The Tainted Decision-Making Approach: A Solution for the Mixed Messages *Batson* Gets from Employment Discrimination

Lisa M. Cox
NOTES

THE "TAINTED DECISION-MAKING APPROACH": A SOLUTION FOR THE MIXED MESSAGES BATSON GETS FROM EMPLOYMENT DISCRIMINATION

INTRODUCTION

The decision in Batson v. Kentucky recognizes the defendant's right to challenge the prosecution's peremptory challenges if it is shown the prosecutor is using the challenges to discriminate against potential jurors on the basis of race. After a showing of possible discrimination, the prosecutor has the opportunity to give a legitimate reason for his strike. Sometimes the prosecutor will defend his strike by giving mixed motives that include a race-neutral and a race-based reason. Mixed motives are problematic because they include a race-based reason that the Batson decision prohibits, along with a race-neutral reason that standing alone would be an acceptable reason to exercise a peremptory challenge.

Courts have taken two approaches when dealing with challenges that evince mixed motives: the "dual motivation" approach and the "tainted decision-making" approach. The dual motivation approach has been imposed on Batson challenges, as a result of courts' use of an imperfect analogy between jury discrimination and employment discrimination. The dual motivation approach permits the peremptory challenge if the prosecutor can show he would have struck the juror regardless of the race-based motive. The tainted decision-making approach will not permit the peremptory challenge if a prosecutor gives any race-based reason. Because Batson challenges are intended to rid the jury selection system of racial discrimination, only the tainted decision-making approach deals effectively with this problem.

Part I of this Note examines the history and evolution of peremptory challenges in the American judicial system with a specific focus on the decision in *Batson v. Kentucky*. Part II examines the mixed motive problem of peremptory challenges. Specifically, it explores which motives are legitimate and which are illegitimate under *Batson* when striking a juror. It will also explore the two distinct approaches courts have taken to resolve this mixed motive problem. Part III details the relevant history of mixed motives in employment discrimination and details different courts' approaches to resolving mixed motives in employment decisions. Part IV examines the analogy between employment discrimination jurisprudence and *Batson* challenges. It explains why the only proper test when mixed motives are present during the exercise of a peremptory challenge is the tainted decision-making approach.

I. PEREMPTORY CHALLENGES AND *BATSON V. KENTUCKY*

A. Peremptory Challenges

To achieve impartiality in the jury, both sides in a trial are allowed to shape the selection of the jury. This is accomplished by challenging a certain number of potential jurors that the parties believe will be biased for one reason or another. The number of challenges depends on the type of challenge, the party, the type of case, and the jurisdiction of the trial. What typically happens in jury selection is as follows: A group of potential jurors (known as the venire) is called into the courtroom and questioned by the judge and attorneys (referred to as voir dire). The court usually inquires into the background of the jury panelists, such as their residential area, marital status, occupation, and prior jury service. The attorneys can then question the potential jurors to identify any biases that may cause the jurors to be partial. In both civil and criminal cases, the parties are then allowed to exercise challenges for cause and peremptory challenges. Challenges for cause are unlimited in number but require the challenging attorney
to give an adequate explanation of why he believes the juror would not be able to be impartial in deciding the case. Peremptory challenges are limited in number and were intended to be "exercised without a reason stated, without inquiry, and without being subject to the court's control." The peremptory challenge was originally seen as an unconditional right to strike a juror based "on nothing more than a gut feeling, or mere speculations, either real or imagined." The justification for such a concept is that no one should be subjected to the judgment of a man whom he believes will be prejudiced against him, even if he is unable to articulate a reason for the supposed bias. Peremptory challenges are important in voir dire because they promote justice and fairness in the judicial process. They are viewed as a means for assuring the Sixth Amendment right to a jury that is fair and impartial. Challenges allow the parties to be involved in choosing the jury, which gives both the parties and the potential jurors a sense of control and faith in the system. Peremptory challenges are used to strike jurors that were not excused by the judge as a result of a challenge for cause, but whom the defense attorney still believes will be biased.

While peremptory challenges are a fixture in the trial process, they are not a constitutional right and have been subject to a few challenges of their own. This is the first dimension of the Batson paradox: peremptory challenges are meant to be exercised based on intuitive feelings and not subject to the courts' reach. However, judicial decisions have placed limitations on peremptory challenges, making them subject to the court's scrutiny by forcing attorneys to disclose their reasons for striking jurors they believe will be biased.

B. Modifying the Peremptory Challenge to Prevent Discrimination

In the wake of the passage of the Fourteenth Amendment, Strader v. West Virginia first addressed discrimination in the jury selection process. In 1880, the Supreme Court held that the West Virginia law

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8 Quin M. Sorenson, Backdooring Batson: The Improper Use of Racial Memory and Other "Peculiar" Characteristics in Juror Challenges, 35 COLUM. HUM. RTS. L. REV. 71, 74 (2003); Mahony, supra note 7, at 985.
10 Mahony, supra note 7, at 140.
11 WILLIAM BLACKSTONE, 4 COMMENTARIES *346-47.
12 Siebert, supra note 3, at 309.
13 Id.
14 Id. at 309-10.
15 Id.
16 100 U.S. 303 (1880).
17 Id.; see also Siebert, supra note 3, at 311 (arguing Batson should be limited in order to
excluding African-Americans entirely from jury service violated the
equal protection rights of an African-American defendant. The opin-
ion in Strauder emphasized the Court's awareness of the historic dis-
crimination that persisted against African-Americans. The Court held
that although a defendant did not have a right to a petit jury that nec-
essarily included members of his own race, he was entitled not to
have racial discrimination play a part in the selection of jurors. The
Court recognized discrimination in the jury selection process as a
threat to equal protection. Subsequently, Congress enacted the Jury
Selection and Service Act in 1968 which implemented a random
jury pool selection procedure that did away with potential discrimina-
tion on the basis of "race, color, religion, sex, national origin, or eco-
nomic status."

In 1965, the Court revisited the issue of racial discrimination in the
jury selection process in Swain v. Alabama. The Court held that if a
defendant could show the state was using their peremptory challenges
to systematically exclude all African-Americans from the jury, then it
would be a violation of the defendant's right to equal protection. An
African-American defendant raised the issue on appeal claiming his
death sentence that an all-white jury imposed was based on discrimi-
natory practices during jury selection. Out of the eight African-
Americans chosen to serve on the venire, two of the potential jurors
were exempt and the other six were removed by the prosecutor who
exercised his peremptory challenges. Apparently this was not a rare
occurrence in Alabama; specifically, the Supreme Court noted that
the State had used its challenges to prevent any African-American
from serving on a petit jury for the entire previous generation. The
Court weighed the benefits of the peremptory challenge with the po-
tential harm in violating the defendant's Fourteenth Amendment right

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18 Strauder, 100 U.S. at 310. This opinion from over a century ago recognizes that the ex-
clusion of African-Americans from a jury and passing judgment on an African-American is
constitutionally wrong and should not be allowed. This Note marvels at how there is still a
question of why courts should ever allow a racially motivated peremptory challenge.
19 Strauder, 100 U.S. 303.
21 Id. §§ 1862-63.
23 Id.
24 Id. at 203-04.
25 Id. at 205.
26 Id.; see also Sorenson, supra note 8, at 77 (finding it alarming that the state of Alabama
had been able to use its challenges so as to prevent any black person from serving on a petit jury
in the previous decade).
to equal protection.\textsuperscript{27} Despite the alarming evidence of a pattern of systematic discrimination, the Court held the State's use of peremptory challenges did not violate the Fourteenth Amendment's equal protection guarantee.\textsuperscript{28} The Court viewed the peremptory challenge as a means of eliminating "extremes of partiality on both sides" that can be based on "sudden impressions and unaccountable prejudices" that the court could not comprehend.\textsuperscript{29}

In a seemingly contradictory statement, however, the Court went on to say that where the State used its peremptory challenges in a way that amounted to the systematic exclusion of African-Americans from the jury, the benefits would not outweigh the equal protection infringement.\textsuperscript{30} In reviewing challenges to the use of peremptory challenges, the Court would presume the State acted properly in exercising its peremptory challenges based on the case, the defendant, and the crime, not based on racial prejudice.\textsuperscript{31} Therefore, a remedy would be available if the defendant were able to show "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be," that the prosecution used its peremptory challenges consistently and systematically to exclude all African-Americans from serving on any petit jury.\textsuperscript{32} Swain fell short of meeting this almost impossible burden of proof, and the Court upheld his conviction by an all-white jury.\textsuperscript{33}

In practice, the "limitation" the Court imposed on peremptory challenges was more of a slap on prosecutors' wrists than an actual limitation. Many jurisdictions did not keep records of jurors' races or even a transcript of the voir dire process, which were necessary to overcome the presumption of nondiscrimination.\textsuperscript{34} The decisions in \textit{Swain} and \textit{Strauder} were moving in the right direction towards equal protection in the jury system, but they still provided minimal protection for a defendant from the racially discriminatory use of peremptory challenges.

\textsuperscript{27} \textit{Swain}, 380 U.S. at 224, 226-28. The racially discriminatory use of a peremptory challenge in this case appears to be directed at the excluded juror because African-Americans were excluded from jury service when the defendant was Caucasian as well. However, racial discrimination against jurors who are the same race as the defendant can have a profound effect on the outcome of the defendant's trial, which implicates his Fourteenth Amendment right to equal protection of the laws and a potential deprivation of liberty.

\textsuperscript{28} \textit{Id}. at 221, 225-26.

\textsuperscript{29} \textit{Id}. at 219-20.

\textsuperscript{30} \textit{Id}. at 222-23.

\textsuperscript{31} Mahony, \textit{supra} note 7, at 142-43.

\textsuperscript{32} \textit{Swain}, 380 U.S. at 223.

\textsuperscript{33} \textit{Id}. at 224.

\textsuperscript{34} Mahony, \textit{supra} note 7, at 144.
C. Batson v. Kentucky

The Supreme Court appeared to make the largest step forward in 1986 when it decided *Batson v. Kentucky*. In *Batson*, the Court reaffirmed that the Equal Protection Clause prohibits the exercise of peremptory challenges in a way that discriminates against members of the venire on the basis of race. The case involved an African-American defendant accused of burglary and the receipt of stolen goods. During voir dire, the judge excused certain jurors, and the prosecutor used his peremptory challenges to remove the four remaining African-Americans from the venire. An all-white jury convicted Batson, and he argued on appeal that the prosecution executed its peremptory challenges in violation of his Sixth Amendment right to a jury representative of a cross section of the community and against his Fourteenth Amendment right to equal protection of the law.

The *Batson* Court articulated three specific harms that result from the racially discriminatory use of peremptory challenges. First, discriminating against potential jurors on the basis of race violates the defendant’s right to equal protection under the Fourteenth Amendment. Second, the excluded juror’s right to equal protection is violated because the exclusion of people from jury service based on their race is unconstitutional. Third, the “state’s continued participation in a judicial system that discriminates against individuals based on their race harms the community as a whole by destroying its confidence in and regard for the judicial system as a whole.” The Court was careful in constructing a test that would replace the burdensome *Swain* test but not impede the legitimate goal of the peremptory challenge.

The Court reduced the defendant’s burden by allowing him to challenge a prosecutor’s peremptory strikes based only on his case, making it no longer necessary to show a pattern of behavior in multiple cases. The test for making a *Batson* challenge is broken into three parts. First, the defendant must “show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the

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36 Id.
37 Id. at 82.
38 Id. at 82-83.
39 Id. at 83-84.
40 Id. at 86.
41 Id. at 87.
42 Mahoney, supra note 7, at 147-48.
43 Batson, 476 U.S. at 92-93. Evidence of a pattern of discriminatory behavior is still one of the primary methods of making a prima facie showing of racial discrimination.
defendant’s race. If the defendant is able to make this prima facie case, then the burden shifts to the prosecution to provide a nondiscriminatory reason for striking the jurors in question. If the prosecution asserts a race-neutral reason, the defendant is required to show that the prosecutor was engaging in "purposeful discrimination" and the reason given by the prosecutor was actually "a pretext for racial discrimination."

To determine which race-neutral reasons will satisfy this second prong of the test, the Supreme Court said in Purkett v. Elem that the explanation does not need to be "persuasive, or even plausible." The primary issue in determining neutrality is the facial validity of the prosecutor’s explanation. Barring a discriminatory intent that is inherent in the prosecutor’s explanation, the reason offered will be deemed race-neutral. The Court said the reason can be "silly or superstitious" and still satisfy the second prong of the test. The actual juror at issue in the Purkett decision was struck because he "appeared to [the prosecutor] to not be a good juror for that fact, the fact that [he] had long hair hanging down shoulder length, curly, unkempt hair."

Under the third prong of the test, explanations that appear "silly" are tested to make sure that they are not pretexts for race-based reasons. The defense can generally establish pretext by demonstrating that similarly situated members of another race were seated on the jury. Other evidence demonstrative of a pretext includes: explanations for challenges not related to the case, a lawyer’s failure to meaningfully question or question a juror at all, disparate treatment in the questioning of African-American jurors, explanations that are suggestive of race or gender such as an assumption on the attorney’s part that an African-American would be less likely to convict another African-American, or a vague explanation for the strike such as “teach-

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44 Id. at 96.
45 Id. at 97.
46 Id. at 98.
49 Purkett, 514 U.S. at 767-68. The legitimacy of the asserted reason is challenged in the third step of the inquiry. 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, 504 (1999) (examining "neutral explanations" given to defend a Batson challenge).
50 Purkett, 514 U.S. at 768 (quoting Hernandez, 500 U.S. at 360).
51 Id.
52 Id.
53 Id. at 766.
ers are liberal" without any questioning to suggest the particular juror is liberal.55

There are many examples of attorneys striking potential jurors based on pretext. A court found an attorney to have asserted a pretextual reason when he struck a Latino allegedly based on his residence but did not remove a non-Latino juror living in the same area.56 Another court found an instance of pretext where a prosecutor did not challenge a Caucasian teacher and a Caucasian nurse's assistant but struck an African-American whose spouse was a teacher and an African-American nurse because teachers are too precise to understand circumstantial evidence and the nurse had a specialized medical background.57 A pretextual reason for racial discrimination was also found where Caucasian jurors who had children near the same age as the defendant were not struck, but African-American jurors with children of a similar age were removed.58 However, if the judge determines that the reason given for the strike was not pretextual, the juror will not be stricken. Therefore, as long as the reason given for the strike is not racially discriminatory on its face, and it is not a pretext for an illegitimate reason, the juror will be stricken.

The decision in Batson has been extended over the last twenty years to include discrimination when the defendant and the excluded juror are not of the same race 59 and discrimination based on gender.60 Moreover, Batson now protects civil litigants as well as criminal defendants.61 Batson continues to be the subject of litigation and academic discussion primarily because of the many paradoxes inherent in the decision.

D. The Batson Paradox

The decision in Batson is paradoxical for several reasons. If the defendant makes a prima facie showing of discriminatory intent in the use of the challenge, the prosecutor is required to provide a nondiscriminatory justification for striking the juror.62 Here is the first dimension of the paradox: a peremptory challenge is meant to allow potential jurors to be stricken based solely on an intuitive feeling by

56 U.S. v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989).
57 People v. McDonald, 530 N.E.2d 1351, 1358-59 (Ill. 1988).
the prosecutor that the juror would be biased. Yet, the decision in *Batson* forces the attorney asserting the peremptory challenge to provide a reason for his intuitive belief that the juror will not be fair and impartial.

The second dimension of the *Batson* paradox is the Court's complete rejection of the "idea that a juror's race or gender has any bearing on how that juror will view the evidence in a case or vote on the question of guilt or innocence." Therefore, if the racial composition of the jury has no effect on the outcome of the trial, there is no harm to the defendant when the state uses their peremptory challenges to exclude members of a certain racial group. The Court has been somewhat schizophrenic regarding whether or not it believes that generalizations about people’s beliefs can be made based on race and gender. In *Metro Broadcasting, Inc. v. FCC*, the Court approved litigation that gave certain minorities a preference when issuing broadcasting licenses because it is "a legitimate inference . . . to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves." The Court supported the idea that it was rational to attribute certain broad views and preferences to minority groups. This same attribution of viewpoints was scolded by the Court in *Miller v. Johnson*, where voting districts were drawn according to minority voters under the assumption that minorities share the same political views.

Prior to the *Batson* decision, the Court clung to the "theory of difference," or the idea that a juror’s race or gender is at the very least a minimal predictor of his or her perspective. The Court said in several decisions that "a flavor, a distinct quality is lost if either sex is excluded" from juries. In *Taylor v. Louisiana* and *Peters v. Kiff*, the Court supported the idea that it was rational to attribute certain broad views and preferences to minority groups. This same attribution of viewpoints was scolded by the Court in *Miller v. Johnson*, where voting districts were drawn according to minority voters under the assumption that minorities share the same political views.

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63 Siebert, *supra* note 3, at 309.
64 Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 96 (1996) (providing an interesting overview of this concept and the studies that support it).
65 *Id.* at 97-107.
67 *Id.* at 582.
68 *Id.*
70 *Id.* at 927 (explaining that in order for society to cleanse itself of discrimination, electorates cannot be carved into racial blocs).
71 Muller, *supra* note 64, at 98-99.
73 419 U.S. 522, 528 (1975) (holding "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a
the Court expressed the importance of having a cross section of the community participate in jury service. Without this cross section, the primary function of the jury is eviscerated as qualities of human nature and experience are excluded. The language in *Batson* and subsequent decisions, in contrast, solidified the Court's opinion that race and gender are impermissible predictors of juror perspective, at least for the time being.

II. THE MIXED MOTIVE PROBLEM AND HOW COURTS HAVE DEALT WITH IT

When the prosecution uses a peremptory challenge to strike a minority from the venire and the defense raises a *Batson* challenge and makes a prima facie showing of discrimination, the prosecution is required to justify their use of a peremptory challenge to strike the juror. To survive the *Batson* challenge, the asserted reason must be nondiscriminatory and must not be a pretext for a discriminatory reason. Courts have upheld the following reasons as legitimate and nondiscriminatory: the juror might be overly sympathetic toward criminal defendants, the juror was familiar with the crime scene, a statement by the juror that he could not be fair, the juror's lack of mental capacity, the juror's membership in a sympathetic religion, and the juror's knowledge of the language that is to be interpreted in the case.

Sometimes the prosecutor will assert two motives, one that is legitimately race-neutral along with an illegitimate, discriminatory reason. When defending his peremptory strike, an attorney might say that he struck the African-American juror because he was tardy and

74 407 U.S. 493 (1972) (granting a writ of habeas corpus where a Caucasian defendant was indicted and convicted by a grand jury and petit jury from which African-Americans were systematically excluded).
75 J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (holding that litigants may not strike potential jurors on the basis of gender). But see Muller, supra note 64, at 100-01 (arguing race and gender do not suggest a particular viewpoint and therefore *Batson* should be a harmless error).
76 Muller, supra note 64, at 101.
77 United States v. Hill, 249 F.3d 707, 714 (8th Cir. 2001); see also Donald P. DeRiggi, *Appellate Court Guidance on Batson Challenges*, 215 N.Y.L.J. 48, 1,4 (1996) (describing the approach to pretext used by the New York Court of Appeals).
81 Id.
therefore he would likely be inattentive during the trial. The attorney might also say that he struck the juror because he is a member of the NAACP. The first reason, that the potential juror was tardy, is race-neutral because on its face being tardy is not associated with one particular racial group. The second reason, being a member of the NAACP, is not race-neutral.\textsuperscript{83} The NAACP's principle concern is the equal treatment of African-Americans and the membership of the group is traditionally African-American.\textsuperscript{84} Striking a juror because he or she is a member of the NAACP is a reason that would be associated with a particular racial group and is therefore not race-neutral. A race-neutral reason combined with a race-conscious reason is known as a mixed motive problem in the resolution of the \textit{Batson} challenge.

Mixed motives are problematic in \textit{Batson} challenges because the court does not know if the juror was struck because of the racially discriminatory reason, which would violate \textit{Batson}, or if he was struck because of the legitimate reason. The United States Supreme Court has not addressed whether the existence of a discriminatory reason for a peremptory strike is sufficient proof for a \textit{Batson} challenge if a nondiscriminatory reason has also been provided. Lower courts have resolved this mixed motive problem in a \textit{Batson} challenge using two approaches: (1) the tainted decision-making approach and (2) the dual motivation approach.\textsuperscript{85} Remember, the dual motivation approach allows the prosecutor to use a peremptory challenge if he can show he would have struck the juror regardless of the race-based motive, whereas, the tainted decision-making approach will not permit the peremptory challenge if the prosecutor gives any race-based reason.

\textbf{A. The Tainted Decision-Making Approach}

The first approach taken by some courts when assessing a \textit{Batson} challenge is the tainted decision-making approach.\textsuperscript{86} The basic premise of this approach is that any time a racially discriminatory reason is asserted when using a peremptory challenge, the purpose of \textit{Batson

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\textsuperscript{84} \textit{Id.} at 268 n.6.

\textsuperscript{85} McCormick v. State, 803 N.E.2d 1108, 1112-13 (Ind. 2004).

\textsuperscript{86} \textit{Id.} at 1113; see Rector v. State, 444 S.E.2d 862, 865 (Ga. App. 1994) (finding the invalid reason tainted the other valid reasons); Payton v. Kearse, 495 S.E.2d 205 (S.C. 1994) (holding that once a discriminatory reason has been uncovered, it taints the entire jury selection procedure); Moore v. State, 811 S.W.2d 197 (Tex. Crim. App. 1991) (finding a \textit{Batson} violation where a juror would have a problem assessing punishment (valid) and was a member of a minority club (invalid)); United States v. Greene, 1993 CMA LEXIS 4 (C.M.A. 1993) (holding strike violated \textit{Batson} because the invalid reason vitiated the valid reasons).

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has been undermined and the selection process has been tainted.\textsuperscript{87} Justice Marshall wrote in his \textit{Wilkerson v. Texas}\textsuperscript{88} dissent from a denial of a writ of certiorari that \textit{Batson} requires a race-neutral reason for striking a juror and “[t]o be ‘neutral,’ the explanation must be based \textit{wholly} on nonracial criteria.”\textsuperscript{89}

The Supreme Court of Indiana recently adopted this approach to solve the mixed motive problem in \textit{McCormick v. Indiana}.\textsuperscript{90} \textit{McCormick} involved an African-American defendant who was indicted for dealing cocaine.\textsuperscript{91} Only two African-Americans were called to serve on the venire, and one was removed on a challenge for cause.\textsuperscript{92} The State sought to use a peremptory challenge to remove the only remaining African-American on the venire.\textsuperscript{93} McCormick raised a \textit{Batson} challenge, claiming the State was improperly removing all African-Americans from the jury.\textsuperscript{94} Removing the only African-American juror through the use of a peremptory challenge constitutes a prima facie showing of discrimination.\textsuperscript{95} Therefore, the burden shifted to the prosecutor to show his decision to strike the juror was race-neutral or to give “an explanation based on something other than the race of the juror.”\textsuperscript{96}

There were two prosecutors working on the case; when challenged regarding their reasons for striking the only remaining African-American on the venire, one asserted a race-neutral reason, and the other offered a racially discriminatory reason.\textsuperscript{97} The first prosecutor thought the juror looked uncomfortable, was distraught, and gave answers that made her seem uncomfortable with the process.\textsuperscript{98} The other prosecutor thought the juror would have a difficult time “\textit{passing judgment on} . . . \textit{a member of ones [sic] own in the community}.”\textsuperscript{99} The reference to “one’s own community” was clearly directed at the fact that the defendant and the challenged juror were both members of the African-American community.\textsuperscript{100} Thus, the State presented sev-

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\item \textsuperscript{87} McCormick, 803 N.E.2d at 1113.
\item \textsuperscript{88} Wilkerson v. Texas, 493 U.S. 924 (1989) (mem.) (Marshall, J., dissenting).
\item \textsuperscript{89} Id. at 926.
\item \textsuperscript{90} McCormick, 803 N.E.2d 1108.
\item \textsuperscript{91} Id. at 1109.
\item \textsuperscript{92} Id. at 1109-10.
\item \textsuperscript{93} Id. at 1110.
\item \textsuperscript{94} Id.
\item \textsuperscript{96} McCormick, 803 N.E.2d at 1111 (quoting Hernandez v. New York, 500 U.S. 352, 359 (1991) (plurality opinion)).
\item \textsuperscript{97} Id. at 1110.
\item \textsuperscript{98} Id. at 1111.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id. at 1111-12.
\end{footnotesize}
eral reasons for striking the juror, some legitimate and one that was illegitimate because of the racial connotation. After a brief analysis of the dual-motivation and tainted decision-making approaches, the Supreme Court of Indiana held it is inappropriate to analyze Batson claims under the dual motivation approach. The court held the tainted decision-making approach is the proper approach and is the only way to protect against the most blatant discriminatory practices in the jury system that Batson is designed to prevent.

The South Carolina Supreme Court in Payton v. Kearse also held the tainted decision-making approach was the proper way to resolve Batson challenges that evince mixed motives. Payton involved a civil suit for damages resulting from an automobile accident. Both parties were African-American, and the respondent used all of his peremptory challenges to remove white members of the venire. The petitioner requested a Batson hearing and the trial court held that the respondent offered race-neutral reasons for the strikes and there was no Batson violation. The South Carolina Supreme Court found that the respondent’s rationale for striking one of the jurors was facially race-based: “[s]he herself has not had any problems but she comes from a family that’s had some problems with the law and she’s kind of what we refer to as a redneck variety, so to speak, and that was the reason we struck her.” The use of the term “redneck” in the respondent’s explanation is not race-neutral as redneck connotes a specific sentiment about Caucasians.

The South Carolina court decided to use the tainted decision-making approach because, “as applied, Batson is only effective against the most obvious examples of racial and gender prejudices. To 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.”

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101 Id. at 1112.
102 Id. at 1113.
103 Id. The Supreme Court of Indiana also said the tainted decision-making approach is the approach that is consistent with the United States Supreme Court decision in Purkett.
104 495 S.E.2d 205 (S.C. 1998).
105 Id. at 210.
106 Id. at 207.
107 Id.
108 Id.
109 Id. at 208.
110 Id. (“The term ‘redneck’ is a racially derogatory term applied exclusively to members of the white race. The use of the term ‘redneck’ is not a valid race-neutral reason to strike a potential juror, and therefore, the strike is facially discriminatory and violates Batson.”).
111 Id. at 210.
B. The Dual Motivation Approach to Batson Challenges

The second approach taken by lower courts is the dual motivation approach. This approach is modeled after the "same decision" Fourteenth Amendment equal protection analysis, which provides that claims may be rebutted by showing the same decision would have been made without the allegedly discriminatory conduct. This test was developed in Mt. Healthy City School District Board of Education v. Doyle, an employment discrimination action, and is the same analysis used in housing discrimination, labor/employment discrimination, and voting rights cases. In the Batson context, the dual motivation approach requires the prosecutor to show that he would have exercised a peremptory challenge to remove the juror regardless of the discriminatory motivation. A Batson violation occurs only when the legitimate reasons were not sufficient by themselves to strike the juror. This test has also been described as the "but for" test: but for the prosecutor's discriminatory use of his peremptory challenges, the juror would not have been removed.

Justice Marshall commented on the two approaches in a dissenting opinion against a denial for a writ of certiorari Wilkerson v. Texas. Richard Wilkerson was found guilty of murder by an all-white jury from which African-Americans had been excluded. During voir dire, the prosecution used peremptory challenges to remove all four African-Americans from the venire. After his sentencing, Wilkerson raised a Batson claim on a petition for habeas corpus. The prosecutor admitted considering that the excluded juror and the defendant were


116 Id.


118 Id. at 925-28.
African-American and feared that might impact the juror’s decision-making process. With regard to a different excluded juror, the prosecutor admitted that he was concerned the African-American juror would be sympathetic to the defendant because they would identify with one another. The state trial court found in favor of the State, denying the Batson claim and the case was eventually appealed to the United States Supreme Court.

Marshall wrote that the dual motivation approach is improper for the Batson context because of the special difficulties that arise when a prosecutor is required to prove that his motive was legitimate. Marshall pointed out that there can be no meaningful review of a prosecutor’s intention in exercising a peremptory challenge, because in order to assess the reason stated for using a challenge, the court must also look at the prosecutor’s reasons for not striking a juror. No explanation is necessary for not exercising a challenge; therefore, there is nothing on record to compare the prosecutor’s use of his challenges. Marshall wrote the only way to resolve this conflict is to trust the prosecutor’s claim that he did not exercise the challenge in a discriminatory manner. “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.”

The dual motivation approach allows the parties to openly consider a potential juror’s race or gender when making peremptory strikes. This concept could not be more antithetical to the decision in Batson that forbade the use of race as a motive in making peremptory challenges.

III. MIXED MOTIVES IN EMPLOYMENT DISCRIMINATION

As noted in the previous section, the dual motivation approach to solving mixed motive problems in Batson challenges is based on the Fourteenth Amendment equal protection analysis used in employment
discrimination cases. To assess the validity of the two approaches to mixed motives in Batson claims, it is important to understand how the U.S. Supreme Court went about analyzing equal protection claims involving employment discrimination. The Court’s decision in *McDonnell Douglas Corp. v. Green* established the framework for analyzing an employment discrimination case that was later used in Batson claims. In *Mt. Healthy School District Board of Education v. Doyle*, the Court established the same decision affirmative defense for the employer in a discrimination case where both legitimate and illegitimate factors lead to the adverse employment decision. This is the same test as the dual motivation approach that some courts have adopted to decide Batson claims with mixed motives. The Court’s decisions in *Price Waterhouse v. Hopkins* and *Desert Palace v. Costa* settled the question of what evidence the plaintiff needs to produce to prevail in an employment discrimination case where mixed motives are present.

**A. McDonnell Douglas Corp. v. Green**

The test the Supreme Court established for proving employment discrimination in *McDonnell Douglas Corp. v. Green* was the foundation for the Batson burden shifting framework. *McDonnell Douglas* involved an employment discrimination action brought by an African-American male who was laid off by his employer and subsequently participated in a demonstration in protest of the employer’s alleged racially discriminatory employment practices. When the plaintiff reapplied for a position, he was turned down on the basis that he participated in the demonstration against the defendant/employer. Plaintiff argued this reason was a pretext for the defendant’s discrimination against him based on his race. He filed a discrimination complaint under Title VII of the Civil Rights Act of 1964 (Title VII).

The Court laid out the requirements for making a prima facie Title VII disparate treatment claim requiring the plaintiff to prove that: he is a member of a protected class; he is qualified and applied for an

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130 *Id.* at 795.
131 *Id.* at 796.
132 *Id.*
133 Disparate treatment is a type of employment discrimination where an employer treats an employee or an applicant less favorably than he would another employee or applicant based on his or her race, religion, gender, or national origin. LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 1.09 (2005).
available position; he suffered from an adverse employment action; and finally, the circumstances suggest an inference of discrimination. Once the plaintiff asserts a prima facie case, the burden shifts to the employer to "articulate some legitimate nondiscriminatory reason" to justify the action against the plaintiff. If the defendant is unable to articulate such a reason, the plaintiff wins. If the defendant is able to provide a justification, however, then the burden shifts to the plaintiff to show that the employer's reasons were merely pretextual and the true reason for the decision was discrimination. While this framework seemed to work in theory, in practice it failed to account for those employers who took an adverse employment action based on mixed motives.

B. Mt. Healthy School District Board of Education v. Doyle

The Supreme Court recognized that there could be both legitimate and illegitimate motives influencing employment decisions in Mt. Healthy City School District Board of Education v. Doyle. The case involved a nontenured teacher who was involved in several incidents during his employment by the school district. The first incident was an argument between Doyle and another teacher in which both parties were suspended. The second incident occurred while Doyle was supervising the cafeteria: two female students refused to obey him so he made an obscene gesture at them. Other incidents included calling students names and arguing with a cafeteria worker about the size of the portion he was given. The final incident involved Doyle calling a local radio program and revealing information about a memorandum that the principal issued to teachers about a potential dress code for teachers.

The school board made the decision not to rehire Doyle for the upcoming school year citing a "notable lack of tact in handling professional matters," the frequent incidents involving students, and the disclosure to the radio station about the memorandum. Doyle argued that the First Amendment protected his call to the radio sta-
The Supreme Court agreed that this was protected speech for which he could not be terminated. However, because the school district cited other factors for terminating Doyle’s employment, a mixed motive issue was present. The Court said that the proper approach to Doyle’s claim was to require him to prove that the protected conduct was a substantial factor in the decision to terminate his employment. The school district very well could have made the same decision not to rehire him prior to Doyle making the call to the radio station, and the termination would have been permissible. Therefore, Doyle was not be entitled to the reinstatement of his position if it would result in retaining a position he would not otherwise have retained absent the call to the radio station. This is referred to as a “same decision” affirmative defense, for which the Court overlooks a discriminatory reason if the same decision would have been reached if only the legitimate ones were present.

C. Price Waterhouse v. Hopkins

The decision in Price Waterhouse v. Hopkins recognized that when employment decisions are made based on legitimate and illegitimate motives, McDonnell’s burden shifting framework is an improper guide. Price Waterhouse involved a female senior manager for Price Waterhouse’s office in Washington, D.C. After five years of employment, she was nominated for partnership, which was voted on by the company’s Policy Board. Her nomination came with excellent performance reviews, including securing a twenty-five million dollar contract “virtually at the partnership level.” It is worth noting that out of the 662 employees of Price Waterhouse at the time of Hopkins’s employment, only 7 were female. Hopkins’ promotion was put on hold and she was

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144 Id. at 283-84.
145 Id. at 287 (referring to both a “substantial factor” and “motivating factor” in the same sentence of the opinion to describe the plaintiff’s burden of proof to prove that the conduct in question was prohibited).
146 Id. at 283-84 (noting Doyle received a letter stating he was being terminated for a lack of tack in professional matters and the call to the radio station).
147 Id. at 287.
148 Id. at 285-86.
149 Id. at 285; see also LARSON, supra note 133, § 135.04 (requiring the defendant to plead the affirmative defense and bear the burden of proof to show that he would have made the same decision regardless of the illegitimate reason).
150 490 U.S. 228 (1989) (plurality opinion).
151 Id. at 241.
152 Id. at 233.
153 Id.
154 Id. at 233-34.
155 Id. at 233.
subsequently informed she would not be reconsidered for a promotion based on what Hopkins believed to be gender discrimination.\textsuperscript{156} In addition to the disparate ratio of male to female employees, Hopkins was chastised both openly and in the recommendations for partnership based on her unfeminine appearance and approach.\textsuperscript{157}

The Court rejected the \textit{McDonnell Douglas} framework for cases involving mixed motives but did not reject the use of circumstantial evidence to prove discrimination in a mixed motive case.\textsuperscript{158} The plurality opinion held that a plaintiff may prevail in a mixed motive case by providing evidence that the employer’s adverse decision was motivated by unlawful discrimination.\textsuperscript{159} However, it went on to say the same decision affirmative defense sanctioned in \textit{Mt. Healthy} would be a complete bar to liability for employment discrimination.\textsuperscript{160} This decision seems counterintuitive: a plaintiff can prevail if he presents evidence that the challenged action was discriminatory, but if the employer can show the action would have happened regardless of the discrimination, then the plaintiff will lose. The Court stated its decision was a balancing of burdens between protecting employees from discrimination and retaining the employer’s freedom to make employment decisions.\textsuperscript{161} The recent decision in \textit{Desert Palace v. Costa}\textsuperscript{162} finally settled the debate over what a plaintiff must prove in order to prevail in a mixed motive case.

\textbf{D. Costa v. Desert Palace, Inc.}

Catharina Costa filed a disparate treatment claim against her former employer, Caesar’s Palace Casino, after she was terminated allegedly based on disciplinary problems.\textsuperscript{163} Costa was the only female operating forklifts and pallet jacks in a warehouse at Caesar’s Palace Casino.\textsuperscript{164} Costa received comments on her work such as “good” and “excellent” but was also subjected to disciplinary action and sexist

\begin{flushleft}
156 \textit{Id.} at 233 n.1.
157 \textit{Id.} at 235.
158 \textit{Id.} at 251.
159 \textit{Id.} at 258.
160 \textit{Id.} (requiring the employer to prove they would have made the same decision by a preponderance of the evidence).
164 \textit{Costa}, 299 F.3d at 844.
\end{flushleft}
remarks to which her male coworkers were not similarly subjected.\(^{165}\) Costa cited several examples of incidents where she was warned or suspended for missing overtime and using foul language yet male counterparts engaging in the same conduct were not disciplined. Caesar’s Palace Casino terminated Costa after she was physically assaulted in an elevator at Caesar’s warehouse. Despite photographs of her injuries and an eye witness account of the incident, she was terminated and the other employee was merely suspended.\(^{166}\)

Costa filed suit claiming that her disciplinary record was not the only factor in her termination, but the fact that she was female also played a part in the adverse employment decision.\(^{167}\) The district court instructed the jury how to decide the case based on the mixed motive evidence presented. The defense objected, saying the plaintiff failed to meet the required “direct evidence” burden under \(\text{Price Waterhouse}\) to show that sex was a motivating factor in her termination.\(^{168}\) The jury found in favor of Costa; the Court of Appeals for the Ninth Circuit affirmed the district court’s mixed motive instruction; and the Supreme Court heard the case on a writ of certiorari.

The Supreme Court held that section 2000e-2(m) of the Civil Rights Act of 1991 unambiguously requires that a plaintiff need only show that an employer used sex as a consideration in the employment decision.\(^{169}\) The statute does not require a heightened “direct evidence” burden as Justice O’Connor suggested in her concurring opinion in \(\text{Price Waterhouse}\).\(^{170}\) The relevant language of the statute reads that “an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice.”\(^{171}\) The Court went on to hold that the statute does not require direct evidence in a mixed motives employment discrimination case. The plaintiff is only required to “present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for . . . any employment practice.’”\(^{172}\) This decision

\(^{165}\) Id. at 844-46.
\(^{166}\) Id. at 846.
\(^{167}\) Id.
\(^{169}\) Id. at 98.
\(^{170}\) Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (plurality opinion) (O’Connor, J., concurring) (arguing that “in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision”).
\(^{172}\) Id. at 101 (quoting 42 U.S.C. § 2000e-2(m)).
makes mixed motives in the employment discrimination context a nonissue because any gender or race-conscious motivation, regardless of the number of neutral motivating factors, is sufficient to prevail on a discrimination claim. While the Court might finally have figured out the proper analysis for mixed motives in employment discrimination cases, it did not necessarily resolve the same issue in Batson claims.

IV. WHY THE USE OF EMPLOYMENT DISCRIMINATION SOLUTIONS DO NOT RESOLVE THE MIXED MOTIVE PROBLEM IN BATSON CHALLENGES

In Batson, the Supreme Court noted that the disparate impact cases relating to Title VII of the Civil Rights Act of 1964 explained the analytical structure for a prima facie showing of purposeful discrimination. The Court used the framework from employment discrimination to illustrate how Batson challenges should be handled. Lower courts have expanded the use of the Fourteenth Amendment’s dual motivation doctrine as used in employment discrimination, to Batson challenges. While these extensions of Fourteenth Amendment jurisprudence make sense in theory, the dual motivation approach fails in practice to achieve the asserted goals of Batson. Courts should reject the employment discrimination analysis, especially in light of the Supreme Court’s decision in Costa.

A. Harmless Error Analysis

There are a variety of errors that can take place during a trial. Courts classify these errors as either trial errors or structural defects. Trial errors are mistakes that happen while the case is presented to the jury, such as allowing illegally obtained evidence to be admitted. Once an error is committed and identified as a trial error, the Court then employs a harmless error analysis. The harmless error analysis requires the reviewing court to examine the error in light of the entire record to determine whether the error might have made a difference in the outcome of the trial. Consider a hypothetical trial at which the following evidence was presented: eyewitness

174 See supra note 112 and accompanying text.
176 Fulminante, 499 U.S. at 307.
177 Id.
178 Id. at 307-08.
testimony that he saw the defendant commit the crime and evidence connecting the defendant to the crime, found at the defendant’s apartment after a legal search. Hearsay evidence, that should have been excluded, was also admitted at the defendant’s trial. This hearsay evidence would likely be viewed as a harmless error in light of the overwhelming weight of the rest of the evidence and the conviction would likely be affirmed.

The other type of error is a structural defect. Structural defects are the type of errors that affect the trial so deeply that it is impossible for the trial to have been fair and impartial, and the verdict rendered was essentially a nullity. The Supreme Court has identified certain errors as structural defects: a biased judge, the denial of counsel, denial of the right to a public trial, the denial of the right of self-representation, and the exclusion of African-Americans from a grand jury when the defendant is African-American. Structural defects are considered offensive to the reliability of a trial. They are implicitly viewed as making the trial inaccurate and therefore require per se reversal of the defendant’s conviction. Although the harmless error analysis has been used more and more to resolve constitutional criminal procedure questions, federal courts have generally considered Batson violations to be structural defects.

While the debate whether race has any effect on the juror’s decision as to guilt or innocence continues, the Supreme Court remains silent about how these factors affect a juror’s outcome. This is ironic considering lower courts deem Batson violations to have such an integral impact on the outcome of the trial that they demand per se

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179 Id. at 309.
180 Id. at 310.
182 Fulminante, 499 U.S. at 310.
184 See, e.g., Ford v. Norris, 67 F.3d 162, 170-71 (8th Cir. 1995); Rosa v. Peters, 36 F.3d 625, 634 n.17 (7th Cir. 1994); United States v. Thompson, 827 F.2d 1254, 1261 (9th Cir. 1987).
185 Muller, supra note 64, at 103 (noting the majority of the justices on the Supreme Court have rejected the theory of difference that says that a juror’s race and gender are at the very least a minimal predictor of their perspective and will likely influence their deliberations).
reversal, yet the whole jury is supposed to be impartial as a prerequisite for jury service.

A court finding an error to be a trial error under the harmless error analysis is analogous to the same decision affirmative defense permitted in employment discrimination cases. The same decision affirmative defense allows an employer to make an employment decision adverse to the plaintiff based on a racial motivation, so long as there are other motivations such that the employer can show that he would have taken the same action regardless of the discriminatory reason. The same formula is the basis for the dual motivation analysis for Batson violations. If the prosecution can show they would have struck the juror regardless of the discriminatory reason, then the peremptory challenge should be allowed. By this reasoning, the dual motivation analysis is like the harmless error test. Therefore, the dual motivation approach likens the illegitimate discriminatory reason to a discrete error that has no effect on the outcome of the trial.

Conversely, the structural defect standard that federal courts apply to Batson violations is similar to the tainted decision-making approach. The Supreme Court’s recognition of a select group of errors that it deems to be so egregious as to compromise the accuracy of the entire trial, including the exclusion of members of the defendant’s race from grand jury service, demonstrates the magnitude of the harm of Batson violations. This view, combined with the federal courts’ treatment of Batson violations as necessitating per se reversal of the conviction, leaves only one plausible solution to the mixed motive problem—the tainted decision-making approach. To reduce the number of Batson violations that are challenged on appeal after a full trial, thus wasting valuable court resources, all courts should use the tainted decision-making approach to preempt the violations before they occur and eliminate race as a motive in voir dire.

B. The Availability of Evidence

Another flaw in the extension of equal protection jurisprudence to Batson challenges is the variation in the amount of evidence that is available to courts when assessing an employment discrimination claim versus a Batson challenge. In an employment discrimination case, a jury is able to examine evidence as to whether an employer treated similarly situated applicants the same. If the employer can show that the same decision would have been made—namely the African-American would not have been hired—absent a discrimina-

tory motive, then the discriminatory motive is overlooked.\textsuperscript{187} When an employer hires a white candidate over an African-American candidate, a juror can assess the employer's motives by examining whether the particular white candidate's qualifications were superior to those of the African-American candidate.\textsuperscript{188} A juror can compare the two applicants side-by-side and see if there were other legitimate reasons for the employer's decision not to hire the African-American. Additionally, the plaintiff can produce evidence that other qualified African-American applicants were also turned down for the position.

In an employment discrimination claim, as in \textit{Costa} where an employment relationship existed at the time of the alleged discrimination, there is likely to be even more evidence available upon which a court can base its decision.\textsuperscript{189} The plaintiff's personnel file would likely be available, providing a context for the claim. Fellow employees could be called to testify about the plaintiff's allegations of disparate treatment by management. Former employees that were terminated for similar grounds could be called to testify to substantiate the plaintiff's claim. In many employment discrimination cases, there is adequate evidence available to the plaintiff to prove his case.

\textit{Batson} challenges are inherently more difficult to prove because of the lack of meaningful evidence. Even if the court has records of the race or gender of the jurors that were struck, and there are transcripts of the questioning of particular jurors, this information does not tell the whole story. The empanelling of a jury and the questioning of a potential juror takes place over a very short amount of time and is easily manipulated based on the relatively loose standards for plausible race-neutral reasons. A minimal amount of questioning of an undesirable juror could lead to any number of "acceptable" reasons for striking the juror. Extending the questioning of a juror is also a frequent tactic to assure the attorney has sufficient race-neutral reasons for striking the juror. The Supreme Court has affirmed the use of silly and implausible reasons for striking jurors as long as they do not involve race or are a pretext for race.\textsuperscript{190} This is a very low standard to meet, which makes for a large number of permissible reasons for striking a juror. This leaves the defendant under-protected with few assurances that the asserted reason for the prosecutor's use

\textsuperscript{187} Id.
\textsuperscript{188} Id.
of a peremptory challenge is the true reason. Justice Marshall scolded courts for using the employment discrimination standard saying, "[a] 'but for' test is inappropriate in the Batson inquiry . . . because of the special difficulties of proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter."191

Putting the original intent of the peremptory challenge aside, in a perfect system trial lawyers would not dare consider race-based reasons for excusing jurors and they would always be forthright about their true reason for asserting a peremptory strike when their actions were subject to a Batson challenge. In reality, though, "[t]he criteria underlying a prosecutor's peremptory challenges are private; a fact-finder therefore lacks an independent means of evaluating the prosecutor's decision making."192 Only the prosecutor knows the true reason why he is striking the juror and a jury may never know. Therefore, when a prosecutor is honest and admits one of his illegitimate motives for striking a juror, we should take the admission for what it is—racial discrimination in violation of Batson.

Critics would argue that the same problem arises in employment discrimination decisions. Employers likely know better than to assert race as a reason for failing to hire or terminate a member of a protected class, instead they prefer to state another reason. Of course, there will always be the opportunity for people to lie and present a reason that will satisfy the race-neutral requirement. However, it is easier to present a subjective reason for a peremptory challenge—which is completely unverifiable at a later time—than it would be to include false reports in a personnel file and persuade other employees to perjure themselves to make an employment decision appear legitimate. Courts differ on the types of reasons they will deem race-neutral. However, many courts will accept reasons such as failure to maintain eye contact, the juror was giving the attorney a blank stare, the juror was too young, or the juror was too old. It is possible for the attorney to go into voir dire having a few of these "plausible" reasons in the back of his mind and to use them if he is unable to assert another race-neutral reason for striking the juror.

There are many examples of this improper, unethical behavior in the system, and in some egregious situations attorneys are being instructed on how to exercise their peremptory challenges to exclude undesirable minority jurors in a way that will appear legitimate.193 In

192 Id. at 927.
193 See Fear of a Black Jury, HARPER'S MAG., July 2000, at 26. This article notes that the Philadelphia District Attorney's Office showed an instructional videotape to its prosecutors on
Justice Marshall’s words, “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.”

The Court’s recent decision in Costa, holding that direct evidence is not required to prevail on an employment discrimination claim, makes it easier for plaintiffs to prevail. Even though this higher burden is no longer required in employment discrimination cases, the tainted decision-making approach already meets that burden. The tainted decision-making approach is consistent with the idea that direct evidence of discrimination will not be tolerated in jury selection. In Batson mixed motive cases, there will always be direct evidence of discrimination because the prosecutor’s race-based reason for the strike is direct evidence of racial discrimination. The South Carolina Supreme Court has said, “Any consideration of discriminatory factors in this decision is in direct contravention of the purpose of Batson which is to ensure peremptory strikes are executed in a nondiscriminatory manner.”

There is no need to require additional evidence because the evidentiary burden is inherently high in a Batson challenge. Id. The instructions included questioning African-American jurors at length so the prosecutor would have as much ammunition as possible if a Batson challenge was later made. Id. They were instructed to write down reasons for striking the African-American juror so they could show the judge later. Id.

Wilkerson, 493 U.S. at 927-28. The meaning of “direct evidence” has proved confusing in employment discrimination cases. Some courts apply the dictionary definition: “evidence, which if believed proves existence of fact in issue without inference or presumption.” LARSON, supra note 133, § 8.07 (quoting BLACK’S LAW DICTIONARY 460 (6th ed. 1990)). The use of this definition would limit evidence to testimony from the decision-maker that he made the adverse employment decision based on a person’s protected characteristic. Id. Other jurisdictions use variations of the traditional approach: “evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic.” Id. (quoting Wright v. Southland Corp., 187 F.3d 1287, 1294 (11th Cir. 1999)). This would include such evidence as a supervisor saying “[a woman] is not mechanically inclined” and therefore he would not promote a woman to a position that required a woman to answer technical questions on a hotline. Id.


Tainted decision-making approaches, but luckily the prosecutor gave the best evidence a defendant could hope for—a statement on the record that he struck a juror based on his race.

C. The Spirit of Batson

The employment discrimination dual motivation doctrine is not consistent with equal protection and the theory behind *Batson*. The momentous decision in *Strauder* over a century ago held that an African American defendant is denied equal protection when members of his race are purposefully excluded from the venire.197 The *Batson* Court relied on *Strauder* when it said, “That decision laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.”198 The Court also cited the *Strauder* opinion for the proposition that the main purpose of the Fourteenth Amendment was to end governmental discrimination on account of race.199 The *Batson* opinion clearly states that the exclusion of African Americans from jury service is precisely what the Fourteenth Amendment is designed to protect against.200

*Batson* held the Equal Protection Clause of the Fourteenth Amendment forbids peremptory challenges to jurors solely based on their race.201 The main purpose of the case was to make the exercise of peremptory challenges based on race unconstitutional.202 By blatantly allowing prosecutors to cite race-based reasons when making peremptory challenges, courts are sanctioning discrimination so long as the illegitimate race-based reason is accompanied by a legitimate reason.

The tainted decision-making approach is preferable for policy reasons as well. Under the dual motivation approach, if a prosecutor asserts mixed motives for ten peremptory strikes and he is able to show he would have struck the jurors even if only the race-neutral reasons were present, then ten minorities will be excluded from the jury. In

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197 *Strauder v. West Virginia*, 100 U.S. 303 (1880). The Supreme Court began its discussion in *Batson* by emphasizing that the decision in *Strauder* was the foundation of the opinion. *Batson*, 476 U.S. at 85.
198 *Batson*, 476 U.S. at 85.
199 *Id.*
200 *Id.*
201 *Id.* at 86; see also *Brooks*, *supra* note 112, at 336-37. Arguments for a literal interpretation of the word “solely” are made to justify the mixed motive approach. *Id.* There is no other language in the opinion to support this interpretation, and a court that used this interpretation in support of the mixed motive approach cautioned that it is dangerous to seize on one word and make rules based on that one word. *Id.* at 337.
202 *Batson*, 476 U.S. at 80.
the same scenario under the tainted decision-making approach, all of
the minority jurors would remain. The harm in the first scenario is to
limit the jury's exposure to the experiences of the minority jurors
based on suspect reasons and potentially bias the entire jury against
the defendant by excluding members of a particular class of people.
In the second scenario, the harm would be to potentially allow onto
the jury a small number of minorities who could be biased, according
to the inherently suspect reasons given by the prosecutor. The likeli-
hood that all minorities on a jury would be biased seems unlikely and
further illustrates the harm that *Batson* violations promote.

The tainted decision-making approach is the proper response to
mixed motives in peremptory challenges. This Note recognizes that
there is the incentive for dishonest attorneys to be untruthful under
both systems, but the dual motivation approach is sending the same
message that equal protection forbids—that it is okay to consider race
in the decision—at least so long as there are other factors. A *Batson*
challenge requires the prosecutor to stand in front of the judge, the
jury, and members of the public and assert a reason for his challenge.
If jurors hear the prosecutor asserting a race-conscious reason for
striking other potential jurors, they will not trust the fairness of a sys-
tem that is supposed to protect the accused. To allow a prosecutor to
publicly articulate a reason that is race-conscious to defend his strike
threatens the legitimacy of the jury system and the public's faith in
the system and should not be tolerated.

The tainted decision-making approach is consistent with *Batson's*
goal of removing discrimination from the jury selection process. One
of the three main goals of the *Batson* decision was to legitimize the
jury system to the public. The Court emphasized the impact of the
"state's continued participation in a judicial system that discriminates
against individuals based on their race harms the community as a
whole by destroying its confidence in and regard for the judicial sys-
tem as a whole."²⁰³ The Court in *Price Waterhouse* balanced the harm
of potentially allowing discrimination in employment decisions with
the importance of allowing employers to have the freedom to make
important employment decisions.²⁰⁴ The Court recognized the impor-
tance of protecting the freedoms of employers who are private actors.
There is no such justification when the state's interest in discriminat-
ing is weighed against the constitutional rights of the accused and the
potential jurors. The potential harm to the public's perception of the
legitimacy of the system and the rights of the excluded juror and de-

²⁰³ Id. at 87.
fendant weigh heavily against allowing a prosecutor to use race as a factor in the exercise of peremptory challenges.

CONCLUSION

The Supreme Court's decision in *Batson v. Kentucky* has led to confusion and inconsistencies in its attempt to eradicate racial discrimination in the jury selection process. The decision forced prosecutors to explain their use of a peremptory challenge, contrary to its intended purpose as a means of striking jurors without the need to give a reason. The Court later went on to contradict its previous equal protection decisions by saying that the race of a juror does not impact his decision-making in coming to a verdict. And finally, lower courts have used the dual motivation approach to analyze mixed motive cases. This approach allows prosecutors to openly consider race as a factor when striking a juror, blatantly disregarding the purpose of *Batson*.

The *Batson* Court was unambiguous in its decree that discrimination should not play a factor in the jury selection process. Discrimination during voir dire violates the rights of the defendant and the excluded juror and hurts the community at large by undermining the legitimacy of the system. The tainted decision-making approach, by unequivocally rejecting the use of race in peremptory strikes, is the only method of analyzing mixed motives in peremptory challenges that is consistent with *Batson*. The tainted decision-making approach is also consistent with courts' classification of *Batson* violations as structural defects warranting the reversal of the defendant's conviction. Courts have held that a *Batson* violation affects the reliability of a trial and is not a harmless error. The tainted decision-making approach recognizes the seriousness of racial discrimination and does not tolerate it in the jury selection process.

The Court's analogy of *Batson* challenges to employment discrimination cases has proven unworkable and impractical. *Batson* claims can only be proven with transcripts of questions, the racial composition of the petit jury and the prosecutor's feeble excuses for striking a juror. Employment discrimination claims involve witness testimony, examination of the employer's prior employment decisions, the plaintiff's testimony, the plaintiff's personnel file, and many other tangible factors. These disparities in available evidence make the analogy impractical. Even if the Supreme Court continues to apply the employment discrimination analogy to *Batson* challenges, the Civil Rights Act of 1991 and its decision in *Costa* holding that any consideration of race in an employment decision is illegal, de-
mands the rejection of the dual motivation approach. The Supreme Court has held that race may not play a factor in employment decisions, opening the door for it to decide the proper approach to a mixed motive *Batson* case is the tainted decision-making approach.

LISA M. COX†

† J.D. candidate 2006, Case Western Reserve University School of Law. I would like to thank Professors Dale Nance and Jessie Hill for their thoughtful guidance in helping with this Note. I would also like to thank my family for their constant love and support.