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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 Supreme Court of the United States, however, has not yet ruled 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 instead proposes the adoption of a "motivating" or "substantial" factor test, as currently used in Title*

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VII mixed-motive cases, to determine when peremptory strikes based on mixed motives violate the Constitution.

I. 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 Civil Rights Act of 1964,[1] for instance, prohibits employers from making employment decisions on the basis of race, sex, religion, or nationality, and the First Amendment bars the government from firing an employee because he exercised protected speech rights.[2] Whenever such actions are the subject of legal challenge, courts ultimately must deter-

1. 42 U.S.C. §§ 2000e-1 to -17 (2000).

2. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that a teacher may not be fired for public criticism of the school board).

mine 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 the "mixed motive" problem.

Mixed motives raise especially difficult issues 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] Although peremptory strikes have traditionally permitted the parties to exclude any juror for any reason, or for no reason, in *Batson v. Kentucky*,[4] the Supreme Court held that a peremptory strike is unconstitutional if it is used to exclude a juror on account of race. Thus, as with employment decisions under Title VII, whether a peremptory strike has been lawfully exercised depends on the proponent's purpose. 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.

Elsewhere in the law, the Supreme Court has sanctioned what has been referred to as "dual motive" or, as here, "mixed motive" analysis.[5] Mixed-motive analysis provides a party, shown to have acted from an unlawful motive, with an opportunity to demonstrate that it would

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3. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (concluding that discrimination against African Americans in jury selection denies African-American defendants equal protection of the laws in violation of the Fourteenth Amendment). 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, 204–05 (1965) (citing Hernandez v. Texas, 347 U.S. 475, 478–79 (1954)) (noting that the Fourteenth Amendment prohibits discrimination on the basis of ancestry or national origin as well as race and color), *overruled in part by* Batson v. Kentucky, 476 U.S. 79 (1986).

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

5. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 240–42 (1989) (plurality opinion) (setting forth a mixed-motive framework in the Title VII context—when a Title VII plaintiff proves that gender played a role in an employment decision, the defendant-employer can avoid liability by proving that it would have made the same decision had it not taken into account plaintiff's gender); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (stating that the proper causation inquiry, after the employee proves that his conduct was constitutionally protected and that it was a "substantial" or "motivating" factor in the employer's decision, is whether the employer could prove by a preponderance of the evidence that "it would have reached the same decision as to [the employee's] re-employment even in the absence of the protected conduct"); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–71 (1977) (applying a mixed-motive analysis to determine whether a discriminatory purpose was a motivating factor in the denial of a rezoning application); *see also infra* Part II.A–B.

have chosen the same course of action, or made the same decision, entirely from other lawful 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 five federal circuit courts of appeals that have ruled on the issue, have permitted or affirmatively endorsed it.[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. Part II 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 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, a growing number of courts have invoked mixed-motive analysis to assess whether such mixed explanations are consistent with *Batson*.[9] Third, 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."[10]

Part III 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

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6. *See infra* Part II.A.
7. *See infra* notes 122–126.
8. *See infra* notes 98–104.
9. *See infra* notes 113–126.
10. *See infra* notes 198–199 and accompanying text.

explanation. Part III 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 IV 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 burden of proof of intentional discrimination that, prior to *Batson*, had prevented practical enforcement of equal protection principles 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 V 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, the appropriate test for determining whether an equal protection violation has occurred in a mixed-motive Title VII case 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 it should not be permitted. Instead, *Batson* and its progeny are best read to bar any peremptory strike in which race, ethnicity, or gender is 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.

II. MIXED-MOTIVE ANALYSIS AND *BATSON*

Batson v. Kentucky[11] represents the Court's most ambitious attempt to impose meaningful prohibitions on the use of race-based peremptory challenges.[12] Several subsequent cases, decided in quick succession, broadened and deepened the core principle of *Batson*: peremptory strikes may not be used to mask or advance invidious discriminatory purposes. The *Batson* principle now applies not only to the exclusion of jurors on account of race, but also to exclusions on account of gender and ethnicity;[13] it may be invoked by the prosecutor as well as the defendant;[14] it applies in civil actions as well as criminal prosecutions;[15] and it can be invoked regardless of whether the excluded jurors are of the same race as the objecting party.[16]

Although numerous critics have pointed out that *Batson* has not eradicated discrimination in jury selection,[17] it is beyond dispute that it has had a major impact on criminal procedure. Litigation under

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11. 476 U.S. 79 (1986).

12. *Batson* overruled the portion of *Swain v. Alabama* that required proof of systematic racial discrimination to establish an equal protection violation. *Id.* at 92–93; *see also supra* note 3.

13. *E.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (gender); Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion) (ethnicity). At present, it is unclear whether *Batson* also prohibits the use of peremptories to exclude jurors based on their religion. *See generally* 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).

14. *Cf.* Georgia v. McCollum, 505 U.S. 42 (1992) (holding that neither the defendant nor the prosecutor may exercise racially discriminatory peremptory challenges).

15. *E.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending the *Batson* framework from the criminal context to private litigants in civil cases).

16. *E.g.*, Powers v. Ohio, 499 U.S. 400 (1991) (holding that defendants may object to race-based peremptory challenges of jurors who are not of the same race as the defendants).

17. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE 120 (1999) (arguing that "*Batson* has by all accounts done relatively little to eliminate the use of race-based peremptory strikes"); 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 (1989) (contending that "racial discrimination is unlikely to yield to the cumbersome, costly, and easily evaded controls created by the *Batson* decision"); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 213 & n.16 (2003) (commenting that *Batson*'s framework "has, in practice, been decidedly ineffective in achieving its original goals"); Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 199 (2005) ("[M]ost 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.").

Batson has proliferated,[18] and *Batson* objections are now an important weapon in the defense lawyer's arsenal both at trial and on appeal. Moreover, there is reason to believe that the Supreme Court's decisions on the discriminatory use of peremptory strikes have succeeded, at least at the margins, in eliminating the most overt forms of racial, gender, and ethnic discrimination from jury selection.[19]

There is also reason to believe the Court will continue to advance *Batson*'s basic goals. Its decision in the October 2004 Term in *Miller-El v. Dretke*,[20] for instance, displayed a remarkable impatience with the Fifth Circuit's willingness to overlook pronounced discriminatory practices.[21] Capping a protracted struggle with the Fifth Circuit, the Court invoked *Batson* to reverse Thomas Miller-El's almost twenty-year-old capital murder conviction, overriding state and federal court findings that the conviction was not tainted by racial discrimination.[22] The *Miller-El* decision reaffirmed the Court's commitment to combat overt discrimination in jury selection through enforcement of *Batson*. But if *Miller-El* raises hope that the Supreme Court 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.

A. Origins of Mixed-Motive Analysis

Mixed-motive analysis originated in *Mt. Healthy City School District Board of Education v. Doyle*,[23] a case that has been described as a

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18. A search of LexisNexis's "Federal and State Cases, Combined" database on December 28, 2006, using the query "Batson" and "jury" and restricted to the 2005 calendar year yielded 573 reported cases.

19. *See, e.g.*, David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 123 (2001) (describing an empirical study of jury-selection practices in Philadelphia that found that the 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").

20. 545 U.S. 231 (2005).

21. *Id.* at 236–37.

22. *Id.* 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 standard is demanding but not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Id.* at 240 (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

23. 429 U.S. 274 (1977); *see also* Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1263 (1988) (identifying *Mt. Healthy* as "[t]he doctrinal genesis of the 'same decision' test of causation").

"mixed-motives constitutional tort case."[24] *Mt. Healthy* involved a conflict between Fred Doyle, an untenured teacher, and the school board regarding, inter alia, the teacher dress code.[25] Doyle communicated the contents of a school memorandum on the subject to a radio disk jockey, who in turn reported the adoption of the dress code as news.[26] One month later, the school board decided not to renew Doyle's employment contract.[27] When Doyle requested an explanation, the school superintendent issued a general statement providing several reasons for its decision, including Doyle's call to the radio station.[28] Doyle challenged the school board's decision not to rehire him, arguing that the refusal to renew his contract was in violation of his rights under the First Amendment.[29] The district court concluded that Doyle was entitled to reinstatement, reasoning that "Doyle's telephone call to 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."[30]

In adjudicating Doyle's claim, the district court had to determine whether the school board's retaliatory motive was the "cause" of Doyle's injury.[31] The causation standard applied by the district court was drawn from a variety of retaliation cases arising under constitu-

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24. 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) (internal quotation marks omitted), *vacated*, 514 U.S. 1034 (1995)).

25. *Mt. Healthy*, 429 U.S. at 281–82. The tension arose following the school administration's unilateral adoption of a teacher dress code which Doyle, a collective bargaining representative for the teachers, had understood to be an issue that would be resolved jointly. Brief for Respondent at 4–5, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278), 1976 WL 194372.

26. *Mt. Healthy*, 429 U.S. at 282.

27. *Id.*

28. *Id.* at 282–83 & n.1.

29. *Id.* at 276.

30. *Id.* at 283 (quoting the unpublished opinion of the United States District Court for the Southern District of Ohio, which was attached in the Appendix to the Petition for Writ of Certiorari at 12a–13a, *Mt. Healthy*, 429 U.S. 274 (No. 75-1278)).

31. *Id.* at 284–87 (discussing the test of causation used by the district court and instructing the district court on remand to apply the test of causation formulated by the Court). Doyle brought suit pursuant to 42 U.S.C. § 1983 (2000). *Mt. Healthy*, 429 U.S. at 277. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

tional law and federal labor law.[32] Those cases, in turn, apply causation analysis borrowed from tort law.

Under well-established tort principles, an act generally is considered a legal cause of a harm only if it is the "but for" cause, that is, an act is a legal cause of the "plaintiff's damage if but for its commission the damage would not have happened."[33] But tort law recognizes an exception to the strict requirement of but-for causation in cases of multiple sufficient causes, where the negligent conduct was sufficient to bring about the harm but there was another separate and independent force that would have brought about the same harm.[34] In that instance, even though the harm would have occurred anyway as a result of the other cause, as long as the defendant's wrongful conduct was a "substantial factor" in bringing about the harm, the defendant may be held liable.[35] Mixed-motive cases can be analogized to

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32. Applying this rule of causation, the district court found a First Amendment violation because the constitutionally protected conduct, Doyle's speech, played a "substantial part" in the school board's decision not to renew his contract. *Mt. Healthy*, 429 U.S. at 285. For similar rationales, see, for example, *Gray v. Union County Intermediate Education District*, 520 F.2d 803, 806 (9th Cir. 1975) ("A decision to terminate employment of a teacher which is only *partially* in retaliation for the exercise of a constitutional right is unlawful."); *Simard v. Board of Education*, 473 F.2d 988, 995 (2d Cir. 1973) ("[A] discharge motivated only in part by demonstrable retaliation for exercise of speech and associational rights is equally offensive to the Constitution."); *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 300 (2d Cir. 1967) ("[A] discharge motivated only in part by anti-union discrimination is similarly illegal."); and *NLRB v. Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953) (explaining that discrimination may be inferred by a "show[ing] that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist."). *See also* Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349–50 (7th Cir. 1970) (interpreting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), to hold that "race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination," and finding "no acceptable place in the law for partial racial discrimination").

33. 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 further require that in cases of multiple sufficient causes 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. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965) (outlining what constitutes legal cause).

34. *See, e.g.*, Corey v. Havener, 65 N.E. 69, 69 (Mass. 1902) (explaining that if two or more wrongdoers contribute to an injury, it "makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each"); Jeremiah Smith, *Legal Cause in Actions of Tort* (pt. 1), 25 HARV. L. REV. 103, 109 n.20 (1911) (noting an exception to the but-for test of 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").

35. *See* RESTATEMENT (SECOND) OF TORTS § 432(2) (setting out the substantial factor test as an exception to the but-for cause requirement). The "substantial factor" test was first developed by Judge, and tort scholar, Jeremiah Smith. *See* Smith, *supra* note 34, at

multiple-sufficient-causation cases in that two concurrent "forces"—a legal motive and an illegal motive—both "cause" an actor to follow a particular course of action. The district court apparently applied the tort law substantial factor causation principle, and upon finding that the school 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.[36]

The Supreme Court, however, unanimously rejected the substantial factor test used by the district court.[37] Such a test, the Court indicated, would potentially bestow an undeserved windfall on employees like Doyle.[38] 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."[39] Although it recognized that Doyle's conduct was constitutionally protected, the Court suggested that Doyle nonetheless was not entitled to reinstatement as long as the school board would have terminated his contract regardless of its displeasure with Doyle's exercise of his First Amendment rights.[40]

In reaching this conclusion, the Court, in an opinion authored by then-Justice Rehnquist, declined to rely on traditional tort causation standards to determine whether the constitutionally protected conduct was a "cause" of the decision to terminate Doyle's contract. Instead, reviewing a variety of confession and exclusionary rule cases in which the admissibility of evidence turned on whether the evidence

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109–14. Numerous cases have recognized the substantial factor test. *See, e.g.*, McElwee v. Wharton, 7 F. App'x 437, 438 (6th Cir. 2001) (per curiam) (asserting 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) (Nelson, J., specially concurring) ("The 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." (quoting Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1214 (Cal. 1997))); *see also infra* Part V.B (discussing the substantial factor test in tort law).

36. *Mt. Healthy*, 429 U.S. at 284–85. The Sixth Circuit affirmed the district court's decision in relevant part. *See* Doyle v. Mt. Healthy City Sch. Dist. Bd. of Educ., 529 F.2d 524 (6th Cir. 1975) (unpublished table decision).

37. *Mt. Healthy*, 429 U.S. at 285–86.

38. *Id.*

39. *Id.*

40. *Id.* at 284, 286–87. The Court reasoned that reinstatement would not be commensurate with the harm if the school 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." *Id.* at 286.

was obtained "because of" unlawful police conduct,[41] the Court fashioned a causation standard permitting defendants to establish a functional affirmative defense and avoid liability upon showing that the causal link between the constitutional violation and the adverse action was overly attenuated. Under this same-decision test,[42] 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 can avoid liability if he can establish "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[43] As in the exclusionary rule context cited by the Court, *Mt. Healthy*'s causation defense provides, in effect, that if the permissible motivations for the government's action constitute an "independent source" of the adverse result, then no remedy is warranted. The test represents a more stringent causation standard than the tort standard it supplanted. Whereas the traditional tort standard permits imposition of liability upon a finding that the defendant's wrongful conduct would have sufficed to cause the harm, the same-decision test limits liability to cases in which the wrongful conduct was the but-for cause of the harm. *Mt. Healthy*'s mixed-motive test thus substitutes a rule that presumptively holds wrongdoers liable with a less plaintiff-friendly standard that appears to have been devised primarily as a remedial limitation in tort-like actions against the government.[44]

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41. *See id.* at 286. The Court noted 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." *Id.* at 286–87 (referencing, as examples, *Parker v. North Carolina*, 397 U.S. 790 (1970), *Wong Sun v. United States*, 371 U.S. 471 (1963), *Lyons v. Oklahoma*, 322 U.S. 596 (1944), and *Nardone v. United States*, 308 U.S. 338 (1939)).

42. *See* Belton, *supra* note 23, at 1263 (describing *Mt. Healthy*'s creation of the "same decision test of causation" (internal quotation marks omitted)).

43. *Mt. Healthy*, 429 U.S. at 287.

44. The mixed-motive test was also invoked in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), a case decided the same day as *Mt. Healthy*. In *Arlington Heights*, the plaintiffs sought a zoning variance from the Village to permit construction of a low- and moderate-income housing project that was expected to benefit minorities. *Id.* at 254. After the application was denied, the plaintiffs brought an equal protection challenge against the Village, asserting that the denial was motivated by racially discriminatory official action. That proof alone, however, was insufficient to overturn the zoning board's decision. As the Court explained:

> 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.

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,[45] and particularly in the adjudication of claims brought under Title VII of the Civil Rights Act of 1964.[46] Mixed-motive analysis received its most extensive treatment in the Title VII context in *Price Waterhouse v. Hopkins*.[47] Prior to *Price Waterhouse*, there was widespread disagreement among the circuits regarding the proper causation standard in mixed-motive Title VII cases.[48] Although some circuits applied the *Mt. Healthy* causation rule, others held that a violation of Title VII was complete for liability purposes upon proof that the employer had been motivated, at least in part, by a discriminatory purpose.[49]

The plaintiff in *Price Waterhouse* was Ann Hopkins, the only female candidate of the eighty-eight persons proposed for partnership that year at the Price Waterhouse accounting firm.[50] Although Hopkins's performance at the firm compared favorably with the other partnership candidates, there were some legitimate criticisms of her performance and ability.[51] At the same time, there was substantial evidence that some Price Waterhouse partners held Hopkins to a higher stan-

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Id. at 270–71 n.21. The framework adopted in *Arlington Heights*, in which the burden of proof shifts to the defendant upon a showing that an illicit criterion was a motivating factor in the decision, was lifted directly from *Mt. Healthy*. In the equal protection context, the *Mt. Healthy/Arlington Heights* same-decision test has been used primarily as a tool to evaluate legislative motive. *Id.* at 254.

45. *E.g.*, NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403–05 (1983) (finding that the NLRB properly relied on *Mt. Healthy* in applying the same-decision test to an employee's claim that he was unlawfully discharged for his union activities); E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403–04 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.").

46. 42 U.S.C. §§ 2000e-1 to -17 (2000); *see, e.g.*, Sheila A. Skojec, Annotation, *Effect of Mixed or Dual Motives in Actions Under Title VII*, 83 A.L.R. FED. 268 (1987).

47. 490 U.S. 228 (1989).

48. *Id.* at 238 n.2 (plurality opinion).

49. *See, e.g.*, Fadhl v. City & County of S.F., 741 F.2d 1163, 1165–67 (9th Cir. 1984) (distinguishing between liability and remedial standards in Title VII cases, and stating as to the former that "[w]here 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 the 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").

50. *Price Waterhouse*, 490 U.S. at 233 (plurality opinion).

51. *Id.* at 234–35.

dard because she was a woman.[52] 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 should be applied under Title VII to establish a statutory violation in a mixed-motive case. Price Waterhouse advocated a standard that would have required Hopkins, who had shown that her gender played a part in the employment decision, to prove but-for causation—"the decision would have been different if the employer had not discriminated."[53] Hopkins, on the other hand, argued for a per se rule—liability should be complete upon a showing that an impermissible criterion played "any part in an employment decision."[54]

In a splintered opinion, the Court rejected both positions. Writing for a plurality, Justice Brennan crafted an approach using the language of tort law.[55] Invoking the multiple-sufficient-cause doctrine, 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.[56] Instead, Brennan reasoned, it makes sense to say that both forces were "causes" of the outcome.[57] 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.[58] Like the district court in *Mt. Healthy*, the plurality indicated that the substantial factor test was the proper standard.[59] So "[t]he question [was] 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."[60] Applying that logic, Brennan asserted that a Title VII plaintiff satisfies her burden on the issue of causation if she establishes that a discrimi-

52. *Id.* at 235–36.

53. *Id.* at 237–38.

54. *Id.* at 238. Hopkins further argued that an employer's proof that "it would have made the same decision in the absence of discrimination" would merely limit equitable relief. *Id.*

55. *See id.* at 242; Maatman, *supra* note 24, at 18 (noting that the plurality in *Price Waterhouse* employed legal language borrowed from tort law "to justify its causation standard").

56. *Price Waterhouse*, 490 U.S. at 241 (plurality opinion).

57. *See id.* (refusing to accept that causally overdetermined events have no cause at all).

58. *See supra* notes 33–35 and accompanying text.

59. *Price Waterhouse*, 490 U.S. at 247–50 (plurality opinion).

60. Carpenter, *supra* note 33, at 952.

natory criterion was a substantial factor relied upon by the employer in reaching its decision.[61] That other motives also influenced the employer's decision does not negate the causal significance of the illicit motive, since "Title VII [was] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[62] The plurality reasoned that the plaintiff is not required to prove but-for causation because the statute focuses on the actual conduct of employers at the moment the employment decision was made.[63] 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 in the head 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 state that although the plaintiff carries her burden on the causation issue by proving that an illicit criterion was a substantial or motivating factor in the decision, the defendant could nonetheless avert liability if it could establish, under the mixed-motive standard set forth in *Mt. Healthy*, that the illicit criterion 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; however, the Court agreed that the burden to prove the lack of but-for causation should shift to the defendant—the defendant "knowingly created the risk" that but-for causation cannot be proven one way or the other, and this risk was created "not by

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61. *Price Waterhouse*, 490 U.S. at 241–42 (plurality opinion).

62. *Id.* at 241.

63. *Id.* at 240–41.

64. *See id.* at 247 n.12 (noting the 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) ("[T]o determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy*." (citation omitted)); *id.* at 268–69 (O'Connor, J., concurring) (relying on the same-decision theory of causation). The *Price Waterhouse* Court also relied heavily on a case arising under federal labor law, *NLRB v. Transportation Management Corp.*, which utilized the same mixed-motive framework set forth in *Mt. Healthy*. *Price Waterhouse*, 490 U.S. at 249–50 (plurality opinion) (citing NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 403 (1983)). According to the *Price Waterhouse* Court, once the factfinder establishes that the challenged action was motivated in part by discriminatory animus, the challenged party "must carry the burden of justifying its ultimate decision." *Id.* at 248. Specifically, if the challenged party wishes to prevail, it 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 (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

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 . . . liability only by 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—(1) an adverse employment decision is "because of" sex as long as sex was considered by the employer in making the decision, and (2) 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 from the multiple-sufficient-causation doctrine in Title VII mixed-motive cases, Congress moved swiftly to correct it. In response to *Price Waterhouse*, Congress enacted the Civil Rights Act of 1991,[68] which, inter alia, amended Title VII to clarify that a plaintiff who establishes that an adverse employment decision was made because of mixed motives has proven discrimination.[69] Underlying the Civil Rights Act of 1991 was a recognition that whenever an improper criterion is a motivating factor in an employment decision, Title VII's stat-

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65. *Id.* at 250 (quoting *Transp. Mgmt. Corp.*, 462 U.S. at 403); *see also id.* at 261–62 (O'Connor, J., concurring) (arguing that it is appropriate to shift the burden with respect to causation "where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion").

66. *Id.* at 244–45 (plurality opinion) (footnote omitted); *id.* at 261 n.* (White, J., concurring); *id.* at 269 (O'Connor, J., concurring). 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 id.* at 267–68 (O'Connor, J., concurring) ("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 neutral selection criteria and procedures have produced the monochromatic result.'" (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972))).

67. *Id.* at 285 (Kennedy, J., dissenting). Believing that but-for causation was an essential element of proof of a violation, Justice Kennedy further argued that the plaintiff, rather than the defendant, should at all times maintain "'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff'" in a mixed-motive case. *Id.* at 286–87 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

68. Pub. L. No. 102-166, 105 Stat. 1071.

69. The Civil Rights Act of 1991 amended section 703 of the Civil Rights Act of 1964 by, inter alia, adding subsection (m): "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." § 107(a), 105 Stat. at 1075 (codified at 42 U.S.C. § 2000e-2(m) (2000)). 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, 584–88 (1996).

utory prohibition is contravened.[70] As amended, Title VII now permits the employer, under the mixed-motive test, to introduce proof that it would have made the same decision notwithstanding the improper motive; the effect of prevailing is merely to limit the obligation to pay compensatory damages and backpay.[71] A plaintiff who establishes that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice,"[72] may be awarded declaratory relief, injunctive relief, and attorneys' fees and costs.[73] With respect to the liability determination, Title VII now operates under a per se rule, and the statutory scheme 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*. 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. At step one of the framework, a party challenging a strike has the burden to make out a prima facie case that the strike was exercised for a discriminatory purpose.[74] Once the defendant makes a prima facie showing, the inquiry proceeds to step two, where the burden shifts to the prosecutor to offer a

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70. *See* Zimmer, *supra* note 69, at 584–85 (noting that the amendments rejected the substantial factor test and adopted the motivating factor standard).

71. Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 & n.2 (2003).

72. 42 U.S.C. § 2000e-2(m) (2000).

73. *Id.* § 2000e-5(g)(2)(B).

74. Batson v. Kentucky, 476 U.S. 79, 93–94, 96–97 (1986); *see also* Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (stating that the first step under the *Batson* framework requires a defendant to "make a prima facie showing that a peremptory challenge has been exercised on the basis of race"). At this stage, the defendant need not prove discriminatory intent; rather, he need only point to facts consistent with such illicit intent as to fairly put the issue into play. *See Batson*, 476 U.S. at 93–95 (explaining that a 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, 239–42 (1976))). The "relevant facts" or "circumstances" supporting an inference of discrimination may include the use of the strike against a member of a protected class, the "pattern" of strikes exercised by the challenged party, or any other evidence that might support an inference of discrimination. *Id.* at 96–97 (noting that "all relevant circumstances" should be considered by the trial court in determining whether a defendant has made the necessary showing).

neutral explanation for striking the juror.[75] 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 neutral reason proffered by the challenged party was pretextual and the challenged strike was, in fact, a product of discrimination.[76]

Although *Batson*'s three-step framework was borrowed expressly from the Supreme Court's Title VII jurisprudence,[77] it shares many features with several earlier jury-selection cases that also utilized a burden-shifting framework.[78] For example, in *Neal v. Delaware*,[79] the Court found that the fact that no black citizen had ever been summoned to serve as a juror in Delaware "presented a prima facie case of denial" of equal protection rights, and that the State's response—there was not a single black juror in the state who possessed the qualifications to serve as a juror—was a "violent presumption" unworthy of credence.[80] Once a prima facie case is established, it has been recognized, "[t]he burden of proof is then upon the State to refute it."[81] The Court's jury-selection cases have adhered to this basic analytical structure, holding that statistical or circumstantial evidence of the systematic exclusion of members of a particular race from jury service constitutes "prima facie proof" of a constitutional violation, and that the government must adduce sufficient evidence of a nondiscriminatory purpose to rebut the prima facie case.[82] *Batson*'s three-step

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75. *Batson*, 476 U.S. at 94, 97. Once the defendant establishes a prima facie showing that a peremptory challenge has been exercised on the basis of race, "the burden shifts to the [prosecution] to come forward with a [race-]neutral explanation" for striking the juror in question. *Id.* at 97.

76. *See id.* at 97–98; Miller-El v. Dretke, 545 U.S. 231, 239 (2005) (explaining that, after the prosecution provides "a clear and reasonably specific explanation of [its] legitimate reasons for exercising the challeng[e]," the trial court has "the duty to determine if the defendant has established purposeful discrimination" (citing and quoting *Batson*, 476 U.S. at 98 & n.20) (internal quotation marks omitted)); Johnson v. California, 545 U.S. 162, 168 (2005) (same).

77. *See Batson*, 476 U.S. at 94 n.18.

78. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 494–95 (1977) (employing a burden-shifting framework to determine purposeful discrimination in the grand jury selection context); Alexander v. Louisiana, 405 U.S. 625, 631–32 (1972) (same).

79. 103 U.S. 370 (1880).

80. *Id.* at 397.

81. Swain v. Alabama, 380 U.S. 202, 233 (1965) (Goldberg, J., dissenting) (quoting Harper v. State, 171 So. 2d 129, 133 (Miss. 1965)).

82. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 481–82 (1954) (reversing the defendant's conviction after the State was unable to rebut prima facie proof of the systematic exclusion of Mexican Americans from jury service); Norris v. Alabama, 294 U.S. 587, 598–99 (1935) (concluding that the government failed to rebut the defendant's prima facie case of recurrent exclusion of blacks from jury service).

framework extends and elaborates upon this procedural structure and thus marks a continuity rather than a break in its approach to discrimination claims in jury selection.

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. Courts facing a mixed-motive explanation have responded in three ways. Some courts have held that when the prosecutor includes a discriminatory reason among the reasons proffered to justify a strike, the prosecutor has failed to satisfy his step-two burden.[83] These courts have reasoned that *Batson*'s framework commands that the proponent of a strike come forward with a neutral explanation, but that any explanation that, in whole or in part, includes race or gender vitiates neutrality.[84] As such, the proper response to a mixed-motive explanation is to terminate the inquiry and sustain the objection.[85] Other courts, acknowledging the mixed nature of an explanation where not all of the articulated reasons were improper, have nonetheless proceeded to step three to conduct a conventional *Batson* pretext analysis.[86] Finally,

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83. *See, e.g.*, State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (reversing the defendant's convictions because the State's non-neutral reason for striking the juror—"he was a southern male"—impermissibly tainted the entire jury-selection process); McCormick v. State, 803 N.E.2d 1108, 1113 (Ind. 2004) (finding that the non-race neutral reason proffered by the State, despite the State's offering of other race-neutral reasons, impermissibly tainted the jury selection under *Batson*); Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998) (expressly rejecting the dual-motivation doctrine on the grounds that "any consideration of discriminatory factors . . . is in direct contravention of the purpose of *Batson* which is to ensure peremptory strikes are executed in a nondiscriminatory manner"); State v. King, 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 [*Batson* prong]." (quoting State v. Jagodinsky, 563 N.W.2d 188, 191 (Wis. Ct. App. 1997))); Rector v. State, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994) (same); *cf.* Robinson v. United States, 878 A.2d 1273, 1284 & n.21 (D.C. 2005) (explaining that "[a] peremptory challenge may not be based even partially on an unlawful discriminatory reason," but choosing not to decide whether the same-decision defense is available to the prosecutor).

84. *See, e.g.*, *Robinson*, 878 A.2d at 1284 ("[E]ven 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.").

85. *See, e.g.*, *Payton*, 495 S.E.2d at 210 (holding that, regardless of how many other non-discriminatory factors are considered, any consideration of a discriminatory factor taints the entire jury-selection process under *Batson*; thus, "[t]he challenged party should not have an opportunity to convince the judge that he would have struck the juror regardless of the discriminatory reason").

86. *See, e.g.*, Leahy v. Farmon, 177 F. Supp. 2d 985, 999 (N.D. Cal. 2001) (finding that the state court's 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"), *rev'd en banc*, Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006).

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, at the second or third step, to determine whether the strike violates the Equal Protection Clause.[87]

The early court decisions that grappled with the problem of mixed motives 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 one of the first courts to expressly confront the problem, in *Owens v. State*.[88] The prosecutor in *Owens*, after having used fifteen of his twenty-four strikes against blacks, initially explained that the primary reason for striking one black juror was "age and single status."[89] When pressed for additional reasons by the trial judge, however, the prosecutor admitted that "the fact that [the juror] was the same race as the defendant was a factor."[90] 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 it thus held that the trial court's finding to the contrary was clearly erroneous.[91] 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 *Owens*, two Justices of the Supreme Court of the United States, writing in dissent from the denial of certiorari, also rejected the use of mixed-motive analysis in the *Batson* context. In *Wilkerson*, the Texas Court of Criminal Appeals 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, because race was merely "[o]ne of the many considerations" and "nothing major."[92] Justice Marshall, joined in dissent

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87. *See* cases cited *infra* notes 122–126.

88. 531 So. 2d 22, 26 (Ala. Crim. App. 1988) (stating that it failed to "see how any explanation can meet the four articulated [neutral-explanation] requirements [in *Batson*] if [the challenge] is based, in part, on race"). The Texas Court of Criminal Appeals also invoked mixed-motive analysis to uphold a conviction in the face of a *Batson* challenge around the same time; however, the Supreme Court denied certiorari in that case. *See* Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1986) (en banc), *cert. denied*, 493 U.S. 924, 925–26 (1989) (Marshall, J., dissenting from denial of certiorari) (discussing the trial court's mixed-motive approach).

89. *Owens*, 531 So. 2d at 23–24.

90. *Id.* at 24.

91. *Id.* at 24–26.

92. *Wilkerson*, 493 U.S. at 924–25 (Marshall, J., dissenting from denial of certiorari).

by Justice Brennan, argued that a mixed-motive explanation "cannot be squared with *Batson*'s unqualified requirement that the state offer 'a *neutral* explanation' for its peremptory challenge[s]."[93] In Justice Marshall's view, a neutral explanation could only be understood as one based "*wholly* on nonracial criteria."[94] Adaptation of the mixed-motive defense in the *Batson* context, in Justice Marshall's view, was also inappropriate "because of the special difficulties of proof" that would arise.[95]

At the same time, other Texas courts interpreted *Batson* to require strict neutrality.[96] 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."[97] In 1991, the Supreme Court of Texas affirmed that approach, holding that any consideration of race in jury selection violates equal protection.[98] Several state courts, including Indiana,[99] Arizona,[100] Georgia,[101] South Carolina,[102] and Wisconsin,[103] have endorsed this "taint approach," reasoning that the inclusion of a discriminatory factor in an explanation, "[r]egardless of how many other nondiscriminatory factors" are also proffered, "taints the entire jury selection process."[104]

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93. *Id.* at 926 (emphasis added) (quoting Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

94. *Id.*

95. *Id.*

96. The Texas Court of Criminal Appeals has not followed the Supreme Court of Texas' lead in finding a *Batson* violation if race was used as any factor in a peremptory strike. *E.g.*, Guzman v. State, 85 S.W.3d 242, 246–48 & n.18, 255 (Tex. Crim. App. 2002) (en banc) (rejecting the "taint approach" in favor of mixed-motive analysis). For a discussion of the battle among Texas courts over the mixed-motive issue, see Ross P. Brooks, Comment, *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); and Geoffrey A. Gannaway, Comment, *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).

97. Speaker v. State, 740 S.W.2d 486, 489 (Tex. App. 1987); *see also* McKinney v. State, 761 S.W.2d 549, 551 (Tex. App. 1988) (citing *Speaker*, 740 S.W.2d at 489).

98. Powers v. Palacios, 813 S.W.2d 489 (Tex. 1991) (per curiam).

99. McCormick v. State, 803 N.E.2d 1108, 1112–13 (Ind. 2004).

100. State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001).

101. Rector v. State, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994).

102. State v. Shuler, 545 S.E.2d 805, 811 (S.C. 2001).

103. State v. King, 572 N.W.2d 530, 535–36 (Wis. Ct. App. 1997).

104. *Lucas*, 18 P.3d at 163. The taint theory was developed in several Texas intermediate appellate court opinions. *See, e.g.*, Moore v. State, 811 S.W.2d 197, 200 (Tex. App. 1991) ("Even though the prosecutor may have given one racially neutral explanation, the

This early momentum came to an abrupt halt, however, with the Second Circuit's decision in *Howard v. Senkowski*.[105] For better or worse, *Howard* has proved tremendously influential in shaping the debate over mixed motives. The facts in *Howard* are similar to those in *Owens* and *Wilkerson*. In 1984, prior to *Batson*, Clifford Howard was tried in a New York state court for various charges, including robbery.[106] 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.[107] The motion was denied, and Howard was convicted by an all-white jury.[108] While Howard's appeal was pending, *Batson* was decided.[109] Finding that Howard had established a prima facie case of discrimination, the state appellate court remanded Howard's case for an evidentiary hearing to determine the prosecutor's reasons for the strikes.[110]

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,"[111] and stated that he also took into account several neutral factors, including that one of the black jurors seemed to lack a sufficient education and that the other black juror had limited work experience, expressed no views on an important issue in the case, had no connection to law enforcement, and might be sympathetic to the defendant given that she was a mother of five children.[112] Applying the three-step pretext analysis from the Title VII case *Texas Department of Community Affairs v. Burdine*,[113] the state court found "that race had been 'part of a totality of factors' for the prosecutor's challenges, that the prosecutor had articulated neutral explanations, and that the explanations were not pretextual."[114] The state court then concluded that Howard failed to establish purposeful discrimination.[115]

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racially motivated explanation 'vitiates the legitimacy of the entire [jury selection] procedure.'" (quoting Speaker v. State, 740 S.W.2d 486, 489 (Tex. App. 1987))).

105. 986 F.2d 24 (2d Cir. 1993).

106. *Id.* at 25.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 450 U.S. 248 (1981).

114. *Howard*, 986 F.2d at 26 (citing People v. Howard, No. 56387, slip op. at 5 (Nassau County Ct. Nov. 6, 1987)).

115. *Id.*

Although the Second Circuit found the state court's pretext analysis too demanding of criminal defendants, it declined to endorse the taint approach to mixed-motive cases.[116] On the one hand, the Second Circuit reasoned that the state court applied the wrong legal standard—*Burdine*'s pretext approach—because the question was not about pretext; once the challenger satisfied his burden to prove improper motivation, it was no longer necessary to inquire as to whether the challenger sustained his burden of showing "purposeful discrimination."[117] On the other hand, the Second Circuit declined to endorse a per se rule, such as the taint approach.[118] Instead, the court, invoking *Mt. Healthy*, endorsed the use of dual-motivation analysis: "[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."[119] Accordingly, the Second Circuit found that "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."[120] Because neither the state court nor the federal district court "imposed that burden upon the prosecutor," the Second Circuit remanded the case so that the dual-motivation analysis could be applied.[121]

The approach endorsed by the Second Circuit in *Howard*[122] has subsequently been adopted by several other federal circuit courts of appeals, including the Third,[123] Fourth,[124] Eighth,[125] and Eleventh.[126] Although the current trend unmistakably favors an embrace of dual-

116. *See id.* at 30–31.
117. *See id.* at 27, 30.
118. *Id.* at 28–29.
119. *Id.* at 27.
120. *Id.* at 30.
121. *Id.* at 30–31.
122. The Second Circuit cited *Howard* with approval in two subsequent cases: *United States v. Brown*, 352 F.3d 654, 662 n.5 (2d Cir. 2003), and *United States v. Taylor*, 92 F.3d 1313, 1328 (2d Cir. 1996).
123. Gattis v. Snyder, 278 F.3d 222, 234–35 (3d Cir. 2002).
124. Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995).
125. United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995); *see also* Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001) (relying on *Darden* for its dual-motivation analysis and upholding the Missouri Supreme Court's determination that the prosecutor would have exercised the strike even absent his discriminatory motive).
126. Wallace v. Morrison, 87 F.3d 1271, 1274–75 (11th Cir. 1996) (per curiam); *see also* King v. Moore, 196 F.3d 1327, 1335 (11th Cir. 1999) (noting adherence to *Wallace*'s dual-motivation approach); United States v. Tokars, 95 F.3d 1520, 1533 (11th Cir. 1996) (applying the dual-motivation approach used in *Howard* and *Wallace*). Although the Seventh Circuit has not yet adopted mixed-motive analysis, Judge Cudahy opined, in a partial dissent,

or mixed-motive analysis, several federal circuit courts, numerous state courts,[127] and the Supreme Court have yet to address its permissibility.[128] This turn to dual- or mixed-motive analysis in the *Batson* context, however, 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.

III. *BATSON*, NEUTRALITY, AND EQUAL PROTECTION

More than 100 years before *Batson* was decided, the Supreme Court declared that the equal protection guaranteed by the Constitution prohibits the exclusion of jurors on account of race,[129] and in case after case, the Court has reaffirmed that principle.[130] Thus, jurors may not be excluded from jury service *because of* an illicit criterion. But what does the slippery term "because of" mean in the peremptory strike context, in which jurors traditionally can be excluded "for any reason or no reason"?[131] What if a juror was struck because of both neutral and non-neutral criteria?[132] Can such an ex-

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that it should. *See* Holder v. Welborn, 60 F.3d 383, 391 (7th Cir. 1995) (Cudahy, J., concurring in part and dissenting in part).

127. *See, e.g.*, People v. Schmeck, 118 P.3d 451, 475 (Cal. 2005) (finding no need to resolve "whether a mixed-motive peremptory challenge could constitute a violation of the defendant's constitutional rights").

128. In an en banc decision, the Ninth Circuit reversed a panel decision affirming the use of mixed-motive analysis. Kesser v. Cambra, 465 F.3d 351, 371 (9th Cir. 2006) (en banc). One judge argued, in a concurring opinion, that mixed-motive analysis was not appropriate in *Batson* cases. *Id.* at 376–77 (Berzon, J., concurring). In addition, some courts that have affirmed a state's use of mixed motive under the highly deferential habeas review standards mandated by 28 U.S.C. § 2254(d)(1) (2000), 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*, 278 F.3d at 225 (holding that "the state courts' application of dual motivation analysis to [the defendant's] *Batson* challenge did not result in a decision that 'was contrary to, or involved an unreasonable application of, Federal law'" (quoting 28 U.S.C. § 2254(d)(1))).

129. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

130. *See, e.g.*, *Ex parte* Virginia, 100 U.S. 339, 345 (1879); Neal v. Delaware, 103 U.S. 370, 386 (1881); Gibson v. Mississippi, 162 U.S. 565, 580–81 (1896); Carter v. Texas, 177 U.S. 442, 447–48 (1900); Norris v. Alabama, 294 U.S. 587, 589 (1935); Hale v. Kentucky, 303 U.S. 613, 616 (1938) (per curiam); Pierre v. Louisiana, 306 U.S. 354, 357 (1939); Swain v. Alabama, 380 U.S. 202, 203–05 (1965); Batson v. Kentucky, 476 U.S. 79, 84 (1986).

131. United States *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, 1406–16 (2001) (tracing history beginning with English law from 1100s and early 1200s through contemporary American practice).

132. 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

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

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struck a juror because they "preferred" a jury with a different racial or sex 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, intelligence, and limited work experience, were more important considerations. 986 F.2d 24, 25 (2d Cir. 1993). In *Gattis v. Snyder*, "the prosecutor exercised a peremptory challenge against an elderly African-American male." 278 F.3d 222, 231–32 (3d Cir. 2002). There, the prosecutor gave two reasons for the strike: (1) the prospective juror's "very conservative" views regarding the "application of the death penalty" and (2) his gender. *Id.* at 232. As to the gender-based motive, the prosecutor characterized the juror as "an older gentleman," and explained that "we would prefer to have some more women on the jury" because of the presence of several other older gentlemen on the jury panel. *Id.* In *United States v. Darden*, the prosecutor gave two reasons for striking a female African-American juror. 70 F.3d 1507, 1530–31 (8th Cir. 1995). First, he stated his belief that "young black females . . . tend to . . . be more sympathetic toward individuals who are involved in narcotics." *Id.* at 1530. Second, he 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." *Id.* 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. 241 F.3d 1024, 1027 (8th Cir. 2001). He also added that, "[i]n any event, [he] 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." *Id.* In *King v. Moore*, the prosecutor proffered the following explanation for striking an African-American female: "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 about the death penalty we felt were sufficient for us to have concern about how she would apply the law." 196 F.3d 1327, 1333 (11th Cir. 1999) (alteration in original). In *Wallace v. Morrison*, 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?" 87 F.3d 1271, 1273 (11th Cir. 1996) (per curiam) (internal quotation marks omitted). The prosecutor responded by explaining that he used a rating system to assign numbers to prospective jurors, adding that "[r]ace was a factor that I considered just as I considered age, just as I considered their place of employment and so on." *Id.* (emphasis omitted). In *Kesser v. Cambra*, the prosecutor exercised peremptory strikes against all three Native Americans on the venire. 392 F.3d 327, 330–32 (9th Cir. 2004), *rev'd en banc*, 465 F.3d 351 (9th Cir. 2006). 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." *Id.* at 331–32 (internal quotation marks omitted). 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. *Id.* at 332.

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

Analysis of the mixed-motive problem begins with consideration of what constitutes a "neutral explanation" at step two of the *Batson* inquiry. In *Hernandez v. New York*,[133] the Supreme Court considered a *Batson* challenge to the prosecutor's strikes against bilingual Hispanic jurors, which the prosecutor justified by expressing concern that such jurors would not defer to the translator's official translation of witness testimony.[134] In rejecting the *Batson* challenge, the Court made clear that the question at step two is narrow, holding that an explanation is "neutral" as long as there is no literal admission of purposeful discrimination.[135] An explanation at step two is legally neutral, according to *Hernandez*, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation."[136] 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*,[137] where two black men were struck purportedly because of the way their hair looked, particularly their facial hair.[138] 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.[139] The *Elem* Court 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."[140] That evaluation takes place at step three.[141] 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 "de-

133. 500 U.S. 352 (1991).
134. *Id.* at 360 (plurality opinion).
135. *Id.*
136. *Id.*
137. 514 U.S. 765 (1995).
138. *Id.* at 766 (per curiam).
139. *Id.* at 767–68.
140. *Id.* at 768.
141. *Id.* The Supreme Court recently reiterated that proposition in *Johnson v. California*, 545 U.S. 162, 171 (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").

fendant need not persuade the court that it was actually motivated by the proffered reasons."[142] After *Elem*, courts are not authorized to terminate a *Batson* inquiry at step two as long as the prosecutor provides a facially neutral explanation. But *Hernandez* and *Elem* did not eliminate step two altogether.[143]

The *Elem* Court was quick to point out that although facially neutral explanations satisfy the step two burden, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" at step three.[144] *Elem*, in other words, defers scrutiny rather than prohibits it. Such a reading is consistent with *Batson*'s obvious intent to create enforceable evidentiary rules. *Batson* was handed down largely in recognition that the *Swain v. Alabama* regime[145] had failed to stop the discriminatory use of peremptory challenges, and its authors undoubtedly intended courts to apply its requirements to provide effective enforcement of the nondiscrimination principle.[146] Although *Elem* bars any searching credibility deter-

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142. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). In *McDonnell Douglas Corp. v. Green*, the Court set forth a three-step burden-shifting framework to help lower courts resolve the evidentiary inquiry mandated by Title VII, which prohibits racial discrimination in any employment decision. 411 U.S. 792, 793–94, 796 (1973). Under *McDonnell Douglas*, the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." *Id.* 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 burden shifts back to the complainant to show that the employer's stated reason "was in fact pretext." *Id.* at 804. This framework was affirmed again in *Burdine*. 450 U.S. at 252–53. 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 purposeful 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 explained in *St. Mary's Honor Center v. Hicks* that, to show pretext, the plaintiff in a Title VII case must prove not only that the pretextual explanation is false but also that discrimination is the true purpose. 509 U.S. 502, 515 (1993). Remarking that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules"—"[t]he party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion"—the *Batson* Court adapted the formal structure of Title VII to the jury-selection context. Batson v. Kentucky, 476 U.S. 79, 94 n.18, 96–98 (1986).

143. *See, e.g.*, José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 373 (1998) (asserting that "[t]he *Elem* opinion in many ways renders useless the ten years of *Batson* jury selection jurisprudence").

144. 514 U.S. at 768.

145. *See* cases cited *supra* note 130.

146. *Batson*, 476 U.S. at 92–93 (noting that its decision to overturn *Swain* was necessary because *Swain*'s requirement that challengers adduce proof of repeated striking of blacks

minations at step two, *Elem* does not disturb the conditional nature of the *Batson* framework, which requires the state to carry its burden of production before the inquiry may properly proceed to step three.[147] A neutral explanation may remain legally sufficient even if it is "silly or superstitious,"[148] but it must nonetheless be free of any inherent discriminatory intent.[149] 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.[150] *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, recognized in *Washington v. Davis*,[151] that an equal protection claim cannot prevail absent proof of purposeful discrimination.[152] Arguably the most important equal protection decision of its time,[153] *Davis* definitively established that disparate impact evidence alone is insuffi-

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over many cases had erected a "crippling burden of proof" that rendered "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny").

147. *Elem*, 514 U.S. at 767 ("*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)).

148. *See id.* at 768.

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

150. *Hernandez*, 500 U.S. at 360 (plurality opinion) ("At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation."); *cf.* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981) (explaining that in a Title VII case, the 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").

151. 426 U.S. 229 (1976).

152. *Id.* at 239–40; *cf.* Swain v. Alabama, 380 U.S. 202, 208–09 (1965) (explaining the fact that minorities were underrepresented on juries does not alone establish evidence of purposeful discrimination).

153. *Davis* has been described by commentators "as the most important equal protection case of the last quarter-century." *E.g.*, Ian F. Haney López, *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).

cient to establish an equal protection violation.[154] 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 subjectively important must that purpose be? Must it be the sole, or dominant, aim or purpose?[155]

Relying largely on tort standards[156] and decided the same day as *Mt. Healthy, Village of Arlington Heights v. Metropolitan Housing Development Corp.* 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.[157] Although some precedent suggested that unconstitutional discrimination only occurs where the sole purpose of the actor was invidious,[158] *Arlington Heights* clarified that such a strong showing was not necessary. 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'

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154. *Davis*, 426 U.S. at 239–40. The *Davis* Court described "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

155. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (arguing against judicial review of legislative motives in part because "[i]t 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. *See infra* note 158 and accompanying text.

156. The rule established in *Washington v. Davis*, which 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 153, 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").

157. 429 U.S. 252, 264–66 (1977); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 240–41 & n.7 (1989) (plurality opinion) (noting that the Title VII words "'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).

158. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 208–09 (1965) (stating that proof "that an identifiable group in a community is underrepresented by as much as 10%" is insufficient to meet the requirement of establishing "purposeful discrimination *based on race alone*" (emphasis added)); Hale v. Kentucky, 303 U.S. 613, 616 (1938) (per curiam) (stating that the Equal Protection Clause is violated whenever individuals are excluded from serving as jurors "*solely because of their race*" (emphasis added)); Norris v. Alabama, 294 U.S. 587, 589 (1935) (same); Carter v. Texas, 177 U.S. 442, 447 (1900) (same); Strauder v. West Virginia, 100 U.S. 303, 309–10 (1879) (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 a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects").

one."[159] The reasoning mirrored language from the *Restatement* (*Second*) *of Torts*, which states that for an act to satisfy the causation standard and warrant tort liability, "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."[160]

If the discriminatory purpose need not be the "sole" or predominant purpose, then to what extent must the discriminatory purpose factor into 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 bringing about the harm."[161] A "substantial factor" is one that would "lead reasonable men to regard it as a cause" of the plaintiff's harm.[162] Professor Brest similarly 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 the complainant need not "establish that consideration of the objective was the sole, or dominant, or a 'but-for' cause of the decision."[163]

In interpreting the causation standard necessary to establish an equal protection violation, the *Arlington Heights* Court drew on these sources, reasoning that although generally "courts refrain from reviewing the merits of [legislative] decisions[ ] absent a showing of arbitrariness or irrationality[,] . . . [w]hen there is a proof that a

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159. *Arlington Heights*, 429 U.S. at 265.

160. RESTATEMENT (SECOND) OF TORTS § 430 cmt. d (1965); *see also* Jeremiah Smith, *Legal Cause in Actions of Tort* (pt. 3), 25 HARV. L. REV. 303, 311 (1912) (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 in its antidiscrimination 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 284 (Kennedy, J., dissenting).

161. RESTATEMENT (SECOND) OF TORTS § 431(a).

162. *Id.* § 431(a) cmt. a.

163. Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 130–31. The Court's decision in *Arlington Heights* represented a rejection of the approach to the review of legislative motive embodied in the Court's controversial decision in *Palmer v. Thompson*, 403 U.S. 217 (1971). In *Palmer*, the Court refused to overturn the City of Jackson's decision to shut down its public swimming pools rather than operate them on an integrated basis, reasoning that motive was irrelevant to the question of whether state action violated the Equal Protection Clause. *Id.* at 218–19, 224–26. 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. *See Arlington Heights*, 492 U.S. at 266 n.12 (citing Brest, *supra*, at 116–18).

discriminatory purpose has been *a motivating factor* in the decision, this judicial deference is no longer justified."[164] Proof of discriminatory purpose, according to the Court in *Arlington Heights*, is established upon a showing that an "invidious discriminatory purpose was a motivating factor" for the decision[165]—the plaintiff need not prove that such purpose was the sole motivating factor,[166] or even that such purpose had "primacy."[167]

The Court revisited the issue in *Personnel Administrator of Massachusetts v. Feeney*,[168] a case involving an equal protection challenge to a Massachusetts 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.[169] However, because the vast majority of veterans were male, the preference clearly had a disparate impact on female job applicants.[170] 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 discriminatory purpose.[171] Under general tort principles, it often

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164. *Arlington Heights*, 429 U.S. at 265–66 (emphasis added).

165. *Id.* at 266. Perhaps because the issue is "purpose," not "causation," the Court adopted the term "motivating" in lieu of the *Restatement*'s "substantial" or Brest's "affirmative" without indicating that the "motivating" factor test differed materially from the "substantial" factor test. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 & n.2 (1977) (using the terms "motivating" and "substantial" interchangeably (citing *Arlington Heights*, 429 U.S. at 270–71 n.21)); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 238–39 n.2 (1989) (plurality opinion) (noting that some lower courts had employed a "substantial" or "motivating" factor analysis in the employment discrimination context, suggesting that the Court understood the terms to be synonymous); *id.* at 259 (White, J., concurring) (quoting the *Mt. Healthy* Court's use of the terms "substantial" and "motivating" as synonyms); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 507–10 (2006) (asserting that there is "no possible logical distinction" between a substantial factor and motivating factor test in light of the causal framework the Court used in *Mt. Healthy* and *Price Waterhouse*).

166. *Arlington Heights*, 426 U.S. at 266; *see also* Howard v. Senkowski, 986 F.2d 24, 28–30 (2d Cir. 1993) (stating that the use of the word "solely" in *Batson* 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 163, at 119 n.123 (urging that when a decision is motivated by both legitimate and illegitimate objectives, the decision "should be invalidated if the illicit objective played any material role in the decision").

167. *See Arlington Heights*, 429 U.S. at 265 n.11 ("The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained." (quoting McGinnis v. Royster, 410 U.S. 263, 276 (1973)) (citation omitted)).

168. 442 U.S. 256 (1979).

169. *Id.* at 274.

170. *Id.* at 270–71.

171. *Id.* at 278–81.

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."[172] Likewise, the *Feeney* Court acknowledged that given the foreseeability of the disparate impact on women caused by 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."[173] 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."[174] Because Feeney could not demonstrate that Massachusetts' veterans preference was the product, even in part, of a discriminatory purpose, her claim failed.[175]

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 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.[176] Accordingly, the Court's equal protection cases make clear that the relevant question is not whether the challenged action was taken in part, even in large part, for *legitimate* motives; rather, it is whether the decision was motivated, *even in part, by an improper purpose*—whether an invidious discriminatory purpose was "a motivating factor" in the decision.[177]

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172. RESTATEMENT (SECOND) OF TORTS § 870 cmt. i (1977).

173. *Feeney*, 442 U.S. at 278.

174. *Id.* at 279 (citation omitted) (emphasis added).

175. *Id.* at 281.

176. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271–72 & n.3 (1993) (citing *Feeney* for the principle that a cause of action for deprivation of equal protection requires proof that a decisionmaker was motivated "at least in part" by the adverse effects that the decision might have on a given group). In *Wards Cove Packing Co. v. Atonio*, Justice Stevens, in dissent, reiterated the causal link that a plaintiff must establish, stating:

> 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. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm.

490 U.S. 642, 672–73 (1989) (Stevens, J., dissenting) (citation omitted) (citing RESTATEMENT (SECOND) OF TORTS §§ 430–433; and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion)).

177. 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

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 *Washington v. Davis*'s command that proof of disparate impact is not enough to establish an equal protection violation[178] 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.[179] 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.[180] *Miller-El* did not demand any proof that the strikes were solely or predominantly the product of invidious intent. In addition, the lower courts that have sanctioned mixed-motive analysis have also acknowledged that the "not motivated even in part" standard represents the proper definition of neutrality. Chief among them is the Second Circuit's decision in *Howard v. Senkowski*, which acknowledged that a discriminatory purpose is established by proof that such a purpose is "*part* of a motivation,"[181] and rejected the proposition that *Batson* must be read to require proof that the improper purpose was the "*sole* motivation" for the peremptory strike.[182]

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—at least one that admits that a discriminatory purpose was part of the motivation for excluding a juror—can be deemed facially valid.[183]

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redistricting cases. There, the Court has required a showing that race was "the predominant factor" that led to a particular outcome. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."); *see also* Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion).

178. Hernandez v. New York, 500 U.S. 352, 359–60 (1991) (plurality opinion).

179. *Id.* at 360–61.

180. 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."); *see also id.* at 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.").

181. 986 F.2d 24, 29 (2d Cir. 1993).

182. *Id.*

183. *See, e.g.*, Hill v. State, 827 S.W.2d 860, 874 (Tex. Crim. App. 1992) (en banc) (Baird, J., concurring) ("No 'neutral explanation' can serve to rebut the presumption that the condemned practice of exclusion based on race occurred when the prosecutor admits that

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."[184] A mixed-motive explanation is not a neutral explanation under the applicable equal protection standards because the prosecutor has in effect admitted that an improper purpose was "a motivating factor" in her decision to strike a juror.[185]

The conclusion that a mixed-motive explanation cannot possibly be considered 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.[186] The strict ban on credibility 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," it may not pick and choose which among several proffered reasons to believe, or choose to credit one articulated reason but disregard another. To do so would require it to weigh the evidence prematurely 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."[187]

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 pur-

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such an exclusion did occur." (quoting McKinney v. State, 761 S.W.2d 549, 551 (Tex. App. 1988)) (internal quotation marks omitted)).

184. Wilkerson v. Texas, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of certiorari) (citing Batson v. Kentucky, 476 U.S. 79, 98 (1986)).

185. *See, e.g.*, *Wilkerson*, 493 U.S. at 926 (Marshall, J., dissenting from denial of certiorari) ("To be 'neutral,' the explanation must be based *wholly* on nonracial criteria."); Owens v. State, 531 So. 2d 22, 26 (Ala. Crim. App. 1988) (stating that it "fail[s] . . . to see how any explanation . . . [that] is based, in part, on race" could satisfy *Batson*'s requirements for establishing a neutral explanation).

186. *See* Johnson v. California, 545 U.S. 162, 171 & n.7 (2005) (noting that the persuasiveness of the justification does not become relevant until the third step); Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) ("The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at step two be not just neutral but also at least minimally persuasive . . . .").

187. Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion).

pose. 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.[188] After all, if the impermissible factor really was superfluous to a prosecutor's decision to strike a juror, the prosecutor would not have felt compelled to include it in her explanation. Thus, mixed-motive explanations are not neutral—that is, they are facially inconsistent with equal protection.[189]

Given that a mixed-motive explanation necessarily fails the step-two neutrality requirement, what is the appropriate response when such an explanation is proffered? 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 done,[190] is an error because *Batson*'s framework was designed to elucidate whether a decision to exercise peremptory strikes was made on the basis of a discriminatory purpose.[191] 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.[192] If that condi-

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188. *Id.* at 360 (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). When a prosecutor admits that she considered race when deciding whether to strike a juror, she seems to acknowledge implicitly that race was at least one of several causal factors in her decision. This implicit acknowledgement is strong evidence that she viewed race as having some bearing on her conduct.

189. *See, e.g.*, Hill v. State, 827 S.W.2d 860, 875 (Tex. Crim. App. 1992) (en banc) (Baird, J., concurring) (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.* at 869 (majority opinion) (rejecting the bright-line rule urged by the concurring opinion in favor of a mixed-motive analysis approach).

190. *See, e.g.*, Leahy v. Farmon, 177 F. Supp. 2d 985 (N.D. Cal. 2001) (holding that *Batson*'s step-two inquiry can be satisfied by articulating race-based and race-neutral rationales for strikes), *rev'd en banc*, Kesser v. Cambra, 465 F.3d 351 (9th Cir. 2006); People v. Howard, 513 N.Y.S.2d 506 (N.Y. App. Div. 1987) (per curiam).

191. *Kesser*, 465 F.3d at 359–60.

192. The conditional nature of *Batson*'s framework has been acknowledged by the Ninth Circuit. *See, e.g.*, Yee v. Duncan, 441 F.3d 851, 860–61 (9th Cir. 2006) (terminating *Batson* inquiry at step two where the prosecutor could not remember her reason for striking a male juror); Boyde v. Brown, 404 F.3d 1159, 1170–71 & n.10 (9th Cir. 2005) (noting that when "a discriminatory intent is inherent in the prosecutor's explanation," the prosecutor

tional requirement were ignored, then there would be no burden at all at step two, and would amount to a wholesale rewriting of *Batson*.

Second, moving to step three propels courts toward the wrong inquiry. In a conventional *Batson* case, the issue at step three is whether the neutral explanation offered by the prosecutor is true.[193] 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, that it was a pretext for an illicit purpose.[194] Likewise, 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" reason.[195]

The dispositive issue in a mixed-motive case, however, is not whether the actor harbored a discriminatory purpose, per *Washington v. Davis*, but whether that purpose had a causal effect.[196] 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*."[197] After all, it may very well be true in a mixed-motive case (indeed, it is presupposed) that the legitimate reasons played a part in the em-

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has failed to satisfy her burden of production, thus ending the *Batson* analysis at step two (quoting *Hernandez*, 500 U.S. at 360 (plurality opinion))). *But see* Bui v. Haley, 321 F.3d 1304, 1317 (11th Cir. 2003) (upholding a strike, notwithstanding the prosecutor's failure to adduce an explanation, based on "circumstantial evidence" suggesting race-neutral grounds for the strike).

193. *See Kesser*, 465 F.3d at 359 ("The question is not whether the stated reason represents a sound strategic judgment, but 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" (quoting *Hernandez*, 500 U.S. at 365 (plurality opinion))).

194. Howard v. Senkowski, 986 F.2d 24, 27–28 (2d Cir. 1993). 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. *Id.* at 27.

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

196. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) (plurality opinion) (noting that an actor "may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision").

197. *Id.* at 247 (citation and internal quotation marks omitted).

ployer'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 truthfulness of any other, neutral justifications asserted by the actor remains relevant; after all, if those reasons prove to be pretextual (that is, if they were invented to cover up for the "true" illegitimate purpose) then there is no possible doubt that the impermissible reason "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, courts should not proceed to a conventional pretext analysis after the proponent of a challenged strike proffers a mixed-motive explanation.[198] The question 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. Although properly rejecting the *Burdine* framework, the *Howard* court's application of the *Mt. Healthy* same-decision test wholly failed to consider whether a showing that an improper purpose was a motivating factor for a strike was itself sufficient to terminate the *Batson* inquiry, or whether the use of mixed motive in the context of a peremptory challenge was consistent with *Batson*'s underlying purposes.[199]

IV. MIXED MOTIVE UNDERMINES *BATSON*

The Second Circuit in *Howard* found it appropriate to use mixed-motive analysis because, it asserted, such analysis had been implicitly sanctioned by the Supreme Court. Citing *Mt. Healthy* and *Arlington Heights*, the *Howard* court contended:

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198. In this case, rejection of the conventional *Burdine* framework is not contrary to the well-established principle that the plaintiff carries the ultimate burden to prove purposeful discrimination, as some have argued. *See id.* at 286–87 (Kennedy, J., dissenting) (noting that *Burdine* makes clear that "[t]he final burden of persuasion . . . belongs to the plaintiff"). Proponents of retaining *Burdine*'s framework in mixed-motive cases have misunderstood the essential purpose of the *Burdine* test: to determine whether discriminatory bias infected the decisionmaking process. 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 that an improper purpose was a substantial factor in the proponent's decision, she has "taken her proof as far as it could go." *See id.* at 272 (O'Connor, J., concurring) (explaining that the plaintiff had met her burden by proving that gender-based stereotypes played a significant role in the defendant's decision).

199. *See Howard*, 986 F.2d at 30 (concluding that a dual-motivation analysis applies to *Batson* challenges, but remanding the case to the district court to apply it).

> 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.[200]

If the Second Circuit's sweeping assertion that a single standard has been utilized in all constitutional cases where 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 not only must prove that race was a "substantial" or "motivating" factor for the legislature's choice of a district's contours, but it must also prove that race was the "predominant" factor.[201] That is, the Equal Protection Clause demands proof not only that race was the but-for cause of the particular lines drawn by the legislature, but that other neutral concerns were "subordinated" to achieve the challenged outcome.[202]

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200. *Id.* at 26.

201. 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.")

202. *See 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."). In *Bush v. Vera*, a redistricting case in which the Court found that producing "minority-majority" districts and protecting incumbents were mixed motives in drawing the challenged districts, the plaintiffs' proof that race influenced the shape of the district was, in itself, insufficient to require strict scrutiny. 517 U.S. 952, 958–59 (1996) (plurality opinion). The Court explained:

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

Id. at 959. According to the plurality, the unique considerations, both of proof and purpose, in the redistricting context were believed to justify a different standard. Under the plurality's standard, the plaintiffs were obligated to prove that race was the "predominant" motive. *Id.* In his concurrence, Justice Thomas observed that the Court's new test was substantially more strict than the but-for causation standard employed in other contexts. *Id.* at 1001 (Thomas, J., concurring) (disagreeing with the plurality's finding 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

Choice of a particular standard for application of strict scrutiny under the Equal Protection Clause, therefore, depends on the context and purpose in which that standard is utilized.[203] Whether the same-decision test found appropriate in other constitutional tort and legislative motive cases should be transferred to *Batson*, therefore, 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, the chosen standard rather than the goals should give way, as the Court's redistricting jurisprudence demonstrates. As the Article establishes 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.

A. Symbolism, Deterrence, and Diversity

The Equal Protection Clause was intended "to put an end to governmental discrimination on account of race,"[204] and *Batson* advances that goal in three ways: it symbolizes official intolerance of discrimination in jury selection; it seeks to deter such discrimination; and it provides marginal incentives not to strike minority jurors and thereby enhances 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.[205] 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;[206] *Batson* was crafted specifically

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majority-minority district is created 'because of,' and not merely 'in spite of,' racial demographics" (emphasis added)).

203. *See Vera*, 517 U.S. at 958 (plurality opinion) (noting that "[o]ur precedents have used a variety of formulations to describe the threshold for the application of strict scrutiny").

204. Batson v. Kentucky, 476 U.S. 79, 85 (1986).

205. *See* Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Color-blindness, and the Jury*, 67 TUL. L. REV. 1807, 1813 (1993) (arguing that "the *Batson* line of cases 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*, 106 HARV. L. REV. 240, 244 (1992) (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 the symbolic value of the *Batson* line of cases—demonstrating courts' "uncompromising hostility to race-based judgments"—is outweighed by the time and energy that scrutinizing race-based challenges diverts from the examination of the merits of the case. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting).

206. Powers v. Ohio, 499 U.S. 400, 415 (1991).

with this goal in mind.[207] The constitutional command to root out discrimination has been treated as 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.[208] *Batson* was fashioned not only to prevent actual discrimination, but also to abolish perceived discrimination and to combat "cynicism" and a loss of "public confidence" in the criminal justice system.[209]

In addition, *Batson* serves a diversity-enhancing function. The exclusion of minority jurors on account of group characteristics "compromis[es] the representative quality of the jury."[210] In holding that the free exercise of peremptory challenges must give way to the antidiscrimination principle, *Batson* signaled that the traditionally unfettered common law/statutory right[211] to peremptory challenges is subordinate to equal protection's constitutional command.[212] 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"[213] that functions as "a kind of affirmative action deemed necessary to overcome deeply entrenched racial discrimination."[214] Under *Batson*, minorities receive special protection against arbitrary removal from the venire. All else being equal, prosecutors have an incentive to strike non-minority jurors rather than minority jurors simply to avoid the chance that the

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207. *See, e.g.*, *id.* ("In . . . *Batson* . . . we noted . . . that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality.").

208. *See, e.g.*, *Batson*, 476 U.S. at 95 ("'A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977))); *see also* Walker v. Girdich, 410 F.3d 120, 123 (2d Cir. 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 antidiscrimination provisions. *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (noting that "[t]he 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.").

209. Miller-El v. Dretke, 545 U.S. 231, 238 (2005).

210. *Batson*, 476 U.S. at 87 n.8.

211. *Id.* at 112 (Burger, C.J., dissenting).

212. *Id.* at 89 (majority opinion).

213. *See* J.E.B. v. Alabama *ex rel.* T.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, 942 (1986) (O'Connor, J., concurring in denial of certiorari))).

214. Charles Nesson, *Peremptory Challenges: Technology Should Kill Them?*, 3 LAW, PROBABILITY & RISK 1, 8 (2004).

defendant might prevail on a *Batson* motion.[215] *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, undermines these symbolic and practical functions. First, by tolerating actual discrimination in jury selection, mixed-motive analysis is inconsistent with the injunction that "[r]acial discrimination has no place in the courtroom."[216] 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.[217] Similarly, excluded jurors themselves 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 members of their group.[218]

Allowing the mixed-motive defense 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

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215. Title VII created precisely the same dynamic. *See* Belton, *supra* note 195, at 1379 (discussing the Court's concern, which was expressed in *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 993–94, 999 (1988) (plurality opinion), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), that minorities may receive preferential treatment by employers).

216. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

217. *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.").

218. Miller-El v. Dretke, 545 U.S. 231, 238 (2005) (explaining that "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication" (quoting *Powers*, 499 U.S. at 412) (citation omitted)).

its hortatory potential to exert a positive influence on the conduct of public officials.[219]

Second, 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 eliminate, so far as possible, the last vestiges" of their discriminatory tactics.[220] 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 nondiscriminatory 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 to attack subterranean discriminatory practices and beliefs that may pervade the wider contextual culture.[221] Given that discrimination in a particular case is likely reflective of an attorney'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.[222] The end product is a vastly underprotective regulatory regime.

Third, mixed-motive analysis diminishes the ability of courts to reinforce the representational quality of juries. Indeed, the use of

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219. *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 jurors is generally not going to be taken very seriously").

220. *See* 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, 417–18 (1975)).

221. In *McKennon v. Nashville Banner Publishing Co.*, the Court noted that the enforcement of age discrimination claims through litigation is important, even absent a showing of but-for causation, because disclosing "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 [Age Discrimination in Employment] Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance." 513 U.S. 352, 358–59 (1995).

222. *Cf.* Katz, *supra* note 165, at 519 (explaining that "[s]ocial scientists would predict that, if undeterred, an employer's minimally 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").

mixed-motive analysis may represent a conscious judicial design to diminish the affirmative-action effects of the *Batson* rule.[223] 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 incentives to adopt quotas or to engage in preferential treatment."[224] 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, consistent with the *Mt. Healthy* framework, 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. These cases demonstrate the ease with which mixed-motive analysis lends itself to the deconstruction of *Batson*'s already skimpy armament.[225] In addition, cases remanded for the purpose of conducting a mixed-motive analysis have typically resulted in affirmance, sug-

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223. *See* Belton, *supra* note 195, at 1364 (arguing that the Supreme Court's employment discrimination decisions dealing with causation and burden-shifting doctrines were the product of the conservative majority's "fundamental objection to affirmative action in any form").

224. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion).

225. *See, e.g.*, King v. Moore, 196 F.3d 1327, 1334–35 (11th Cir. 1999) (affirming the state court's denial of a *Batson* motion where the prosecutor proffered a mixed-motive explanation and the state court did not apply the burden-shifting framework specified in *Mt. Healthy*, basing its decision on its "interpretation" of the trial court's findings as implicitly satisfying the standard); Wallace v. Morrison, 87 F.3d 1271, 1275 (11th Cir. 1996) (per curiam) (accepting the district court's implicit findings that the state court made necessary factual findings under the correct legal standard, notwithstanding the state court's failure to apply the 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 to argue specifically for the application of the mixed-motive standard in order to preserve the claim on appeal. This reasoning appears consistent with a finding that the mixed-motive defense is an "affirmative defense," which normally is deemed waived when not raised by the party that is entitled to the defense. *See* State v. Hodge, 726 A.2d 531, 544–45 (Conn. 1999) (declining to consider a newly raised dual-motivation claim on appeal given that the only assertion made by the defendant in trial court was that "the reasons articulated by the state's attorney compelled the conclusion that the state's attorney had engaged in purposeful discrimination," and where the "trial court [had] expressly found that the reasons given by the state's attorney for striking the six minority venirepersons were not pretextual").

gesting that the mixed-motive framework performs little more than a rubber-stamping function.[226]

In short, a jury-selection process that tolerates discriminatory bias in any form does not clearly and unmistakably communicate the message that discrimination is unacceptable, and it does not serve the function of effectively deterring discrimination. 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 analysis sends to the larger community is that racism and sexism in jury selection 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."[227] As the Court explained, *Swain*'s requirement that evidence 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."[228] As a result, after *Swain*, a prosecutor's peremptory challenges remained "largely immune from constitutional scrutiny."[229] *Batson* directed courts to abandon the focus on the systematic practices of the prosecutor and find 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 barrier

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226. 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 City Sch. Dist. Bd. of Educ., 670 F.2d 59, 61 (6th Cir. 1982) (per curiam) (affirming finding that the Board would have dismissed Doyle even if it had not considered his exercise of his protected speech rights); People v. Howard, 601 N.Y.S.2d 548, 552–53 (Nassau County Ct. 1993) (finding, on remand, that the prosecutor would have taken the "same action" of striking the juror notwithstanding his admission that "race was a factor"). *But see* Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1207 (D.D.C.) (affirming judgment for Hopkins under mixed-motive standard), *aff'd*, 920 F.2d 967, 982 (D.C. Cir. 1990).

227. *See* Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986); *see also* Miller-El v. Dretke, 545 U.S. 231, 239 (2005) (noting that *Batson* was decided in the wake of the recognition that "*Swain*'s demand to make out a continuity of discrimination over time . . . [was] difficult to the point of unworkable").

228. *Batson*, 476 U.S. at 92.

229. *Id.* at 92–93.

against purposeful discrimination.[230] After all, to sustain her burden of production at step two, the proponent of a strike need not articulate a persuasive or plausible reason, only one that is not itself facially discriminatory.[231] As Justice Marshall observed in his *Batson* concurrence, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."[232] 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.[233] Mixed-motive analysis compounds this problem and thus 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 to shed much light on the question of whether an explanation is credible. But the evidentiary problems are greatly increased 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 constituting 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.[234] It is invariably difficult for 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 miscon-

230. *See Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1475, 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").

231. Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam).

232. 476 U.S. at 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 Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993).

233. *See* Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460 (1996) (discussing the low success rate of *Batson* claims in reported cases from 1986 to 1993 and surmising that this result may be because "it is too easy for the responding party to offer neutral explanations").

234. Kesser v. Cambra, 392 F.3d 327, 344 (9th Cir. 2004) (Rawlinson, J., dissenting), *rev'd en banc*, 465 F.3d 351 (9th Cir. 2006).

duct.[235] As a result, courts have an inherent disincentive to uphold *Batson* challenges. Given the acknowledged difficulty of identifying outright prevarication, at a 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 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 a challenged 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.[236] 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."[237]

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. The prosecutor's explanation must therefore be evaluated in light of its self-serving nature, and one could logically infer that the admission of any improper motive is much more significant than the articulation of purportedly neutral reasons. Although attorneys can be expected to attempt to justify their strikes by providing neutral reasons, an admission by a prosecutor that race or gender was a motivating factor is "direct evidence" of a discriminatory motive, and as Justice O'Connor pointed out in *Price Waterhouse*, direct evidence of discrimination has great persuasive force.[238] Indeed, in a Title VII case the defendant may not

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235. Robin Charlow, *Tolerating Deception and Discrimination After* Batson, 50 STAN. L. REV. 9, 42 (1997); *see also* Anderson, *supra* note 143, at 373–74 (noting that *Batson* objections involve challenges to the integrity of lawyers).

236. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981).

237. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2302–03 n.239 (1995).

238. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 270–71, 275–76 (1989) (O'Connor, J., concurring) (arguing that the mixed-motive test's burden shifting should occur only

rebut the plaintiff's prima facie case "merely through an answer to the complaint or by argument of counsel."[239] Instead, the defendant must produce evidence that supports his proffered explanation.[240] 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. Mixed-motive analysis in such a context builds a virtual castle of purported factual inquiry out of nothing but self-serving conjurations.[241] As Justice Marshall argued, "[a] judicial inquiry designed to safeguard a criminal defendant's basic constitutional 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."[242]

It also is important to acknowledge the context in which the dispute is played out.[243] In a *Batson* dispute, a minority juror necessarily has been struck under circumstances giving rise to "an inference" of discrimination.[244] The prosecutor has been called to explain the basis for the strike—that is, the alleged wrongdoer has been asked the ques-

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upon the introduction of direct evidence of an improper motive); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that Title VII, as amended in 1991, does not require "direct evidence" to prove mixed motive); Brest, *supra* note 163, 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").

239. *Burdine*, 450 U.S. at 255 n.9.

240. *See id.* at 255 & n.9 (stating that the defendant has a burden of *production* and that "[a]n articulation not admitted into evidence will not suffice" to rebut the plaintiff's prima facie case).

241. Again, comparison with Title VII cases is instructive. In contrast to equal protection claims, a Title VII plaintiff may prevail by demonstrating that an employment practice has a disparate impact on a minority group. In *Wards Cove Packing Co. v. Atonio*, the Court instructed the lower courts on remand that a plaintiff cannot establish a prima facie case based on statistical evidence of disparate impact alone. 490 U.S. 642, 657 (1989). Rather, the plaintiff must also demonstrate that "the disparity [he] complain[s] of" was caused by a specific, challenged employment practice. *Id.* In explaining why this proof of causation requirement is not 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," and administrative regulations require employers to maintain records detailing the impact of the selection process on employment opportunities of persons of different race, sex, or ethnic group. *Id.* at 657–58. 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.

242. Wilkerson v. Texas, 493 U.S. 924, 927–28 (1989) (Marshall, J., dissenting from denial of certiorari).

243. *See* Batson v. Kentucky, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) (stating that "unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case").

244. *See* Johnson v. California, 545 U.S. 162, 168 & n.4 (2005) (explaining that step one of *Batson* only requires evidence giving rise to an inference of discrimination).

tion, 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.

Indeed, 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.[245] A mixed-motive *Batson* case, therefore, 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.[246] As one court embracing the taint approach has stated, "[t]o 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."[247]

2. *Unconscious Discrimination*

Not only is the foundation for the mixed-motive 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 subconscious or instinctive motivations that prompt the exercise of peremptory strikes on the basis of relatively intangible criteria.[248] The necessary finding in a case in which the prosecutor

245. The 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 the 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.

246. The Second Circuit expressed concern that permitting mixed-motive analysis 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) ("The cynical might suggest that prosecutors will take from our ruling [requiring 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."). In fact, however, the mixed-motive defense allows prosecutors to retain their biases rather than work to overcome them.

247. Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998).

248. *See* Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 235 (2005) (concluding that it is difficult for attorneys "to correctly identify the factor that caused them to strike or not strike a particular potential

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 discriminatory impulse 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 always entirely honest and open about their motivations for striking jurors, there are powerful reasons to believe that much discrimination occurs at the subconscious level. Like all people, lawyers undoubtedly form negative impressions about others based on a wide array of factors, only some of which may be articulable. Often, the factors that trigger these negative assessments may be illicit criteria such as race, ethnicity, or gender. A well-intentioned lawyer thus may not only be unaware that her discomfort with a particular juror is race-based, but might sincerely deny the allegation. Indeed, believing herself to be part of the "liberal" and "tolerant" class, such a lawyer might be deeply offended by the suggestion. To explain her impressions, she might even lie to herself and 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;[249] he was "sullen" or "distant";[250] 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, or his television viewing habits.[251] As Justice Marshall observed, "prosecutors' peremptories are based on their 'seat-of-the-pants instincts,'" and such instincts may be nothing more than "racial prejudice."[252] Taking equal protection seriously means recognizing both the conscious and subconscious sources of discrimination. "Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to

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juror" and that a prosecutor may "plausibly believe[ ] she was actually striking on the basis of a race- or gender-neutral factor").

249. *Cf.* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (noting that "an attorney may lie to himself in an effort to convince himself that his motives are legal" (quoting King v. County of Nassau, 581 F. Supp. 493, 502 (E.D.N.Y. 1984))).

250. *See id.* (internal quotation marks omitted) (providing an example of how a striking attorney may unconsciously discriminate by characterizing persons of one race as having certain qualities but not persons of another race even if they acted identically).

251. For a discussion of the problem of unconscious bias and the inadvertent application of nominally neutral criteria in a systematically biased fashion, especially in the workplace, see Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1135–45 (1999).

252. *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

confront and overcome their own racism on all levels . . . ."[253] Unfortunately, there is little evidence that much progress has been made toward overcoming subconscious racial bias, and little reason to hope that it will be overcome 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.[254] Mixed motive merely establishes a convenient 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 juror's race.[255] The *Batson* Court reasoned, "[i]f these

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253. *Id.* Justice Marshall also added that overcoming unconscious racism was "a challenge I doubt all [parties] can meet." *Id.*

254. *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, 49 (1990) (arguing that "[i]f racial 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 Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987)) (footnote omitted)).

255. *Batson*, 476 U.S. at 97–98. In *Johnson v. California*, 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. 545 U.S. 162, 172–73 (2005). The Court also explained that a prosecutor's failure to adduce an explanation for the strike at step

general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'"[256] 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 plaintiff will have a full and fair opportunity to demonstrate pretext."[257]

An adequate explanation, the Court has repeatedly emphasized, must 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."[258] Explanations that lack these characteristics fail the basic purpose of burden allocation, which is to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination."[259] Like summary denials of discriminatory intent, long, multi-faceted, and disjointed explanations that are neither clear nor reasonably specific do anything but sharpen the inquiry,[260] and thus significantly detract from *Batson*'s purposes.

4. Counterfactual Speculation

Finally, the counterfactual nature of the mixed-motive inquiry poses a daunting obstacle to any meaningful resolution of the causation question.[261] Determining whether one motive was a but-for cause

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two would be a powerful confirmation that the inference of discrimination was correct. *Id.* at 171 n.6.

256. *Batson*, 476 U.S. at 98 (quoting Norris v. Alabama, 294 U.S. 587, 598 (1935)).

257. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981). 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.* at 255.

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

259. *See Burdine*, 450 U.S. at 255 n.8 (noting the reason for burden allocation and the creation of a presumption in a Title VII case).

260. Miller-El v. Dretke, 545 U.S. 231, 239 (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].'" (alteration in original) (quoting *Batson*, 476 U.S. at 98 n.20)).

261. Assessments of causation are highly intertwined with counterfactual reasoning, and they are subject to change based on changing counterfactual assumptions. *See generally* Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual ("But For")*

of a decision is notably more difficult than resolving the question of whether a given explanation is credible. Under a 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 this 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."[262] As one scholar noted: "It 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."[263]

Perhaps even more so than in other contexts, 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. 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. After all, the decision to strike one juror depends on the comparative attractiveness of the other jurors in the venire. To make a meaningful determination of what would have occurred, therefore, the court must consider the prosecutor's perceptions of the merits and demerits of all the other jurors who were not struck.[264] Of course, there normally will be no record of those assessments, and thus (except in the rare case where the neutral reasons

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and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions, 64 LAW & CONTEMP. PROBS. 241 (2001).

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

263. *Id.*

264. 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 (Tex. Crim. App. 2002) (en banc) (Womack, J., dissenting) (describing the inherent difficulty of speculating whether any particular juror would have been struck in the absence of discriminatory animus given the nature of Texas' "blind struck-jury" system in which each party privately strikes jurors by ranking the desirability of each juror on a list).

given for a strike are based on truly glaring deficiencies), there rarely will be any basis for a court to assess the but-for question. Inevitably, its decision will depend on little more than its own intuitive hunch about how jury selection is unfolding.[265] 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, mixed-motive analysis simply cannot be reconciled with *Batson*'s 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 similarly replicates these evidentiary hurdles.

V. RECLAIMING THE SUBSTANTIAL FACTOR TEST

Not only does the 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' insistence on but-for causation is not appropriate in an antidiscrimination regime designed to root out invidious bias rather than to compensate victims. *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.

A. The Logic and Limits of the Title VII Analogy

Title VII has long served as a procedural guidepost in devising mechanisms to adjudicate allegations of discrimination in jury selection. In fact, *Batson*'s architecture was borrowed almost wholesale

265. *See* Wilkerson v. Texas, 493 U.S. 924, 927 (1989) (Marshall, J., dissenting from denial of certiorari) (asking "how is the factfinder to uncover the prosecutor's intuitive reservations regarding the unchallenged white jurors" when "[n]o record memorializes the prosecutor's contemporaneous justifications for failing to challenge a juror," and noting that "given the purely subjective nature of peremptory challenges, such a record could not be made").

from two leading Title VII intentional discrimination cases, *McDonnell Douglas Corp. v. Green*[266] and *Texas Department of Community Affairs v. Burdine*.[267] Jurisprudentially speaking, it makes sense to look to Title VII as a guide because the fundamental dynamics in the two contexts are remarkably similar.[268] As the *Batson* Court framed it, the central issue in a peremptory challenge case is whether a juror was excluded "on account of [her] race."[269] Title VII, which is part of a broader fabric of employment discrimination law intended to eradicate discrimination from private employment decisionmaking,[270] 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."[271]

The essential regulatory problem in Title VII is very similar to that in *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.[272] As a result, Title VII permits employers to make employment decisions based on any criteria except those specifically enumerated by statute.[273]

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266. 411 U.S. 792 (1973).

267. 450 U.S. 248 (1981).

268. *See* Batson v. Kentucky, 476 U.S. 79, 94–98 nn.18–21 (1986) (noting the relevance of Title VII "disparate treatment" cases to "the operation of prima facie burden of proof rules," parameters of neutral explanation, and ultimate inquiry regarding intentional discrimination).

269. *Id.* at 89.

270. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995) (noting that the Age Discrimination in Employment Act of 1967 "is but part of a wider statutory scheme to protect employees in the workplace nationwide").

271. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added). This statutory language parallels the provision in the fourth section of the Civil Rights Act of 1875 that deals with jury selection: "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 (1880) (Field, J., dissenting) (quoting Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37).

272. United Steelworkers of Am. v. Weber, 443 U.S. 193, 207 (1979) (noting that Title VII was not intended to "diminish traditional management prerogatives").

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

Peremptory challenges, which have a historical pedigree as long as the "at will" presumption in master-servant law,[274] also assume unchecked discretion. Like the traditional authority of employers to hire and fire without having to provide cause, peremptory challenges need not be based on objective criteria, do not have to be explained or defended, and are not subject to "judicial scrutiny."[275] Just as Title VII did not impose a "for cause" requirement on employment relations, *Batson* did not supplant the peremptory challenge regime with a "for cause" system of strikes.[276] 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.[277] Peremptories have traditionally permitted the exclusion of jurors "for any reason or no reason" at all,[278] and *Batson* 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 long-recognized similarities in the two domains of law, the solution Congress adopted in the Civil Rights Act of 1991 to the mixed-motive problem under Title VII provides a ready-made roadmap to resolve the mixed-motive problem in *Batson*. 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. Healthy*'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 rejecting *Price Waterhouse*'s holding and clarifying that liability ensues whenever an employer relies upon a prohibited criterion in making an employment decision, regardless of whether or not the

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274. *See* Swain v. Alabama, 380 U.S. 202, 212–14 (1965) (explaining that peremptory challenges have "very old credentials," were employed in England "[i]n all trials for felonies at common law," and were recognized by Congress early on in the history of the United States).

275. *See id.* at 211–12.

276. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986) (stressing "that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause"). Justice Marshall, however, argued in his *Batson* concurrence that the only way to prevent discrimination in jury selection is to eliminate peremptories entirely and limit strikes to cause. *See id.* at 102–03 (Marshall, J., concurring). Justice Breyer has made a similar argument in several recent cases. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) ("I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.").

277. *See Price Waterhouse*, 490 U.S. at 239 n.4 (plurality opinion) (noting that Congress, in enacting Title VII, expressly deleted the phrase "'for cause' . . . in favor of the phrase 'for any reason other than' one of the enumerated characteristics").

278. United States *ex rel.* Darcy v. Handy, 351 U.S. 454, 462 (1956).

"same decision" might have been made absent the criterion, Congress indicated a strong preference for a regulatory model that is much less forgiving of discrimination.[279] As a result, proof that a prohibited criterion was a "motivating factor" for an employment decision now suffices to establish a violation under the Act.[280] The Civil Rights Act of 1991 thus underscores that the interpretive emphasis should be on the employer's actual motivation rather than the strict question of causation.

Given the substantial parallels, a comparable standard is warranted in mixed-motive *Batson* cases. A *Batson* violation should be deemed complete upon a showing that an improper bias was a motivating factor in the decision to strike a juror. The additional inquiry into but-for causation is superfluous to the deterrent antidiscrimination purpose of *Batson*, and just like in Title VII cases, permitting a same-decision defense to liability unduly waters down *Batson*'s basic purposes.

B. Substantial Factors and Multiple Sufficient Causation

An approach that identifies a *Batson* violation upon a showing that an improper purpose was a substantial factor in the decision to strike also is consistent with causation standards expressly developed to serve broader equitable purposes. 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 also contributed to or caused the injury should not preclude recovery.[281] As Justice Brennan noted in *Price Waterhouse*, a "causally overdetermined" event is, nonetheless, still the product of the causes that brought it about.[282] Such cases are often said to involve "multiple sufficient causes."[283]

As discussed previously, 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.

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279. *Price Waterhouse* held that an employer that succeeded in proving that it would have made the "same decision" was not liable at all. 490 U.S. at 242 (plurality opinion). Congress abrogated *Price Waterhouse* when it enacted the Civil Rights Act of 1991, which, inter alia, amended Title VII of the Civil Rights Act of 1964. *See supra* note 69.

280. 42 U.S.C. § 2000e-2(m) (2000).

281. Carpenter, *supra* note 33, at 941; *see also* RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) (setting out the substantial factor test as an exception to the but-for cause requirement); *supra* notes 33–35 and accompanying text.

282. 490 U.S. at 241 (plurality opinion).

283. *See* David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1129–30 (1999) (discussing multiple-sufficient-cause cases).

For example, imagine that two campers negligently light campfires in a dry area.[284] The fires converge, burning out of control, and cause 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.[285] 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-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."[286] Some courts may decline to hold a defendant liable where an innocent source would have independently caused the loss, on the grounds that doing so puts the plaintiff in a better position than he would have been in absent the tortious conduct.[287] 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, which also would have burned out of control. If *A* is held liable for the fire, then a plaintiff suing under a tort theory is in a better position than he would have been in if *A* had not done

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284. *See* Katz, *supra* note 165, at 497–98 (presenting the well-known "two-fires hypothetical").

285. Fischer, *supra* note 283, at 1149–50. In the classic multiple-sufficient-causation case, *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), two hunters negligently shot in the direction of a third hunter, who suffered several gunshot wounds as a result. *Id.* at 1–2. Finding both hunters negligent, the court relieved the plaintiff of the burden to prove that either of the hunters was the but-for cause of plaintiff's injury and held each hunter jointly and severally liable. *Id.* at 5. Similarly, *Corey v. Havener*, 65 N.E. 69 (Mass. 1902), involved two motorcyclists who simultaneously passed a rider on horse-drawn wagon, frightened the horse, and caused injury to the driver. *Id.* at 69. Both motorcyclists were liable even though neither of their respective negligent acts was the but-for cause of plaintiff's injury. *Id.*

286. Fischer, *supra* note 283, at 1130; *see also Price Waterhouse*, 490 U.S. at 263–64 (O'Connor, J., concurring) (noting that courts, applying the multiple causation rule in cases where an innocent cause combines with a wrongful one, shift the burden of proof to the defendant to prove that his conduct was not the legal cause of the harm).

287. *See* Katz, *supra* note 165, at 512–14 & n.92 (discussing windfalls to plaintiffs as a problem with applying a minimal causation standard).

anything, because the lightning would have caused the forest to burn in any event.

As Martin Katz argues, in this situation one party receives a windfall no matter which causation standard is invoked.[288] 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,[289] it is technically more analogous to the latter problem 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.

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,[290] and as such, the causation standards applicable to intentional torts are more relevant than those applicable to negligent ones. Where the actor's conduct is intentional, tort law has long preferred the more relaxed causation standard rather than the more stringent but-for causation requirement in cases of multiple tortious causes where a wrongful cause accompanies an innocent one.[291] In

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288. *See id.* at 521 (noting that where two sufficient causes trigger the harm, "someone—either the plaintiff or the defendant—will always receive a windfall").

289. *See Price Waterhouse*, 490 U.S. at 241 (plurality opinion) (analogizing mixed-motive employment decisions to cases of multiple sufficient causes); *id.* at 263–64 (O'Connor, J., concurring) (comparing the burden of proof in mixed-motive employment decision cases to multiple causation cases).

290. 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").

291. *See* W. PAGE KEETON ET AL., PROSSOR AND KEETON ON THE LAW OF TORTS § 8, at 37 (5th ed. 1984) (noting the "definite tendency to impose greater responsibility" on an intentional tortfeasor); *see also* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1279–80 n.133 (2003) (stating that "[b]ecause of the state of mind

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 . . . a substantial factor in causing the harm."[292]

An attorney who strikes a juror for mixed motives in a *Batson* case acts with the purpose and effect of causing the harmful result, excluding the juror from the venire, and triggers *Batson*'s deterrent purposes.[293] The presence of this wrongful motive certainly increases the likelihood that the juror will in fact be excluded, even if there are other reasons or motives that also contributed to the juror's exclusion.[294] 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,"[295] places a priority on rooting out wrongful conduct rather than limiting damages, and it bars actors who have been proven to have acted wrongfully from escaping a liability determination simply because they can show that other causative forces were at work.[296] Such an approach is much more consistent with the categorical language of equal protection, and it is more faithful to the courts'

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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 . . . [from] 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, 55 & n.234 (2002) (observing that causation standards in intentional tort cases are easier to satisfy than in unintentional tort cases).

292. RESTATEMENT (FIRST) OF TORTS § 870 cmt. c (1939).

293. *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.").

294. *See* Katz, *supra* note 165, at 518–19 (noting that in the Title VII context, the use of improper criteria in decisionmaking, regardless of but-for causation, is harmful because "the utilization of protected characteristics increases the risk of an adverse ultimate employment decision").

295. Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 668–69 (2001).

296. *See* Blumoff & Lewis, *supra* note 254, at 48 (discussing the multiple causation doctrine and policy concerns undergirding courts' inclination to find liability even where a defendant did not in fact cause the injury).

long-established efforts to root out discrimination from jury selection than a mixed-motive analysis that emphasizes windfall prevention.[297]

The substantial factor standard helpfully supplements the taint approach adopted by several courts. 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. This stringent regime, however, 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,[298] 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.[299] The substantial factor test, as used in Title VII liability

297. 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 in a mixed-motive case. 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 that 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 both to warm himself *and* 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 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.

298. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 346–47 (2003) (explaining that discriminatory jury-selection practices "tend[ed] to erode the credibility of the prosecution's assertion that race was not a motivating factor in the jury selection"); Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (noting that the decisionmaker must have acted "at least in part 'because of' . . . [the action's] adverse effects upon an identifiable group" to have the discriminatory intent required for an equal protection violation (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)) (internal quotaton marks omitted)).

299. As the Supreme Court of South Carolina reasoned, "any consideration of discriminatory factors in this decision is in direct contravention of the purpose of *Batson* which is to

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.

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. Although some might object that the adoption of the test would further limit the discretionary nature of peremptory challenges, at least one sitting Justice is on record as opposing the institution of peremptory strikes altogether.[300] Rejection of the mixed-motive analysis, and reliance on 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 empanelled. The converse is not true. Widespread recognition of the availability of the mixed-motive defense might lead to broad changes in the way prosecutors respond at step two of the *Batson* inquiry, and it 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 limits its role to the choice of remedies. Title VII actions, and constitutional tort cases like *Mt. Healthy*, routinely involve potentially large compensatory awards. Momentous effects on the plaintiffs' careers (such as tenure for Doyle in *Mt. Healthy* and partnership for Hopkins in *Price Waterhouse*) often hinge on the outcome. 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, because of the plaintiffs' alleged performance deficiencies. The but-for causation rule protects one wrongdoing party from being obligated to compensate another

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ensure peremptory strikes are executed in a nondiscriminatory manner." Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998).

300. *See* Miller-El v. Dretke, 545 U.S. 231, 266–69 (2005) (Breyer, J., concurring) (discussing "the practical problems of proof" of a *Batson* challenge and noting that "peremptory challenges seem increasingly anomalous in our judicial system").

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 remedies doctrine 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. Even more than tort and other actions for monetary damages, enforcement of the exclusionary rule "provides some defendants with a windfall."[301] Because of the strong public policy 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 must be narrowly applied. 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 "[g]overnment to convince the trial court that its proof had an independent origin,"[302] that it inevitably would have been discovered,[303] or that some intervening independent cause rendered the connection between the unlawful conduct and the outcome "so attenuated as to dissipate the taint."[304] 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. These limitations on the poisonous tree doctrine were adopted even though their availability inevitably diminishes the marginal deterrent value of the exclusionary rule and raises concerns regarding the judicial integrity of the tribunals that admit such evidence.[305]

Whereas tort law balances the goals of corrective justice by optimally apportioning the costs of accidents among the parties,[306] the constitutional criminal procedure cases invoked by then-Justice Rehnquist in *Mt. Healthy* reflect a concern with fashioning the least intru-

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301. Karlan, *supra* note 219, at 2015; *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 28–29 (1997) (characterizing the exclusionary rule as overcompensating some defendants).

302. Nardone v. United States, 308 U.S. 338, 341 (1939).

303. Nix v. Williams, 467 U.S. 431, 440–50 (1984) (adopting and applying the inevitable discovery exception to the exclusionary rule).

304. Wong Sun v. United States, 371 U.S. 471, 491 (1963) (quoting *Nardone*, 308 U.S. at 341) (internal quotation marks omitted).

305. *See, e.g.*, Segura v. United States, 468 U.S. 796, 817 (1984) (Stevens, J., dissenting) (arguing that the independent source exception to the poisonous tree doctrine "provide[s] government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home").

306. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

sive remedial scheme consistent with the goal of deterring unconstitutional conduct.[307] Given the virtual absence of any 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 cases' emphasis on deterrence places the analytical focus on the wrongdoer rather than the victim. Remedies are designed with an emphasis not on restoring the victim to the position he would have been in "but for" the wrongdoing, but on 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,[308] 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 criterion actually affected the outcome of the case or otherwise harmed the defendant.[309]

Unlike exclusionary rule cases or actions for monetary damages, enforcement of the *Batson* right at trial does not result in any obvious tangible gain for the defendant.[310] One of the premises of *Batson* is

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307. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286–87 (1977). As Justice Stevens explained, the Court has not mechanically applied the exclusionary rule "to every item of evidence that has a causal connection with police misconduct." *Segura*, 468 U.S. at 829 (Stevens, J., dissenting). Rather, Justice Stevens noted that "[t]he 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 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) (internal quotation marks omitted)).

308. The defendant's interest in assuring that members of his racial group are not discriminatorily excluded was the initial harm that equal protection doctrine acknowledged. *See* Neal v. Delaware, 103 U.S. 370, 394 (1880) (stating that a "colored citizen" has the 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 discrimination against them because of their color" (quoting Virginia v. Rives, 100 U.S. 313, 323 (1879)) (internal quotation marks omitted)).

309. *See* Powers v. Ohio, 499 U.S. 400, 427 (1991) (Scalia, J., dissenting) (criticizing the majority's decision to permit *Batson* challenges where the defendant and the struck juror were not members of the same racial group because the majority "does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm").

310. For example, compare *Batson* motions with Fourth or Fifth Amendment suppression motions. In the latter cases, the defendant who prevails at the suppression hearing

that exclusions predicated on race, ethnicity, or gender are illogical and, therefore, reliance on such criteria does not 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, a 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.[311] 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, thereby enhancing the public perception of integrity, fairness, and impartiality of the jury system. The proper enforcement of *Batson* claims by the trial court thus does not threaten to reward defendants with any windfall.

Admittedly, 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.[312] 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.[313] The harmless error doctrine has been developed to address this different kind of

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obtains a substantial benefit: the exclusion of probative evidence. The suppression remedy is so potent, in fact, that in practice it often results in the dismissal of charges altogether.

311. The two remedies for a *Batson* violation detected during jury selection are: (1) overruling the strike and empanelling the juror, and (2) calling a new venire. Although the latter remedy is certainly more onerous than the former, it is still far less onerous than retrial. *See* Pizzi & Hoffman, supra note 131, at 1435–36 (describing trial court remedies to correct jury selection error and noting that "once a decision favorable to the [*Batson*] challenger is made the corrective action is easy").

312. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 791 (1999) (arguing that, because *Batson* violations are not subject to harmless error review, "the perception of windfall is heightened when the defendant successfully challenges a conviction on appeal").

313. This distinction may not seem so significant to appellate courts, which must decide whether to penalize an apparent violation with the reversal remedy, because they cannot "calibrate the remedy." *See* Karlan, *supra* note 219, at 2015. As a result, appellate courts are undoubtedly tempted to "fudge on the right instead." *Id.*

windfall problem, but for reasons discussed below, that doctrine has not been applied to *Batson* violations and, for those 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 had an impact on the outcome. Such types of "trial errors" include the admission of improper evidence,[314] errors in instructing the jury,[315] and improper comments to the jury.[316] However, errors the effects of which are impossible to trace (such as the total deprivation of the right to counsel)[317] or which trench upon interests unrelated to the reliability of the proceedings (such as a violation of the right to a public trial)[318] are not subject to harmless error review because they are considered "structural errors." Like the failure to provide counsel to a defendant, *Batson* errors are structural errors, the effects of which are impossible to isolate or trace.[319] Given the practical impossibility of proving that the exclusion of any one juror would have changed the outcome at trial, adopting the harmless error doctrine in *Batson* cases would effectively remove appellate review of *Batson* claims. To combat this result, when an appellate court finds a *Batson* violation, it results in a per se reversal.[320] Although automatic reversal is a serious threat, and might

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314. *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249 (1988) (holding that the admission of evidence in violation of the Sixth Amendment's right to counsel is harmless error in a capital sentencing proceeding).

315. *See, e.g.*, Carella v. California, 491 U.S. 263, 266 (1989) (per curiam) (finding that an erroneous jury instruction containing conclusive presumption as to elements of a criminal offense could be harmless error).

316. *See, e.g.*, United States v. Hasting, 461 U.S. 499 (1983) (holding an improper comment regarding the defendant's invocation of his right to silence to be harmless error).

317. *See* Arizona v. Fulminante, 499 U.S. 279, 309 (1991) (describing the complete deprivation of the right to counsel as a structural error that is not subject to harmless error review).

318. *See* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (finding that defendants are not required to prove specific prejudice when deprived of the intangible benefits of a public trial).

319. *See Fulminante*, 499 U.S. at 309–10 (characterizing "unlawful exclusion of members of the defendant's race from a grand jury" as part of the "category of constitutional errors which are not subject to harmless error" review).

320. *See, e.g.*, United States v. Santos, 201 F.3d 953, 959–60 (7th Cir. 2000) (noting that structural errors are necessarily reversible per se); Tankleff v. Senkowski, 135 F.3d 235 (2d Cir. 1998) (holding that a *Batson* claim "is a structural error that is not subject to harmless error review"); *see also* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 544 (noting

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 that have adopted mixed-motive analysis, including *Howard v. Senkowski*, involved pre-*Batson* trials. Undoubtedly, courts are naturally hesitant to overturn convictions where there is no evidence of knowing misconduct on the part of the prosecutor or where there is no 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.[321] 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 allowed courts 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 reasons similar to those that preclude harmless error review in *Batson* cases generally, that argument should not be permitted in the mixed-motive context. 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

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critically that "[t]he 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").

321. The same dynamic was apparent in the wake of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 447, 450–52 (1974) (reversing the exclusion of witness testimony in a pre-*Miranda* case where the witness's identity was learned through police interrogation, notwithstanding the failure of the interrogating officers to administer one of the *Miranda* warnings, and where there was no reason for the officer to know that a fourth warning was required).

criteria to escape sanction by convincing a court that they would have made the "same decision" anyway effectively "shields wrongdoers from liability."[322] A strict prohibition is easier to implement and preserves the role of appellate courts in policing jury selection to effectuate the goals of equal protection. In addition, appellate courts' 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* also 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 by articulating a different justification for it, the initial finding of unconstitutionality will seem rather pointless.[323] The mixed-motive 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 to justify them. Unlike in the legislative context, where nothing stops the legislature from reenacting the same bill, prosecutors who lose

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322. *See* Katz, *supra* note 165, at 517 (noting the common criticism of the but-for causation standard in the Title VII context).

323. *See* Palmer v. Thompson, 403 U.S. 217, 225 (1971) (explaining that it is rather futile for courts "to invalidate a law because of the bad motives of its supporters. If 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 163, at 126 (presenting the argument that judicial review of legislative motives is an exercise in futility, given that "a particular decisionmaker whose law is once struck down because it was illicitly motivated will readopt the law, retaining his illicit motivation but taking care to conceal it").

Batson motions may not strike the same juror again after they think up a better reason.[324] 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 that 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 prevail upon demonstration that "race or another forbidden criterion was a motivating factor in the decision."[325] *Batson*'s nonremedial purposes are better served by a rule that precludes the use of peremptory strikes that are even in part motivated by discriminatory animus.[326] 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 her race, ethnicity, or gender, and that the criminal justice system itself remains unblemished by discriminatory animus.

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324. Not only does the prosecutor lack a second chance to strike a juror when a *Batson* objection is upheld, she also cannot "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* Miller-El v. Dretke, 545 U.S. 231, 252 (2005) ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis."); Johnson v. California, 545 U.S. 162, 172 (2005) ("'[I]t does not matter that the prosecutor might have had good reasons . . . [;] [w]hat matters is the real reason they were stricken.'" (quoting Paulino v. Castro, 371 F.3d 1083, 1090 (9th Cir. 2004)) (alteration in original)).

325. Brodin, *supra* note 220, at 317 (arguing that the deterrent goals of Title VII counsel against requiring plaintiffs, for liability purposes, to "go beyond proving" that a "forbidden criterion was a motivating factor in the decision").

326. Consider the following argument in favor of tort law's 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?

Malone, *supra* note 262, at 91.

VI. CONCLUSION

The expansion and consolidation of the *Batson* doctrine represents a widespread legal and social recognition that discrimination on the basis of race, ethnicity, or 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 this standard 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 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.'"[327] 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.[328] Because there is no opportunity to take discovery, no ability to examine the prosecutor directly, and no other way to substantiate a discrimination claim ex-

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327. United States v. De Gross, 913 F.2d 1417, 1421 (9th Cir. 1990) (quoting Peters v. Kiff, 407 U.S. 493, 502 (1972) (plurality opinion)).

328. *See* Miller-El v. Cockrell, 537 U.S. 322, 339–40 (2003) (noting that *Batson* challenges require the trial court to evaluate the state of mind of the prosecutor, an issue on which there will often be very little evidence).

cept 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.[329] 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.

329. *See* Batson v. Kentucky, 476 U.S. 79, 85 (1986); *see also supra* Part IV.