to elucidate, is simply not the relevant inquiry in a mixed-motive case. First, it renders superfluous the conditional nature of the *Batson* framework, which only directs courts to undertake a factual assessment if the prosecutor carries her step two burden of production. If that conditional requirement were ignored, then there would be no burden at all at step two, which would amount to a wholesale rewriting of *Batson*.

Second, moving to step three propels the court toward the wrong inquiry. In a conventional *Batson* case, the issue at step three

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having some bearing on her conduct. That is, she herself seems implicitly to be acknowledging that race was at least one of several causal factors in her decision. Presumably, if race really was superfluous to her decision, she would not have felt compelled to include it in her explanation.

[171] *See*, *e.g.*, Hill v. State, 827 S.W.2d 860, 874 (Tex. Crim. App. 1992) (concurring opinion) (stating that "equal protection is denied whenever race is a factor in the exercise of a peremptory challenge. This "bright line" rule is necessary because one simply cannot articulate a "race-neutral" explanation for exercising a peremptory strike when race is a part of that explanation. *But see id.*, 827 S.W.2d at 869 (plurality opinion) (rejecting "bright-line" rule urged by concurring opinion in favor of mixed-motive approach).

[172] *See, e.g.*, Leahy v. Farmon, 177 F.Supp.2d 985 (N.D. Cal. 2001) (holding, on habeas review, that state court decision "that the second step of the *Batson* analysis can be met by articulating both race-based and race-neutral reasons for a strike is not contrary to or an unreasonable application of, United States Supreme Court precedent") (*aff'd*, Kesser v. Cambra, 392 F.3d 327 (9th Cir. 2004); *rehearing en banc granted,*425 F.3d 1230 (9th Cir.2005)); People v. Howard, 128 A.D.2d 804, 513 N.Y.S.2d 506 (N.Y.A.D. 2 Dept. 1987).

is whether the neutral explanation offered by the prosecutor is "true." If it is, then the strike was not the product of a discriminatory purpose. The party objecting to the strike carries the burden to prove, by a preponderance of the evidence, that the neutral explanation was not true, that is, was a pretext for an illicit purpose.[173]

Pretext cases and mixed-motive cases thus involve quite distinct legal issues. In a typical pretext case – for which the *McDonnell Douglas/Burdine* framework was devised – the factual issue to be resolved at step three is whether the facially neutral reasons articulated by the defendant at step two were the "real" reasons for the adverse employment decision, or whether they are more likely than not a "pretext" for the "true" discriminatory reason.[174] That is not the case once an illicit motive has been admitted or proved. As the plurality in *Price Waterhouse* explained, "[w]here a decision was the product of a mixture of legitimate and illegitimate motives … it simply makes no sense to ask whether the legitimate reason was 'the true reason' for the decision—which is the question asked by *Burdine*."[175] After all, it very well may be true in a mixed motive case (indeed, it is presupposed) that the legitimate reasons played a part in the employer's decision. At most, what is at issue is whether the employer still would have made the decision in the absence of the illegitimate consideration.

The dispositive issue in a mixed-motive case is not whether or not the actor harbored a discriminatory purpose, per *Washington v. Davis*, but whether that purpose had a causal effect. The truthfulness of any other, neutral justifications asserted by the actor is still relevant; after all, if those reasons prove to be pretextual (that is, they were invented to cover up for the "true" illegitimate purpose) then there is no possible doubt that the impermissible reason

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[173] As the *Howard* court itself recognized, the central question in a pretext case is whether the facially neutral explanation proffered by the challenged party was the "real" reason for the exercise of the strike, or rather was merely a pretext for the illicit, discriminatory, purpose. *See* 986 F.2d at 27.

[174] *See, e.g.*, Robert W. Belton, Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove, 64 TUL. L. REV. 1359, 1383-84 (1990).

[175] *Price Waterhouse*, 490 U.S. at 247 (plurality opinion).

"caused" the adverse action. But proof that the legitimate reasons were not pretextual does not resolve the causation question, it merely complicates it.

Because mixed-motive cases are conceptually distinct from pretext cases, where the proponent of a challenged strike proffers a mixed-motive explanation, it is error to proceed to a conventional pretext analysis. Those who have argued that anything but adherence to the conventional *Burdine* framework is contrary to the well-established principle that the plaintiff carries the ultimate burden to prove purposeful discrimination,[176] have misunderstood that a plaintiff who has established mixed motives has already carried that burden. As Justice O'Connor noted in *Price Waterhouse*, once a plaintiff has established this much, she has "taken her proof as far as it could go."[177]

The question, then, is not whether a mixed-motive explanation should be subjected to standard pretext analysis, but whether the mixed-motive principles used in other contexts should be invoked to give the prosecutor an opportunity to save a peremptory strike notwithstanding her failure to carry her burden at step two. In affirming the applicability of mixed-motive analysis, the Second Circuit in *Howard* wholly failed to consider whether a showing that an improper purpose was a motivating factor for a strike was sufficient to terminate the *Batson* inquiry, or whether the use of mixed motive in the *Batson* context was consistent with *Batson*'s underlying purposes. If, as *Howard* recognized, it would be error to conduct a conventional pretext analysis,[178] as will be demonstrated below, it is equally erroneous to turn to mixed motive to resolve the causation question.

III. MIXED MOTIVE UNDERMINES *BATSON*

In *Howard*, the Second Circuit found it appropriate to use mixed-motive analysis because it concluded that such analysis had

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[176] *See Price Waterhouse*, (Kennedy, J., dissenting).
[177] *Price Waterhouse*, 490 U.S. at 272 (O'Connor, J., concurring).
[178] 986 F.2d at 27 (noting once the claimaint has proven improper motivation, there is no further need for "pretext" analysis).

been implicitly sanctioned by the Supreme Court. Citing *Mt. Healthy* and *Arlington Heights*, it contended that:

> In the realm of constitutional law, whenever challenged action would be unlawful if improperly motivated, the Supreme Court has made it clear that the challenged action is invalid if motivated in part by an impermissible reason but that the alleged offender is entitled to the defense that it would have taken the same action in the absence of the improper motive.[179]

If the Second Circuit's sweeping assertion that a single standard has been utilized in all constitutional cases in which motivation is an issue were true, then the Second Circuit's resort to mixed-motive in *Howard* might be more defensible. But a single standard has never been uniformly employed. In the redistricting context, for example, a plaintiff must prove not only that race was a "substantial" or "motivating" factor behind the legislature's choice of a district's contours, but that it was the "predominant" factor.[180] That is, not only was it the "but-for" cause of the particular lines drawn by the legislature, but that other neutral concerns were "subordinated" to achieve the challenged outcome.[181] Thus, in *Bush v. Vera*, a redistricting case that the Court acknowleded involved "mixed motives" – the districts challenged in *Vera* were drawn to produce "minority-majority" districts and to protect incumbents – the plaintiffs' proof that race influenced the shape of the district was held to be insufficient to require strict scrutiny.[182] Instead, the

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[179] *Id*. at 26.

[180] Miller v. Johnson 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.")

[181] *Id.* ("To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.")

[182] Bush v. Vera 517 U.S. 952, 959 (1996) ("The appellants concede that one of Texas' goals in creating the three districts at issue was to produce majority-minority districts, but they also cite evidence that other goals, particularly incumbency protection (including protection of "functional incumbents," *i.e.,* sitting members of the Texas Legislature who

plaintiffs were obligated to prove that race was the "predominant" motive. In dissent, Justice Thomas observed that the court's test was substantially stricter than the "but-for" causation standard employed in other contexts.[183] But the unique considerations, both of proof and purpose, in the redistricting context have long been thought to justify a different standard.

Choice of a particular threshold standard for application of strict scrutiny under the equal protection clause, therefore, depends on the context and purpose in which that standard is utilized.[184] Whether the same-decision test found appropriate in other constitutional tort and legislative motive cases should be transferred to *Batson* depends on whether that causation standard is appropriate to the *Batson* context and furthers its purposes. Certainly, if a chosen threshold standard conflicts with or undermines the basic goals in an area of law, as the Court's redistricting jurisprudence demonstrates, the chosen standard rather than the goals should give way. As the Article demonstrates below, mixed-motive analysis undermines Batson's expressive function, undercuts its practical effectiveness, and requires the trial court to engage in counterfactual speculation for which it is wholly ill-equipped. For all these reasons, mixed-motive analysis should not be permitted in the *Batson* context.

A. Symbolism, Deterrence and Diversity

Batson was intended to "put an end to governmental discrimination on account of race,"[185] and advances that goal in three ways: it symbolizes official intolerance of discrimination in jury selection, it seeks to deter such discrimination, and it provides

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had declared an intention to run for open congressional seats), also played a role in the drawing of the district lines.").

[183] *Id*. at 1001 (Thomas, J., dissenting) (disagreeing with majority that creation of minority-majority districts does not necessarily require strict scrutiny; doing so "means that the legislature affirmatively undertakes to create a majority-minority district that would not have existed *but for* the express use of racial classifications-in other words, that a majority-minority district is created "because of," and not merely "in spite of," racial demographics") (emphasis added).

[184] *See id*., at 1951 (noting that "[u]r precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny.")

[185] Batson, 476 U.S. at 85.

marginal incentives not to strike minority jurors and thus should, in theory, enhance jury diversity. Of these functions, *Batson* probably has served the first most successfully. As a rhetorical device, *Batson* and its progeny have sent a strong message to the criminal justice system that discrimination in jury selection cannot and will not be tolerated.[186] Indeed, the Court has stated that nowhere is the Fourteenth Amendment's command to eliminate official racial discrimination more compelling than in the judicial system, and *Batson* was crafted specifically to achieve that goal.[187] The constitutional command to root out discrimination is so overriding that the Supreme Court repeatedly has stated that the exclusion of even a single juror on account of his or her race, ethnicity, or gender calls it into force.[188]

Batson serves the function not only of preventing actual discrimination, but also of abolishing perceived discrimination and combatting "cynicism" and a loss of "public confidence" in the criminal justice system.[189] Mixed-motive analysis undermines this symbolic function by tolerating actual discrimination in jury

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[186] *See* Susan N. Herman, Why the Court Loves *Batson*: Representation-Reinforcement, Colorblindness, and the Jury, 67 TUL. L. REV. 1807, 1813 (1993) (arguing that the Court has taken *Batson* seriously because it "acts as a lightning rod for all of the Court's unexpressed concerns about racism in the criminal justice system"); The Supreme Court, 1991 Term; Leading Cases; I. Constitutional Law, 106 HARV. L. REV. 163, 244 (asserting that "the Court's extension of *Batson* to a criminal defendant's exercise of peremptory challenges stands as a powerful condemnation of race-based judgments in the courtroom"). Some, however, have argued that *Batson*'s symbolic message is far outweighed by its practical failure to restrain discrimination. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (characterizing the *Batson* line of cases as having merely "great symbolic value" as a demonstration of the court's "uncompromising hostility to race-based judgments.")

[187] *See* Powers v. Ohio, 499 U.S. at 415.

[188] *Batson*, 476 U.S. at 95 (noting that "'a single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the makign of other comparable decisions'"); Walker v. Girdich, 410 F.3d 120, 2005 WL 1349916, at *3 (2d Cir. June 8, 2005) (stating that "under *Batson* and its progeny, striking even a single juror for a discriminatory purpose is unconstitutional"). Precisely the same "zero tolerance" approach has been recognized to underlie statutory anti-discrimination provisions. *See*, *e.g.*, *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 358 (1995) (noting that the objectives of the Age Discrimination in Employment Act "are furthered when even a single employee establishes that an employer has discriminated against him or her.").

[189] *Id.*

selection, and as such, is inconsistent with the injunction that "racial discrimination has no place in the courtroom."[190] Permitting the exclusion of a juror after the prosecutor has admitted a discriminatory purpose in striking her cannot but contribute to a belief by a convicted defendant that her conviction was the product of discrimination.[191] Similarly, jurors themselves so excluded are unlikely to comprehend the subtle distinction between a discriminatory purpose and a causative factor. Jurors who surmise the reasons for their exclusion, therefore, undoubtedly will be no less offended that the prosecutor harbored a discriminatory bias against them simply because the prosecutor also identified a separate subjective basis for their exclusion. Likewise, this subtle distinction is sure to be lost on the general public that learns that blacks, or women, or other minority members, were excluded from jury service notwithstanding the prosecutor's admission that she harbored a distrust, or dislike, of persons of their group.[192]

Allowing the mixed-motive defense also sends precisely the wrong message to prosecutors and judges, who learn that some invidious intent is tolerable, and that they may even be relatively candid in admitting or tolerating a discriminatory purpose. Toleration of intentional misconduct is inconsistent with *Batson*'s basic premises, and undercuts its hortatory potential to exert a positive influence on the conduct of public officials.[193]

Like Title VII, *Batson*'s prohibition on discrimination was crafted to provide a "spur or catalyst" to cause trial lawyers to "self-evaluate" their jury-selection practices "and to endeavor to

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[190] *Edmonson*, 500 U.S. 614, 630 (1991).

[191] *See* Powers v. Ohio, 499 U.S. 400, 412 (1991) ("Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.")

[192] Miller-El v. Dretke, 125 S. Ct. at 2324 (explaining that "the very integrity of the courts is jeopardized when a prosecutor's discirmination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication").

[193] *See* Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 MICH. L. REV. 2001, 2023 (1998) (noting that "the *Batson* rule is to a great extent hortatory" and courts' acceptance of dubious *Batson* explanations "may send a message to prosecutors and defense counsel that the exclusion of minority jruors is generally not going to be taken very seriously").

eliminate, so far as possible, the last vestiges" of their discriminatory tactics.[194] In insisting that there be a but-for causal nexus before any relief is provided, the mixed-motive test works against the goal of deterrence. The mixed-motive defense permits a prosecutor who has relied on improper criteria to prevail simply because the prosecutor was able to demonstrate that there may have been other non-discriminatory factors that would have led to the "same decision." As the Court has noted in the statutory discrimination context, the identification of discriminatory acts through litigation provides an important tool by which to attack subterreanean discriminatory practices and beliefs that may pervade the wider contextual culture.[195] Given that the instance of discrimination targeted in a particular case is likely reflective of the prosecutor's general attitudes and biases, and the likelihood that these same biases will influence the decisions made by that attorney in future trials, permitting the proponent of the strike to evade sanction by persuading the court that the discriminatory motive was not the "but-for" cause of the strike against that individual juror increases the chances that either that attorney, or other attorneys, will discriminate against other jurors in the future.[196] The end product is a vastly underprotective regulatory regime.

Batson also serves a diversity-enhancing function. The exclusion of minority jurors on account of group characteristics "compromis[es] the representative quality of the jury."[197] In holding that the free exercise of peremptory challenges must give way to the

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[194] Mark S. Brodin, The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 COLUM. L. REV. 292, 318 (1982) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975)).

[195] *See McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 358-359 (1995) (explaining that enforcement of age discrimination claims is important even absent showing of but-for causation as to damages, because "[t]he disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance").

[196] *See* Katz, *supra* note 156, at 519 (explaining that "[s]ocial scientists would predict that, if undeterred, an employer's minimually causal utilization of protected characteristics in one decision will increase the likelihood of future utilization by that employer, as well as future utilization by other employers").

[197] 476 U.S. at 87 n.8.

antidiscrimination principle, *Batson* signalled that the traditionally unfettered common law/statutory right to peremptory challenges is subordinate to equal protection's constitutional command. By prohibiting race-based peremptory strikes, *Batson* demanded, in essence, that certain otherwise rational generalizations be ignored or disabled to serve the larger goal of ensuring minority representation in the criminal justice system. *Batson* thus created what some have described as a "special rule of relevance"[198] that functions as a kind of "affirmative action" for the purpose of overcoming entrenched racial discrimination.[199] Under *Batson*, minorities receive special protection against arbitrary removal from the venire. Everything else being equal, prosecutors have an incentive to strike non-minority jurors rather than minority jurors simply to avoid the chance that the defendant might prevail on a *Batson* motion.[200] *Batson* thus contributes at the margins to expand minority participation in the criminal justice system. Both in preventing discrimination in jury-selection, and in affirmatively discouraging the exclusion of minority jurors, *Batson* furthers the goal of enhancing the diversity of juries.

Mixed-motive analysis, however, diminishes the ability of courts to reinforce the representational quality of juries. Indeed, the use of mixed-motive analysis may represent a conscious judicial design to diminish the affirmative-action effects of the *Batson* rule.[201] In crafting burden-shifting and causation rules under Title VII, the Supreme Court expressly acknowledged that these rules were intended to countermand "the risk that employers will be given

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[198] *See* J.E.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (describing *Batson* as establishing "'a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact'") (quoting *Brown v. North Carolina,* 479 U.S. 940, 941-942, 107 S.Ct. 423, 424-425, 93 L.Ed.2d 373 (1986) (opinion concurring in denial of certiorari).

[199] Nesson, *supra* note __, at 8.

[200] Title VII created precisely the same dynamic. *See* Belton, *supra* note __, at 1379 (discussing Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 993 (1988) & Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989)).

[201] *See* Robert Belton, Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove, 64 TUL. L. REV. 1359, 1364 (1990) (arguing that the Supreme Court's decisions dealing with causation and burden-shifting doctrines were the product of the conservative majority's "fundamental objection to affirmative action in any form").

incentives to adopt quotas or to engage in preferential treatment."[202] As with other forms of affirmative action, the application of mixed-motive principles to *Batson* would have the effect of neutralizing, at least in part, its progressive purposes.

Whatever the ideological motivation behind its adoption, practically speaking, mixed motive analysis has tended to insulate discriminatory jury selection tactics from reversal. Although every Circuit that has permitted mixed motive analysis in *Batson* cases has also recognized the necessity of shifting the burden of proof to the proponent of the challenged strike, and has acknowledged that the legal issue in the mixed-motive analysis is but-for causation, several courts have applied the but-for analysis in a sloppy or superficial manner to avoid reversing convictions, demonstrating the ease with which the mixed-motive test lends itself to the deconstruction of *Batson*'s already skimpy armament.[203] In addition, cases remanded for the purpose of conducting a mixed-motive analysis have typically resulted in affirmance, suggesting that the mixed-motive framework performs little more than a rubber-stamping function.[204]

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[202] Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 993 (1988) (plurality opinion).

[203] *See*, *e.g.*, King v. Moore, 196 F.3d 1327 (11th Cir. 1999) (affirming state court's denial of *Batson* motion where prosecutor proffered mixed-motive explanation and state court did not apply the burden-shifting framework specified in *Mt. Healthy*, based on its "interpretation" of the trial court's findings as implicitly satisfying the standard); Wallace v. Morrison, 87 F.3d 1271 (11th Cir. 1996) (making implicit findings that state court had made necessary factual findings under correct legal standard, notwithstanding that state court did not in fact apply correct burden-shifting framework). At least one court has further placed the burden on the defendant not only to raise the initial *Batson* objection, but also specifically to argue for the application of the mixed-motive standard in order to preserve the claim on appeal. This reasoning appears inconsistent with the status of the mixed-motive defense as an "affirmative defense," which normally when not raised by the party that is entitled to the defense are deemed waived. *See* State v. Hodge 248 Conn. 207, 226, 726 A.2d 531, 544 (Conn., 1999) (declining to consider dual motivation claim on appeal where defendant asserted in trial court only that "the reasons articulated by the state's attorney compelled the conclusion that the state's attorney had engaged in purposeful discrimination" and the "trial court expressly found that the reasons given by the state's attorney for striking the six minority venirepersons were not pretextual").

[204] The number of cases in which a court on remand finds that the challenged party carries its burden to prove that it would have made the "same decision" vastly outnumbers the cases in which the challenging party prevails. *See*, *e.g.*, Doyle v. Mt. Healthy Bd. of Ed., 670 F.2d 59 (6th Cir. 1979) (affirming finding that Board would have dismissed Doyle even had it not considered his exercise of protected speech rights); People v. Howard, 158 Misc.2d 739, 601 N.Y.S.2d 548 (N.Y.Co.Ct. Jul 28, 1993)

In short, a jury selection process that tolerates discriminatory bias in any form does not clearly and unmistakably communicate the message that such discrimination is unacceptable, nor is it likely to serve the function of deterring discrimination effectively. Although as a formal matter, the mixed-motive test is designed to identify instances in which the discriminatory purpose did not matter (in the sense that it did not affect the ultimate result), the message mixed motive sends to the larger community is likely that racism and sexism just "don't matter."

B. Easing the "Crippling Burden of Proof"

Not only does mixed-motive analysis undercut *Batson*'s expressive functions and deterrent goals, it erects new evidentiary hurdles. *Batson*'s framework was developed specifically to address the "practical difficulties of proving that the State systematically has exercised peremptory challenges to exclude blacks from the jury on account of race."[205] As the Court explained, *Swain*'s requirement that proof of abuse of the peremptory challenge over a number of cases was necessary to establish a constitutional violation "placed on defendants a crippling burden of proof."[206] As a result, under *Swain*, a prosecutor's peremptory challenges remained "largely immune from constitutional scrutiny."[207] *Batson* directed courts to abandon the focus on the systematic practices of the prosecutor and permits a finding of an equal protection violation based on the prosecutor's conduct in the instant case alone.

Notwithstanding this focus on efficacy, *Batson* has been severely, and rightfully, criticized for failing to erect an adequate

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(finding on remand that prosecutor would have made "same decision" to strike juror notwithstanding admission that "race was a factor"). *But see* Hopkins v. Price Waterhouse, 737 F.Supp. 1202 (1990) (affirming judgment for Hopkins under mixed-motive standard) (*aff'd*, Hopkins v. Price Waterhouse, 920 F.2d 967 (1990)).

[205] 476 U.S. at 93 n.17. 476 U.S. 79 (1986); *see also* Miller-El v. Dretke, 125 S. Ct. at 2426 (noting that *Batson* was decided in wake of recognition that "Swain's demand to make out a continuity of discrimination over time … [was] difficult to the point of unworkable").

[206] 476 U.S. at 92.

[207] 476 U.S. at 92-93.

barrier against purposeful discrimination.[208] After all, to sustain her burden of production at step two, the proponent of a strike need not articulate a good reason, but only one that is not itself facially discriminatory.[209] As Justice Marshall observed in his *Batson* concurrence, "any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[210] The relative ease with which a party intent on discriminating can conjure up a neutral explanation for a strike helps explain why so few *Batson* challenges succeed.[211] Mixed-motive analysis further undermines *Batson*'s objective of easing the evidentiary burden of proving discrimination.

1. Lack of Evidence

Batson challenges occur in a virtual evidentiary vacuum -- there is extremely little evidence available even in a full-blown *Batson* hearing that sheds much real light on the question of whether an explanation is credible. But the evidentiary problems are greatly compounded if a Court, allowing the mixed-motive defense, must also decide whether an improper purpose was the but-for cause of the prosecutor's decision to strike the juror. Aside from the circumstantial evidence adduced by the objecting party as the prima facie case, the primary evidence, and sometimes the only evidence, will be the prosecutor's own explanation for her conduct – the objective validity of which is open to obvious attack. As one judge observed, "no prosecutor worth his salt is going to come right out" and admit an intent to discriminate.[212] It is invariably difficult for

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[208] *See* Developments in the Law – Race and the Criminal Process, 101 HARV. L. REV. 1472, 1581 (1988) (noting that under *Batson*, "the prosecutor can easily articulate a non-race based reason for her peremptory challenges - and often a reason that is difficult for trial judges to assess.").

[209] *See* Purkett v. Elem, 514 U.S. 765 (1995)

[210] 476 U.S. 79, 106 (Marshall, J., concurring). Indeed, as one commentator more bluntly put it, "[i]f prosecutors exist who have read Hernandez and cannot create a 'racially neutral' reason for discriminating on the basis of race, bar examinations are too easy." Sheri L. Johnson, The Language and Culture (Not to Say Race) of Peremptory Challaneges, 35 WM. & MARY L. REV. 21, 59 (1993).

[211] *See* Melilli, *supra* note __, at 460 (discussing low success rate of *Batson* claims in reported cases from 1986 to 1993 and surmising that low success rate may be because "it is too easy for the responding party to offer neutral explanations").

[212] Kesser v. Cambra, 392 F.3d 327, 344 (9th Cir. 2004) (Rawlinson, J., dissenting).

courts to confidently conclude that an attorney's neutral explanation, even when the circumstantial evidence suggests otherwise, is a flat-out lie. Such a finding extends beyond a mere procedural ruling and implicates the attorney in ethical misconduct.[213] Given the acknowledged difficulty of identifying outright prevarication, at minimum, *Batson* should be construed to provide vigilant and unyielding protection at least in those few instances where racial or gender bias is overt.

In a constitutional tort case or an employment discrimination action, indeed, in any case in which the conduct of an organization, legislature, or administrative body is challenged, the multiplicity of actors and the availability of an often extensive record produced through document discovery and depositions creates the possibility that evidence of racial bias can be disentangled from the causal sources of an adverse action. In Title VII cases, "the liberal discovery rules applicable to any civil suit in federal court," which are supplemented "by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint," improve the chances that a plaintiff can meet her evidentiary burden.[214] But such evidence is wholly unavailable in the context of *Batson* challenges. Unlike routine civil cases, *Batson* disputes "have no pretrial phase: no pleading, no discovery, no pretrial memoranda," and "present none of the usual methods for 'smoking out' evidence and narrowing disputed issues."[215]

The primary evidence available to answer the question at issue under mixed-motive analysis – whether the "same decision" would have ensued notwithstanding the improper motive – is the prosecutor's own statements. A *Batson* hearing is not, however, psychotherapy; attorneys are advocates with partisan objectives. An attorney's statements thus must be evaluated in light of their self-serving nature, suggesting that the admission of an improper motive, as an inculpatory admission, is much more significant than the

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[213] *See* Charlow, *supra* note __; Anderson, *supra* note __ (noting that *Batson* objections involve challenges to the integrity of lawyers).
[214] Burdine, 450 U.S. at 258.
[215] Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229, 2303 n.239 (1995)

articulation of purportedly neutral reasons. As Justice O'Connor pointed out in *Price Waterhouse*, direct evidence of discrimination has great persuasive force.[216] Although attorneys can be expected to attempt to justify their strikes by stating neutral reasons, an admission by a prosecutor that race or gender was a motivating factor is "direct evidence" of a discriminatory motive. Indeed, in a Title VII case the defendant may not rebut the plaintiff's prima facie case "merely through an answer to the complaint or by argument of counsel."[217] Instead, the defendant must produce evidence that supports his profferred explanation.[218] In a *Batson* dispute, the "defendant" and "counsel" are one and the same, and *Batson* does not obligate the production of any evidence other than the "articulation" of counsel. In obliterating the distinction in roles, *Batson* is at odds with the mixed-motive framework. Mixed motive analysis in such a context builds a virtual castle of purported factual inquiry out of nothing but self-serving conjurations.[219] As Justice Marshall argued, "[a] judicial inquiry designed to safeguard a

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[216] *See Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring) (arguing that mixed-motive test burden-shifting should occur only upon introduction of direct evidence of an improper motive); Desert Palace, 539 U.S. 90, 91 (2003) (holding that Title VII, as amended, does not require "direct evidence" to prove mixed motive). *See also* Brest, *supra* note 38, at 124 (noting that admissions by the decisionmaker are "the most reliable evidence of his actual objectives," especially given "the ease with which one can lie successfully about one's motives").

[217] Burdine, 450 U.S. at 256 n.9.

[218] *Id*. ("An articulation not admitted into evidence will not suffice" to rebut the plaintiff's prima facie case.)

[219] Again, comparison with Title VII cases is instructive. Under Title VII, and unlike the equal protection context, a plaintiff may prevail by demonstrating that an employment practice has a disparate impact on a minority group. In *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), the Court held that a plaintiff could not, however, establish a prima facie case based on statistical evidence of disparate impact alone. Rather, the plaintiff must also demonstrate that "the disparity they complain of" was caused by a specific, challenged, employment practice. In explaining why this proof of causation requirement should not be unduly burdensome on plaintiffs, the Court reasoned that "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims," as well as administrative regulations that require employers to maintain records detailing the impact of its "selection procedures" on employment opportunities of minority group members. *Id*. at 657-658. Obviously, persons raising a *Batson* objection to a peremptory strike lack access to any such information, and strike proponents are under no comparable regulatory regime to document their exercise of strikes.

criminal defendant's basic constititutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias."[220]

It also is important to acknowledge the context in which the dispute is played out.[221] In a *Batson* dispute, a minority juror is struck by the prosecutor under circumstances giving rise to "an inference" of discrimination.[222] The prosecutor is called to explain the basis for the strike – that is, the alleged wrongdoer is asked the question, point blank, immediately upon taking the apparently improper action – "why did you strike this juror?" An answer that includes illicit criteria seems an implicit concession that the illicit purpose not only existed but played a causal role as well.

The question "why" did you strike this juror is linguistically interchangeable with "for what cause" did you strike this juror or "what caused you" to strike this juror. The prosecutor's act of identifying an improper motive itself is proof that the articulated reason was a "cause" of the strike.[223] A mixed-motive case is that rare exception where the prosecutor candidly, or stupidly, confesses a discriminatory impulse. Where there is a "smoking gun," permitting the strike is a direct affront to basic equal protection values.[224] As one court embracing the taint approach has stated, "[t]o

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[220] *Id*. at 927-928.

[221] 476 U.S. at 123 (Burger, J., dissenting) ("unadulterated equal protection analysis ius simply inapplicable to peremptory challenges exercised in any particular case").

[222] *See* Johnson v. California, 125 S. Ct. 2410 (2005) (explaining that step one of *Batson* only requires evidence giving rise to inference of discrimination).

[223] That separation between cause and motive may be more defensible in other contexts involving groups or corporate bodies, as is typically the case in employment discrimination or constitutional tort actions. For instance, although an employee's supervisor may have been motivated to recommend termination of the employee by racial animus, the corporation may be able to demonstrate that the employee would have been fired anyway as a result of a race-neutral plan to lay off workers. Similarly, some members of a legislative or administrative body may be motivated to take action based on a discriminatory animus, but a majority may be shown to have pursued the course of action for other, legitimate and race-neutral, reasons. In these cases, the identification of an illicit motive might be conceptually severable from a causal account of the conduct that rendered the illicit motive superfluous to the outcome.

[224] Although the Second Circuit expressed concern that permitting mixed motive might encourage prosecutors to falsely deny that they were influenced by improper views, see Howard v. Senkowski, 986 F.2d 24, 31 (2d Cir. 1993) (noting that "[t]he cynical might

excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection *Batson* provides against discrimination in jury selection."[225]

2. Unconscious Discrimination

Not only is the foundation for this inquiry inherently untrustworthy, there is reason to doubt the capacity of even the most honest and fully candid attorney to acknowledge, or even understand, the subconcious or instinctive motivations that prompt the exercise of peremptory strikes on the basis of relatively intangible criteria.[226] The necessary finding in a case in which the prosecutor carries his burden under the mixed-motive test – that the admitted discriminatory bias did not ultimately influence the decision to strike the juror – presumes that the court can confidently conclude that the admitted bias was a relatively minor factor. But the presumption that the discrimination was minimal may be based on the false perception that what exists is what can be perceived – like thinking that the iceberg consists solely of what can be viewed above the waterline, when the vast bulk lies unobserved below.

Even presuming that lawyers are entirely honest and open about their motivations for striking jurors, there are powerful reasons to believe that much discrimination occurs at the subconscious level. Lawyers undoubtedly form negative impressions about potential jurors based on a wide array of factors, only some of which may be articulable by the lawyer. Often, the factors that trigger these negative assessments may be illicit criteria such as race, ethnicity, or gender. A well-intentioned lawyer may not only be unaware that her discomfort with a particular juror is racially-based, but would sincerely deny the allegation. Indeed, believing herself part of the "liberal" and "tolerant" class, she might be deeply offended by the

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suggest that prosecutors will take from our ruling [permitting mixed motive analysis] a message of caution not to acknowledge that race was a factor in their use of peremptory challenges even in those instances when it was"), permitting the mixed motive defense in fact frees prosecutors to retain their biases rather than work to overcome them.

[225] Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205, 210 (1998).

[226] *See* Antony Page, *Batson*'s Blind-Spot: Unconscious Stereotyping And The Peremptory Challenge, 85 B.U. L. REV. 155 (2005).

suggestion. To explain her impressions, she might lie even to herself.[227] She would likely identify some other nominally neutral trait or character on which to pin her unease: it was not his race, but his age, occupation, education, or general demeanor. He was "sullen" or "distant."[228] It was the way he answered questions, his tone of voice, his facial expression, his "lack of connection" with her, his lack of investment in the community, the cut of his hair, his bodyweight, his television viewing habits, etc.[229] The list is potentially endless.

The problem, as Justice Marshall observed, is that "prosecutors' peremptories are based on their 'seat-of-the-pants instincts," and such instincts may be nothing more than "racial prejudice.[230] "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels."[231] There is depressingly little evidence that much progress has been made toward overcoming subconscious racial bias, and little reason to hope that it will be anytime soon.

Allowing the prosecutor to preserve a peremptory strike after she has admitted a discriminatory purpose, based on a belief that the other "neutral" reasons articulated would have led to the "same decision," therefore, is to ignore the very real possibility that those neutral reasons are the product of the same discriminatory animus already confessed.[232] Mixed motive merely establishes a convenient

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[227] *Batson*, 476 U.S. at 106 (Marshall, J., concurring) (noting that attorney may even lie to themselves to convince themselves that their motives are legal) (citing King v. County of Nassau, 581 F.Supp. 493, 501-502 (E.D.N.Y. 1984).

[228] 476 U.S. at 106.

[229] For a discussion of the problem of inadvertent bias, especially in the workplace, see Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129 (1999) (discussing unconscious bias – the inadvertent application of nominally neutral criteria in a systematically biased fashion).

[230] *Id*.

[231] 476 U.S. at 106 (Marshall, J. concurring) (adding that overcoming unconcious racism was "a challenge I doubt all of them can meet").

[232] *See* Blumoff & Lewis, Jr., *supra* note __, at 49 (arguing that "[I]f facial and gender stereotyping are pervasive, it is not at all clear that one should assume sufficient independent 'legitimate' employer motivation," and that "because racist and sexist thoughts are so deeply imbedded in our'cultural belief system,' the idea that one can distinguish among such motives … reflects a 'false dichotomy'") (quoting Lawrence, The

fiction by which courts, and lawyers, can pretend that one's improper views can somehow be walled off, segregated, and neutralized.

3. Incentivizing Obfuscation

The availability of the mixed-motive defense also creates strong incentives for prosecutors to give long, elaborate, and convoluted explanations for their strikes. A prosecutor who realizes that she has made a damaging admission can quickly move to rectify that slip by adding several additional justifications for the strike. Indeed, prosecutors might find it advisable as a matter of strategy to provide long-winded explanations of their strikes in every *Batson* case. If they do, then every future *Batson* case will at the least also be a mixed-motive case.

Encouraging lengthy and disjointed explanations, however, is flatly inconsistent with *Batson*. In describing the state's burden, *Batson* emphasized that an adequate step two showing requires more than a mere pro forma denial of discriminatory intent, an affirmation of good faith, or an assertion that the prosecutor assumed partiality because of the jurors race.[233] "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'"[234] As the Court explained in the comparable Title VII context, the burden of production at step two serves a critical litigative function by "fram[ing] the factual issue with sufficient clarity so that the

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Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987)).

[233] *Batson*, 476 U.S. at 97-98. In Johnson v. California, moreover, the Court reaffirmed the necessity that the strike's proponent come forward with an explanation, notwithstanding that *Batson*'s framework does not demand that a prima facie case establish that discriminatory intent more likely than not motivated the strike. The reason that the prima facie case can be satisfied by raising a mere inference of discrimination, the Court explained, was that the prosecutor's failure to adduce an explanation for the strike at step two would be powerful confirmation that the inference of discrimination was correct. *See* 125 S.Ct. 2410, 2418 n.6 (2005).

[234] 476 U.S. at 98 (quoting Norris v. Alabama, 294 U.S. at 598).

plaintiff will have a full and fair opportunity to demonstrate pretext."[235]

An adequate explanation, the Court has repeatedly emphasized, must therefore possess two characteristics: it must be a "'clear and reasonably specific' explanation of [the] 'legitimate reasons'" for exercising the strike, and it must be "related to the particular case to be tried."[236] Explanations that lack these characteristics fail the basic purpose of burden allocation, which is "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[237] Like summary denials of discriminatory intent, long, multi-faceted and disjointed explanations do anything but sharpen the inquiry, are not clear and reasonably specific,[238] and thus significantly detract from *Batson*'s purposes.

4. Counterfactual speculation

Finally, the counterfactual nature of the mixed-motive inquiry poses another daunting obstacle to any meaningful resolution of the causation question.[239] Determining whether one motive was a but-for cause of a choice is notably more difficult than resolving the question of whether a given explanation is credible. Under a

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[235] *Burdine*, 450 U.S. at 255-256. The Court also explained that the step two burden "serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the [challenged] action." *Id.*

[236] *Batson*, 476 U.S. at 98 & n.20. *See also Burdine*, 450 U.S. at 258 (explaining that limiting the step two burden to one of production rather than persuasion does not "unduly hinder" the plaintiff for several reasons, because the defendant still must adduce an "explanation of its legitimate reasons … [that is] clear and reasonably specific" in order to afford the plaintiff "'a full and fair opportunity' to demonstrate pretext"). The Court recently reaffirmed these requirements, and noted that to be adequate, an explanation must have "some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

[237] Burdine, 450 U.S. at 256 n.8.

[238] Miller-El v. Dretke, 125 S. Ct. 2317, 2324 (2005) ("Although there may be "any number of bases on which a prosecutor reasonably [might] believe that it is desirable to strike a juror who is not excusable for cause ..., the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].") (quoting *Batson*, 476 U.S. at 98 n.20).

[239] Assessments of causation are highly intertwined with counterfactual reasoning, and are subject to change based on changing counterfactual assumptions. *See* Barbara A. Spellman and Alexandra Kincannon, The Relation Between Counterfactual "But For" and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions, 64 LAW & CONTEMPT. PROB. 241 (2001).

conventional pretext analysis, the issue before the court is the historical question of what actual purpose motivated the strike. Under a mixed-motive analysis, however, the inquiry turns from the historical to the hypothetical, and the court must undertake the speculative inquiry not of what happened, but of what would have happened had the prosecutor not harbored an invidious purpose. The speculative nature of the "but-for" inquiry has long been apparent to tort scholars. Although sometimes the facts of a case make it seemingly easy to say that some consequence would not have occurred "but-for" some antecedent occurrence, at other times applying the but-for test "demands the impossible." As one scholar noted:

> [I]t challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what might have happened opens the door wide for conjecture.[240]

The but-for question in a mixed-motive case requires a court to engage in pure speculation. Assuming that the neutral reasons given by the proponent of the strike are credible, to answer the but-for question, a court must first assess whether those reasons would have impelled the prosecutor to strike the juror or jurors absent the accompanying wrongful motive. Moreover, the court cannot responsibly confine its inquiry to an evaluation of the juror or jurors that were struck, because the probability that a particular juror would have been struck does not depend solely on the characteristics of that juror. The decision to strike a juror depends on the comparative attractiveness of the other jurors in the venire. Therefore, the court also must consider the prosecutor's perceptions of the merits and demerits of all the other jurors who were not struck.[241] Of course,

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[240] Wex S. Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60, 67 (1956).

[241] These problems may be further accentuated depending on the specific jury-selection practices used in different jurisdictions. *See*, *e.g.*, Guzman v. State, 85 S.W.3d 242, 257 (Womack, J., dissentingt) (describing inherent difficulty of speculating whether any particular jury would have been struck in the absence of discriminatory animus given the nature of Texas's "blind struck-jury" system in which all jurors are ranked in one list)

there normally will be no record of those assessments, and thus (except in the rare case where the neutral reasons given for a strike are based on truly glaring deficiencies), there is little basis on which a trial court can accurately assess the but-for question, aside from relying upon its own intuitive hunches about how jury selection is unfolding.[242] Appellate courts reviewing mixed-motive challenges will lack even that minimal basis to review the trial court's ruling.

Given the highly speculative nature of the inquiry, the tenuous nature of the evidence upon which that inquiry is based, and the importance of making equal protection principles operative in the jury selection process, recognizing the mixed-motive defense is contrary to *Batson*'s evidentiary goals. *Swain*'s requirement that an objecting party adduce proof of a pattern of discrimination was abandoned precisely because it established an evidentiary hurdle that was practically insurmountable. Adoption of mixed-motive analysis in the *Batson* context, however, replicates these evidentiary hurdles.

IV. RECLAIMING THE SUBSTANTIAL FACTOR TEST

Not only does use of mixed-motive analysis directly contravene *Batson*'s primary purposes, the original concerns that prompted the Court to devise the mixed-motive standard, which center on the problem of windfall limitation and harmless error, do not apply to *Batson* claims. Mixed-motive analysis's insistence on "but-for" causation is not appropriate in an antidiscrimination regime the primary purpose of which is to root out invidious bias rather than to compensate victims. Instead, *Batson* and its progeny are best understood to bar any peremptory strike in which race, ethnicity, or gender was a "substantial" or "motivating" factor for its exercise. Such an approach, which represents a modified version of the "taint theory," reflects basic equal protection principles, relies upon traditional causation doctrines from the law of tort, and has powerful precedent: it is the same approach to mixed-motive that Congress has specified under Title VII.

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[242] *See* Wilkerson, 493 U.S. at 927 (denying certiorari) (Marshall, J., dissenting) ("But how is the factfinder to uncover the prosecutor's intuitive reservations regarding the unchallenged white jurors? … No record memorializes the prosecvutor's contemporaneous justifications for failing to challenge a juror. Moreover, given the purely subjective nature of peremptory challenges, such a record could not be made.").

A. The Logic and Limits of the Title VII Analogy

The roadmap for resolving the mixed-motive problem in *Batson* can be found in the solution Congress adopted in the 1991 Civil Rights Act to resolve the mixed-motive problem in Title VII. Although Justice Brennan made a partial case for using a "substantial factor" test to determine liability in mixed-motive Title VII cases, ultimately, the *Price Waterhouse* court rejected that test in favor of *Mt. Health's* mixed-motive analysis, which allows the defendant to prevail as long as he can show that the improper motive was not the but-for cause of the decision. In clarifying that liability ensues whenever an employer relies upon a prohibited criterion in making an employment decision, regardless of whether or not the "same decision" might have been made absent the criterion, Congress rejected the approach taken in *Price Waterhouse*.[243] Proof that a prohibited criterion was a "motivating factor" for an employment decision suffices to establish a violation under the Act. The 1991 Civil Rights Act thus underscores that the interpretive emphasis should be on the employer's actual motivation rather than the strict question of causation.

Title VII has long served as a guidepost in crafting the legal response to discrimination in jury selection. In fact, *Batson*'s architecture was borrowed almost wholesale from two leading Title VII intentional discrimination cases, *McDonnell Douglas v. Green*[244] and *Texas Dep't of Community Affairs v. Burdine*.[245] Jurisprudentially speaking, it makes sense to look to Title VII as a guide, because the fundamental dynamics in both cases are remarkably similar.[246] As the *Batson* court framed it, the central issue in a peremptory challenge case is whether a juror was excluded "on account of race."[247] Title VII, which is part of a broader fabric of

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[243] *Price Waterhouse* held that an employer that succeeded in proving that it would have made the "same decision" was not liable at all, which was overturned by the 1991 Amendments. *See* 42 U.S.C. § 2000e-2(m).
[244] 411 U.S. 792 (1973).
[245] 450 U.S. 248 (1981).
[246] *See Batson*, 476 U.S. at 94-98 nn.18-21 (noting relevance of Title VII "disparate treatment" cases to "operation of prima facie burden of proof rules," parameters of neutral explanation, and ultimate inquiry regarding intentional discrimination).
[247] 476 U.S. at 89.

employment discrimination law intended to eradicate discrimination from private employment decisionmaking,[248] makes it unlawful for an employer, *inter alia*, "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."[249]

The essential regulatory problem is thus very similar in Title VII and *Batson*. An employer traditionally has been assumed to possess the right, within the normal parameters of contract law, to hire and fire employees at his or her discretion; that is, for any reason, or for no reason at all. Title VII interferes with the employer's traditionally broad discretion, but it does not purport to supplant it.[250] As a result, Title VII permits employers to make employment decisions based on any criteria except those specifically enumerated by statute.[251]

Peremptory challenges, which have a historical pedigree as long as the "at-will" presumption in master-servant law,[252] also assume unchecked discretion. Like the traditional authority of employers to hire and fire without having to provide "cause,"

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[248] *See McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 357 (1995) (noting that Age Discrimination in Employment Act of 1967 "is but part of a wider statutory scheme to protect employees in the workplace nationwide" that includes Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1988 ed. and Supp. V), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1988 ed., Supp. V), the National Labor Relations Act, 29 U.S.C. § 158(a), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)).

[249] 42 U.S.C.A. § 2000e-2, 78 Stat. 255 (emphasis added). This statutory language parallels Section Four of the 1875 Civil Rights Act provision dealing with jury selection, which provides that "no citizen possessing all other qualifications, which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude." Neal v. Delaware, 103 U.S. 370, 405 (Field, J., dissenting).

[250] Steelworkers v. Weber, 443 U.S. 193, 297 (noting that Title VII was not intended to "diminish traditional management prerogatives").

[251] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (noting that "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice").

[252] *See* Swain v. Alabama, 380 U.S. at 212-214 (explaining that peremptory challenges have "very old credentials," were employed in England "[i]n all trials for felonies at common law," and received specific mention by Congress in the 1790 Act, 1 Stat. 119 (1790)).

peremptory challenges need not be based on objective criteria, need not be explained or defended, and are not subject to "judicial scrutiny."[253] Just as Title VII did not impose a "for cause" requirement on employment relations, the *Batson* court did not seek to supplant the peremptory challenge regime with a "for cause" system of strikes.[254] Instead, *Batson*, like Title VII, attempted to preserve a general regime of unrestricted discretion limited only by a small set of prohibited causes or reasons for the exercise of a peremptory strike.[255] Although *Batson*'s critics have long observed that regulation of peremptory strikes exercised for improper reasons is logically problematic, given that peremptories have traditionally permitted the exclusion of jurors for any reason, or no reason at all,[256] the *Batson* opinion itself took pains to assure that the proponent of a challenged strike need not give reasons for the strike that amount to "cause" for the strike.

Given the similarities, the ultimate solution to the mixed-motive problem adopted by Congress casts valuable light on the mixed-motive issue in *Batson*, and suggests that a comparable standard is warranted, whereby a Batson violation will be deemed complete in a mixed-motive case upon a showing that an improper bias was a motivating factor in the decision to strike a juror. Not only is this approach consistent with Title VII, it is also the approach used more generally in the analogous context of multiple sufficient causation tort cases.

B. Substantial Factors and Multiple Sufficient Causation

As noted above, tort causation doctrine has long recognized that where an actor's tortious conduct was an independent sufficient cause of an injury, the fact that other independent sufficient causes

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[253] Swain v. Alabama, 380 U.S. at 211-212.

[254] *See Batson*, 476 U.S. at 97. Justice Marshall argued that the only way to prevent discrimination was to limit strikes to cause. *See id.* at 105 (Marshall, J., concurring). Justice Breyer has made similar arguments in several recent cases. *See, e.g.*, Miller-el v. Dretke, 125 S. Ct. 2317, 2340 (2005) (Breyer, J., concurring).

[255] *See Price Waterhouse*, 490 U.S. at 238 n.4 (noting that Congress expressly deleted the phrase 'for cause' "in favor of the phrase 'for any reason other than' one of the enumerated characteristics" when Title VII was enacted) (citing 110 Cong. Rec. 2567-2571 (1964)).

[256] U. S. ex rel. Darcy v. Handy 351 U.S. 454, 462 (1956).

also contributed to or caused the injury should not preclude recovery.[257] As Justice Brennan argued in *Price Waterhouse*, a causally overdetermined event is, nonetheless, still the product of the causes that brought it about.[258] Such cases are often said to involve "multiple sufficient causes."[259]

Multiple sufficient cause cases are those in which an injury can be traced to two separate and distinct sources, each of which alone would have been sufficient to cause the injury. One example of a multiple sufficient cause case involves two campers who negligently light campfires in a dry area.[260] The fires converge, burning out of control, and causing a major forest fire. Each of the fires alone would have been sufficient to cause the forest to burn. Because the forest fire would have occurred regardless of the individual negligence of each camper alone, under conventional causation principles, neither camper's campfire was the "but-for" cause of the forest fire. Nonetheless, courts consistently have held that under such circumstances, both campers face joint and several liability for the injury.[261] The decision to relax causation standards reflects a policy-based consideration that causation standards must give way to the need to make sure that an innocent victim is not deprived of a remedy where any uncertainty regarding the causal mechanism of injury is attributable to wrongdoers.

Multiple sufficient cause cases present harder problems, however, where one of the multiple sufficient causes was non-

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[257] *See* RESTATEMENT (SECOND) OF TORTS §432; Carpenter, *supra* note 27. *See supra* text accompanying nn. __.

[258] 490 U.S. 228, 241 (1989).

[259] *See* David A. Fischer, Successive Causes and the Enigma of Duplicated Harm, 66 TENN. L. REV. 1127, 1129 (1999).

[260] *See* Martin J. Katz, The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law, 94 GEO. L.J. 489, 497-498 (2006).

[261] Fischer, supra note 244 at 1129-30. In the classic multiple sufficient causation case, *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), two hunters negligently shot in the direction of a third hunter, who suffered several gunshot wounds as a result. Finding both hunters actions negligent, the court relieved the plaintiff of the burden to prove that either of the negligent hunters were the "but-for" cause of plaintiff's injury. *See also*, Corey v. Havener, 182 Mass. 250, 65 N.E. 69 (1902) (where two motorcyclists ride simultaneously past a rider on horse-drawn wagon, frightening the horse and causing injury to the driver, both motorcyclists liable even though neither's negligence was the "but-for" cause of plaintiff's injury).

tortious. In that instance, some courts impose liability on the tortfeasor as long as "the tortfeasor's conduct was a 'substantial factor' in producing the harm."[262] Other courts have declined to hold the defendant liable where an innocent source would have independently caused the loss in any event, on grounds that doing so puts the plaintiff in a better position than he would have been in absent the tortious conduct.[263] Using the prior example, imagine that camper A negligently sets a fire that would have burned out of control, but that fire converges with a second fire started by lightning, that also would have burned out of control. If A is held liable for the fire, then the plaintiff is in a better position than he would have been in, since the lightning would have caused the forest to burn in any event.

As Martin Katz argues, one party receives a windfall no matter which causation standard is invoked.[264] If no but-for causation is required, then the plaintiff is made better off than he otherwise would have been. However, if but-for causation is required, then the tortfeasor receives a windfall. After all, there is no dispute that the tortfeasor's conduct was wrongful, and if not for the "fortuitous" fire, the tortfeasor would have been liable for the injury.

To the extent that the mixed-motive problem in discrimination cases can be (and has been) likened to the problem of multiple sufficient causes,[265] it is technically more analogous to the latter case than the former, in that conduct motivated by mixed-motives is said to be "caused" by both wrongful and innocent motives. For two reasons, however, the multiple causation analogy counsels in favor of relaxing but-for causation in the mixed-motive context.

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[262] Fischer, *supra* note __, at 1130; 490 U.S. at 263-264 (O'Connor, J., concurring) (noting that the multiple causation rule has been applied by courts where an innocent cause combines with a wrongful one to shift burden of proof to defendant to prove that his conduct was not the legal cause of the harm).

[263] *See* Fischer, *supra* note __, at 1130.

[264] *See* Katz, *supra* note 156, at 521 (noting that where two sufficient causes trigger the harm, "someone—either the plaintiff or the defendant—will always receive a windfall").

[265] *See Price Waterhouse*, 490 U.S. at 241 (plurality opinion); *id*. at 263-264 (O'Connor, J., concurring).

First, for policy reasons, overlooking a wrongful motive simply because the proponent of the strike can convince the trier of fact that the same result would have ensued allocates the "windfall" to the wrongdoer at the expense of the defendant, the juror, and the criminal justice system in general. For the reasons explained above, strong policy arguments counsel against recognizing the validity of the mixed-motive defense in *Batson* cases. Second, the purposeful exclusion of a juror on account of an invidious discriminatory purpose is not merely negligent, it is an intentional act,[266] and as such, the causation standards applicable to intentional torts are more relevant than those applicable to negligent ones. For good reason, where the actor's conduct is intentional, tort law has long preferred the more relaxed causation standard applicable in cases of multiple tortious causes than the stricter causation requirement recognized in some multiple sufficient cause cases where a wrongful cause accompanies an innocent one.[267] In intentional tort cases, the injury combined with the intent to cause it establish a sufficient equitable basis for liability as long as the actor's conduct might be said to have contributed to the risk. As the Restatement explains, where the actor acts with the purpose of causing "the harmful result which ensues, questions of legal causation are not pertinent except where the defendant's act in no way has increased the risk of harm; it is enough that his act was a cause in fact or … was a substantial factor in causing the harm."[268]

An attorney who strikes a juror for "mixed motives" in a *Batson* case acts with the purpose of causing the harmful result that

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[266] Robert A. Kearney, The High Price Of *Price Waterhouse*: Dealing With Direct Evidence Of Discrimination, 5 U. Pa. J. Lab. & Emp. L. 303, 332 (2003) (noting that "discrimination is an intentional tort").

[267] *See* W. Page Keeton et al., Prossor and Keeton of the Law of Torts § 8, at 37 (5th ed. 1984). *See also* Meredith J. Duncan, Criminal Malpractice: A Lawyer's Holiday, 37 GA. L. REV. 1251, 1306 n.133 (2003) ("Because of the state of mind required to prove that a defendant is liable for an intentional tort, any intervening event, such as another person's negligence, typically does not break the chain of causation between the defendant's intentional act and any resulting harm that is a consequence of that intentional act."); Jeffrey Brian Greenstein, The First Amendment v. The First Amendment: The Dilemma of Inherently Competing Rights in Free Speech-Based "Constitutional Torts," 71 UMKC L. REV. 27, 54 (2002) (observing that causation standards in intentional tort cases are easier to satisfy than in unintentional tort cases).

[268] REST. TORTS § 870 (c).

in fact occurs, that is, excluding the juror from the venire, and in so doing, triggers *Batson*'s deterrent purposes.[269] The presence of this wrongful motive, moreover, certainly increases the risk that the juror will in fact be excluded, even if there are other reasons or motives that also contributed to the juror's exclusion.[270] It follows, therefore, that as long as the wrongful motive was a "substantial" or "motivating" factor, the issue of but-for causation should be moot. The substantial factor test, "grounded in notions of equity and fairness,"[271] places a priority on rooting out wrongful conduct rather than limiting damages, and it bars actors that have been proven to have acted wrongfully from escaping a liability determination simply because they can show that other causative forces were at work.[272] Such an approach is much more consistent with the categorical language of equal protection, and more faithful to the court's long-established efforts to root out discrimination from jury selection, than is mixed-motive analysis's emphasis on windfall prevention.[273]

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[269] *Cf. Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring) ("Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered.")

[270] *See* Katz, *supra* note 156, at 518-519 (noting that use of improper criterion in decisionmaking regardless of but-for causation is harmful because "the utilization of protected characteristics increases the risk of an adverse ultimate employment decision").

[271] Brodin, *supra* note 202, at 317.

[272] *See* Theodore Y. Blumoff & Harold S. Lewis, Jr., The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task, 69 N.C. L. REV. 1, 48 (1990) (discussing tort law multiple causation doctrine).

[273] Of course, the multiple sufficient cause analogy has serious analytical shortcomings. The most significant difference between a mixed-motive case and a multiple sufficient cause case is that "motives" are not the equivalent of distinct "causes." Unlike a multiple causation tort case, there is only one wrongdoer. At issue is not the causal effects of the actor's chosen conduct, but the proper characterization of the actor's mental state in choosing the conduct. The closest analogy may not be a tort analogy at all, but rather a criminal law analogy. Numerous crimes require proof that the defendant acted with a particular purpose or intent for conviction. Take burglary, for example. To prove burglary under the common law, the state must prove, *inter alia*, that the defendant entered a dwelling with the intent to commit a felony therein. A defendant who breaks and enters a dwelling for a non-felonious purpose is not guilty of the offense. Now consider the case of the "mixed-motive" burglar, who breaks into a home 1) to warm himself, and 2) to steal food. Imagine further that it is a very cold night, and the defendant can prove at trial that he would have entered the house solely to escape the

The substantial factor standard helpfully supplements the "taint" approach adopted by several courts. Although the taint approach suggests that any indication or suggestion of an improper purpose might suffice to establish an equal protection violation, a standard that could be triggered by the mere mention of an improper criteria risks delegitimizing *Batson* by establishing a standard courts would simply refuse to enforce. The motivating/substantial factor standard has already been utilized in the Court's *Batson* case law,[274] and is familiar to courts in other contexts. The approach specifically defines the plaintiff's proof burden in terms consistent with well-established equal protection doctrine. Courts that have adopted the "taint" approach have acknowledged that peremptory strikes exercised even in part for wrongful purposes undermine *Batson*'s purposes.[275] The substantial factor test, as used in Title VII liability determinations and in various analogous tort contexts, clarifies that the threshold to trigger a finding of taint is the finding that a discriminatory purpose was a "substantial" or "motivating" factor is one that violates the equal protection clause as a matter of law.

Applied to *Batson* disputes, a substantial factor test would marginally strengthen the protections against the discriminatory use of peremptory strikes, and marginally narrow the power of litigants to strike jurors on the basis of arbitrary criteria. At least one sitting justice is on record as opposing the institution of peremptory strikes altogether.[276] Rejection of mixed-motive analysis, and reliance on

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cold. In other words, his motive of stealing food was not the "but-for" cause of the break-in. Despite the presence of mixed-motives, such a defendant is almost certainly guilty. The relevant question is not whether there were "non-criminal" motives sufficient to explain the defendant's conduct, but whether there was any culpable intent present.

Because discrimination in jury selection is an affirmative wrong, it may be preferable to treat the intent question as one of culpability rather than one of causation. A prosecutor who admits to an invidious bias and who proceeds to follow a course of action consistent with it is culpable, regardless of any other innocent motives also consistent with that course of action.

[274] *See* Miller-El v. Cockrell, 537 U.S. 322, 346 (2003); Hernandez v. New York, 500 U.S. 352, 360 (1991).

[275] As the South Carolina Supreme Court reasoned, "any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner." Payton v. Kearse, 329 S.C. 51, 60 (1998)

[276] *See* Miller-el v. Dretke, 125 S. Ct. 2317, 2340 (2005) (Breyer, J., concurring).

the substantial factor test, would be far less disruptive of the jury-selection process than abolition of peremptory strikes. Indeed, its adoption is unlikely to have any measurable impact on prosecutorial power. Continued availability of the "for cause" strike removes the possibility that truly biased jurors will be empaneled. The converse is not true. Widespread recognition of the availability of the mixed-motive defense might lead to widespread changes in the way prosecutor's respond at step two of the Batson inquiry, and could further weaken the ability of courts to prevent trial attorneys from using peremptory strikes for discriminatory purposes.

C. The Windfall Problem

Of course, Title VII does reserve a place for the "same decision" defense, but it limits it to the choice of remedies. Title VII actions, and constitutional tort cases like *Mt. Healthy*, routinely involve potentially large compensatory awards. On the outcome often hinges momentous effects on the plaintiffs' careers, such as tenure for Doyle in *Mt. Healthy* and partnership for Hopkins in *Price Waterhouse*. The windfall problem is heightened where there is an element of comparative negligence and the award of damages requires a selection between two at-fault parties. In *Mt. Healthy* and *Price Waterhouse*, for example, adverse employment decisions were made both because of improper criteria used by the employer and in part based on the plaintiffs' alleged performance deficiencies. The but-for causation rule protects one wrongdoing party from being obligated to compensate another absent strong proof that the defendant's wrongdoing caused the harm.

The *Mt. Healthy* mixed-motive test fashioned its causation standard not from tort law, however, but from approaches to remedies in exclusionary rule cases. Enforcement of the exclusionary rule often means abandoning reliable evidence of guilt, and sometimes abandoning a prosecution against a verifiably guilty person. Like tort cases and other actions for monetary damages, therefore, enforcement of the exclusionary rule also "provides some defendants with a windfall."[277] Because of the strong public policy

[277] *See* Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 28-29 (1997); Karlan, *supra* note 201, at 2015.

interest that probative evidence not be excluded from trial unless absolutely necessary to vindicate the purposes of constitutional law, the Supreme Court has held in a long series of cases that the exclusionary rule remedy must be narrowly drawn. For instance, even if the accused initially demonstrates that evidence admitted against him was "a fruit of the poisonous tree," it remains available to the "Government to convince the trial court that its proof had an independent origin,"[278] that it inevitably would have been discovered,[279] or that some intervening independent cause rendered the connection between the unlawful conduct and the outcome "'so attenuated as to dissipate the taint.'"[280] Each of these defenses permits the government, in effect, to use the fruits of unlawful searches or interrogations notwithstanding that the unlawful conduct was a causal factor – and probably even a "substantial factor" – in its discovery. The narrowing limitations on the poisonous tree doctrine were adopted notwithstanding that their availability inevitably diminishes the marginal deterrent value of the exclusionary rule and raises concerns regarding the judicial integrity of the tribunals that permit the evidence to be so used.[281]

Whereas tort law balances the goals of corrective justice with those of optimally apportioning the costs of accidents among the parties,[282] the constitutional criminal procedure cases invoked by Rehnquist in *Mt. Healthy* reflect a concern with fashioning the least intrusive remedial scheme consistent with the goal of deterring unconstitutional conduct.[283] Given the virtual absence of any

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[278] Nardone v. United States, 308 U.S. 338, 341 (1939).
[279] Nix v. Williams, 467 U.S. 431, 440-448 (1984).
[280] Wong Sun, 371 U.S. at 491 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939).
[281] *See, e.g.*, Segura v. United States, 468 U.S. 796, 817 (1984) (Stevens, J., dissenting) (arguing that independent source exception to poisonous tree doctrine will "provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home").
[282] *See* Guido Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) (discussing public-regarding purposes of tort law).
[283] As Justice Stevens has explained, the Court has not mechanically applied the exclusionary rule "to every item of evidence that has a causal connection with police misconduct." Segura v. United States, 468 U.S. 796, 825 (1984) (Stevens, J., dissenting). "'The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent

countervailing interest in corrective justice by a defendant seeking to exclude probative evidence of guilt at trial, the optimal level of deterrence is quite low. The exclusionary rule jurisprudence's emphasis on deterrence places the analytical focus on the wrongdoer rather than the victim, and the remedies are designed with an emphasis not on restoring the victim to the position he would have been in "but-for" the wrongdoing, but in depriving the state of the fruits of its wrongful conduct in order to put the state back in the position *it* would have occupied absent the violation.

The enforcement of *Batson*, however, does not pose any comparable risk of overcompensation. Although equal protection in jury selection was first recognized as an element of the right to a fair trial, [284] limitations on the discriminatory use of peremptory strikes are not solely, or even principally, designed to remedy a cognizable injury to the litigant. A defendant may have an interest in assuring that members of his or her own racial, ethnic, or gender group are not excluded based on those criteria, but there is no requirement that a defendant prove that the exclusion of a juror on account of an improper criteria actually affected the outcome of the case or otherwise harmed the defendant.[285]

Unlike in exclusionary rule cases or actions for monetary damages, therefore, enforcement of the *Batson* right at trial does not result in any obvious tangible gain for the defendant.[286] One of the premises of *Batson* is that exclusions predicated on race, ethnicity,

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effect of the exclusionary rule no longer justifies its cost.'" *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975)(Powell, J., concurring in part).

[284] The defendant's interest in assuring that members of his racial group are not discriminatorily excluded, however, was the initial harm that equal protection doctrine acknowledged. *See* Neal v. Delaware, 103 U.S. 370, 394 (1881) (stating that a citizen is entitled to a right '"that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimiantion against them, because of their their color'") (quoting Virginia v. Rives, 100 U.S. 313 (1879)).

[285] *See* Powers v. Ohio, 499 U.S. 400, 427 (Scalia, J., dissenting) (criticizing majority's decision to permit Batson challenges where defendant and struck juror are not members of same group because majority "does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm").

[286] Compare *Batson* motions with Fourth or Fifth Amendment suppression motions. In the latter cases, the defendant who prevails at the suppression hearing obtains a quite substantial benefit: the exclusion of probative evidence. The suppression remedy is so potent, in fact, that it often results in practice in the dismissal of charges altogether.

or gender are illogical and, therefore, that reliance on such criteria does not even advance the rational interests of the striking party. Even if that premise is relaxed, the benefit that accrues to a party prevailing in a *Batson* dispute is highly ethereal. In denying a party the ability to exercise a peremptory strike, the court does not force the party to accept a juror as to whom there is an objective basis to suspect bias – any such juror could be struck for cause.

The costs of strictly enforcing *Batson* at trial are *de minimis* – at most, a juror who one of the parties has an unsubstantiated hunch or belief will view the case less favorably than others will sit on the jury.[287] Even assuming that these hunches are accurate more often than not (an assumption not necessarily supported by empirical evidence), the litigants' marginal decrease in control over the jury panel is compensated by the marginal increase in the number of minority jurors that will sit on juries, enhancing the public perception of integrity, fairness, and impartiality of the jury system. The proper enforcement of *Batson* claims by the trial court thus simply does not threaten to reward defendants with any "windfall."

The remedy of appellate reversal for a *Batson* violation can look like a "windfall" in some instances – particularly where there is no reason to believe that the violation made any difference to the outcome, or where retrial is not practically possible – but the apparent windfall only results from the trial court's error.[288] The question whether the remedy of reversal is appropriate to correct trial court error, however, is fundamentally different from the question of whether zealous enforcement of the right in question itself risks unfairly rewarding litigants or criminal defendants.[289] The

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[287] The two remedies for a *Batson* violation detected during jury selection are 1) overruling the strike and empaneling the juror, and 2) calling a new venire. Although the latter remedy is obviously more onerous than the former, it is still far less onerous than retrial. *See* William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal, 38 AM. CRIM. L. REV. 1391, 1436 (2001) (describing trial court remedies and noting that "once a decision favorable to the challenger is made the corrective action is easy").

[288] *See* Peter Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 WASH. U. L.Q. 713, 791 (1999) (arguing that lack of harmless error review of Batson violations creates perception of windfall when defendant successfully challenges a conviction on appeal).

[289] This distinction may not seem so significant to appellate courts who must decide whether to penalize an apparent violation with the reversal remedy, and because they

harmless error doctrine has been developed to address this different kind of windfall problem, but for reasons discussed below, that doctrine has not been applied to *Batson* violations and, for the same reasons, mixed-motive analysis should not be permitted to serve as a substitute.

D. Harmless Error

It is well-established that *Batson* errors are exempt from harmless error review. The harmless error doctrine is predicated on the assumption that it is normally possible to isolate the effects of a procedural error and assess whether the error likely had an impact on the outcome. Such types of "trial errors" include the admission of improper evidence,[290] errors in instructing the jury,[291] and improper comments to the jury.[292] However, errors the effects of which are impossible to trace (such as the total deprivation of the right to counsel[293]) or which trench upon interests unrelated to the reliability of the proceedings (such as violation of the right to a public trial[294]) are considered "structural errors" that are not subject to harmless error review. Like the failure to provide counsel to a defendant, *Batson* errors are "structural errors," the effects of which are impossible to isolate or trace.[295] Given the practical impossibility of proving that exclusion of any one juror would have changed the outcome at trial, adoption of a harmless error doctrine in *Batson* cases would effectively remove appellate courts from enforcement of *Batson*. As a result, an appellate court finding of a *Batson*

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cannot "calibrate the remedy," as a result, appellate courts are undoubtedly tempted to "fudge on the right instead." Karlan, *supra* note 201, at 2015.

[290] *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of evidence in violation of Sixth Amendment Counsel Clause deemed harmless in capital sentencing proceeding).

[291] *See, e.g.*, Carella v. California, 491 U.S. 263, 266 (1989) (erroneous jury instruction containing conclusive presumption deemed harmless error).

[292] *See, e.g.*, United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's invocation of right to silence deemed harmless error).

[293] *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (describing deprivation of right to counsel as a structural error not subject to harmless error review).

[294] *See* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984)

[295] *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

violation results in a per se reversal.[296] Although automatic reversal is a serious threat, and might be perceived as a windfall for the defendant, it serves an important function. The threat of reversal creates powerful incentives for trial judges to ensure that jury selection is not infected by racial discrimination.

No doubt, the impetus toward the adoption of mixed-motive analysis can be explained in part by the problems created by the combination of *per se* reversal and retroactive application of *Batson*'s more demanding standard to trials conducted before it was decided. Many of the lower federal court decisions, including *Howard v. Senkowski*, that adopted mixed-motive analysis involved pre-*Batson* trials. Undoubtedly, courts are naturally hesitant to overturn convictions where there is no evidence of obvious misconduct on the part of the prosecutor nor any obvious reason to doubt the reliability of the conviction. In convictions obtained prior to *Batson*, where prosecutors did not know that race or gender-based peremptory strikes were strictly unlawful, it is understandable that reviewing courts might be tempted to downplay the seriousness of the constitutional violation.[297] Some appellate court decisions that have affirmed the use of mixed motive analysis in *Batson* cases reflect what appears to be a presumption that the admitted discrimination was de minimis. Such a conclusion is easy to justify in a mixed motive case, since the prosecutor's purposes are obscured. The turn to mixed motive analysis in these cases has functioned as a mechanism to avoid what otherwise would be mandatory reversal – *i.e*. as a *de facto* harmless error doctrine. But harmless error review is not appropriate in this context.

A mixed-motive finding is the equivalent of a finding that the discrimination did not matter to the outcome; it was irrelevant. For

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[296] *See, e.g.,* Tankleff v. Senkowski,135 F.3d 235, 248 (2d Cir. 1998); s*ee also* Leonard L. Cavise, The *Batson* Doctrine: The Supreme Court's Utter Failure ot Meet the Challenge of Discriminaitoin in Jury Selection, 1999 WIS. L. REV. 501, 544 (noting critically that "the typical appellate court that finds a *Batson* violation will simply reverse the conviction outright, without a consideration of whether or not the *Batson* error was harmless" and suggesting that harmless error review should be adopted).

[297] The same dynamic was apparent in the wake of Miranda. *See*, *e.g.*, Michigan v. Tucker, (upholding conviction notwithstanding failure of interrogating officers to administer one of the Miranda warnings, where three other warnings were given and there was no reason for officer to know that fourth warning was required).

reasons similar to those that preclude harmless error review in *Batson* cases in general, that argument should not be permitted in the mixed-motive context either. As a practical evidentiary matter, it is virtually impossible to reliably determine the effect of the discriminatory bias on the decisions made by an attorney during jury selection. Evidence that bias influenced that process should be sufficient to establish a violation, and permitting a party that has relied in part on discriminatory criteria to escape sanction by convincing a court that they would have made the "same decision" anyway effectively "shields wrongdoers from liability."[298] Such a rule is easier to implement and preserves the role of appellate courts in policing jury selection to effectuate the goals of equal protection. In addition, the reluctance to penalize prosecutors for failure to comply with standards not yet articulated is no longer valid. After twenty years of living with *Batson*, every trial lawyer is on notice that she may not exercise peremptory strikes on the basis of race, ethnicity, or gender. There is far less justification for a quasi-harmless-error doctrine now than there was a decade earlier.

The use of mixed-motive analysis in *Arlington Heights* points to a second, and more subtle, kind of harmless error review. Where judicial review of legislative or administrative rulemaking is concerned, courts have a practical concern with the preservation of judicial capital and resources. Courts abhor decisions on questions that are "moot" or not yet ripe, and generally seek on grounds of futility to avoid issuing edicts that can be easily circumvented. Challenges to legislative or administrative enactments based on purported unlawful motive raise precisely those kinds of concerns. After all, if a legislature can simply repass the same statute, but simply articulate a different justification for it, the initial finding of unconstitutionality will seem rather pointless.[299] The mixed-motive

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[298] *See* Katz, *supra* note 156, at 517 (noting frequency of criticism of but-for causation test as shielding wrongdoers from liability).

[299] *See* Palmer v. Thompson 403 U.S. 217, 225 (1971) (explaining that "there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters" because "[I]f the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons"); Brest, *supra* note 38, at 126 (discussing argument against judicial review of legislative motives based on fear that review will be futile, because "a particular decisionmaker whose law is once struck down

test articulated in *Arlington Heights* saves the courts, and the legislature or administrative body, that trouble by providing that if there is a permissible reason for the statute that would have resulted in its passage anyway, the court should keep its powder dry.

The futility justification, however, does not apply to *Batson* disputes. Although prosecutors possess the discretion initially to remove virtually anyone from the jury with a peremptory strike, the legitimacy of the strike stands or falls on the legitimacy of the reasons articulated in their defense. Unlike in the legislative context, where nothing stops the legislature from reenacting the same bill, prosecutors who lose *Batson* motions may not strike the same juror again after they think up a better reason.[300] Discretionary abuses in using peremptory strikes result in the permanent inability to make the "same decision" later. Accordingly, there is far less justification for permitting a "same-decision" defense where it already has been established the initial decision was substantially influenced by discrimination.

Batson cases thus raise no windfall problems if they are properly resolved at trial, and harmless error review for mistakes made by the trial court is no more warranted in mixed-motive cases than in a simple, single motive case. For these reasons, and given the symbolic, deterrent, and evidentiary goals underlying *Batson*, the proper approach to mixed-motive cases in *Batson* is the approach Congress adopted under Title VII. Defendants bringing *Batson* challenges should not be required to prove anything more than "that race or another forbidden criterion was a motivating factor in the

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because it was illicitly motivated will readopt the law, retaining his illicit motivation but taking care to conceal it").

[300] Not only does the prosecutor lack a second chance to strike a juror when a *Batson* objection is upheld, she also can not "save" a strike that was exercised for what later is acknowledged to be an improper reason by showing that there were other adequate reasons for the strike. On appeal, the question for the reviewing court is not whether the prosecutor might have had good reasons for striking a juror, but solely whether the prosecutor's real reasons were permissible. *See Johnson,* 125 S.Ct. at 2418; *Miller-El,* 125 S.Ct. at 2332 ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

decision."[301] *Batson*'s non-remedial purposes are better served by a rule that precludes the use of peremptory strikes that are even in part motivated by discriminatory animus.[302] The substantial or motivating factor test, which reflects basic equal protection principles, better serves the goals of assuring that the defendant is tried by a fairly selected jury, that no juror will be excluded from jury service on account of his or race, ethnicity, or gender, and that the criminal justice system itself remains unblemished by discriminatory animus.

CONCLUSION

The expansion and consolidation of the *Batson* doctrine represents a widespread legal and social recognition that discrimination on the basis of race, ethnicity, and gender is fundamentally unacceptable, and marks a triumph of equal protection principles. But the story is not one of unmitigated success. Increased recognition that overtly discriminatory jury selection practices are unacceptable has brought increased sophistication in masking or hiding the selection criteria actually employed. This increased sophistication requires more rigorous enforcement of *Batson*. Mixed-motive analysis, however, portends just the opposite. Mixed-motive analysis fundamentally dilutes *Batson*'s protections by permitting prosecutors to exclude jurors notwithstanding an express admission of an invidious intent.

The Supreme Court has not yet ruled on the propriety of mixed motive analysis, but it cannot dodge the issue forever – the storm is gathering. Widespread acceptance of mixed motive will almost certainly lead to the evisceration of *Batson*'s already minimal protections. Shortly after *Price Waterhouse* was decided, Congress amended Title VII to provide that a plaintiff who establishes that a

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[301] Brodin, *supra* note 202, at 317 (arguing that deterrent goals of Title VII counsel against requiring plaintiffs, for liability purposes, in Title VII cases to prove more than that illicit criteria was a motivating factor in decision).

[302] *Cf.* Malone, *supra* note 247, at 91 (arguing in favor of substantial factor test: "If the fire started by plaintiff was sizeable and merges with another fire, why must the court require the jury to make an estimate at plaintiff's risk as to whether defendant's fire would have worked the same destruction unaided? If the flames he caused to be put into motion were actively playing a part, is it not enough to inquire whether that part was sufficient to warrant an imposition of liability").

discriminatory purpose was a motivating factor in an adverse employment decision has prevailed for purposes of establishing her employer's liability. The amended Act clarified that the mixed-motive defense, while available, is only relevant to limiting available remedies. Congress has thus unequivocally declared that any adverse employment action that was motivated, even in part, by a discriminatory purpose contravenes the basic antidiscrimination purposes underlying the law.

That recognition is equally valid in the jury selection context. As under Title VII, demonstration of *even one* discriminatory motive should suffice to establish a *Batson* violation. After all, "[t]he mere existence of discriminatory practices in jury selection 'cast[s] doubt on the integrity of the whole judicial process.'"[303] This conclusion is especially warranted because *Batson's* safeguards are so easily overcome by prosecutors intent on discriminating in jury selection, and because the evidence available to determine whether a strike was exercised for an improper purpose is so elusive.[304] Because there is no opportunity to take discovery, no ability to examine the prosecutor directly, and no other way to substantiate a discrimination claim except through reliance on the explanation provided by the prosecutor, *Batson* will be ineffective unless its step-two neutrality requirement is rigorously enforced. In those rare cases where there is *direct evidence* of discriminatory intent, failure to recognize an equal protection violation under *Batson* would undermine the "Court's unceasing efforts to eradicate racial discrimination" from jury selection.[305] Mixed motive analysis applied in the context of discriminatory peremptory strikes is unnecessary, unworkable, and in conflict with the basic purposes for which *Batson* was crafted. The Supreme Court should say so.

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[303] *United States v. DeGross*, 913 F.2d 1417, 1421 (9th Cir. 1990) (quoting *Peters v. Kiff*, 407 U.S. 493, 502-03 (1972))
[304] *See Miller-El*, 537 U.S. at 322.
[305] *Batson*, 476 U.S. at 85.