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Ross P. Brooks

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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

BY: ROSS P. BROOKS†

† The author is a third year law student at St. Mary's University School of Law. Special thanks to my parents, Donn & Betty Brooks, for their continued support, encouragement, and inspiration. I would like to especially thank my wife Lindsay.

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"The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society."[1]

-Untied States Supreme Court Justice Kennedy paraphrasing Alexis de Tocqueville

1. Powers v. Ohio, 499 U.S. 400, 407 (1991). Justice Kennedy is paraphrasing a quote from Alexis de Tocqueville, 1 *Democracy in America* 334-37 (Schocken 1st ed. 1961).

I. INTRODUCTION

A. *Problems With the Mixed Motive Defense and a Suggested Alternative*

The State of Texas permits attorneys to use race as a factor when selecting jurors during the juror selection process.[2] It is perfectly permissible for an attorney to have racially discriminatory motives in excluding potential jurors, as long as an attorney can offer an additional race-neutral reason for striking the juror.[3] The Supreme Court has added that this "race-neutral" explanation does not even have to be persuasive or plausible, and held that the fact that a potential juror who has, "unkempt hair, . . . a mustache, and a goatee" would be a sufficient race-neutral reason.[4] In fact, Texas courts have allowed such "race-neutral" reasons as: wearing earrings in both ears,[5] having a thick accent,[6] failing to shake the prosecutor's hand during the course of a demonstration,[7] and even (for goodness sake) looking bored in the courtroom.[8] Thus, in Texas, an attorney can openly exclude a minority from serving as a juror because of her race as long as he would have excluded her anyway, perhaps merely because he did not like her earrings.[9]

It would appear axiomatic that such malfeasances of the juror selection process should not occur since the Supreme Court of the United States has determined that the Fourteenth Amendment Equal Protection

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2. *See generally* Guzman v. State, 85 S.W.3d 242 (Tex. Crim. App. 2002) (permitting the consideration of race as a factor in the exercising of a peremptory strike, so long as it is not the *only* factor). *But see* TEX. CODE CRIM. PROC. art. 35.261 (Vernon 2003) (prohibiting peremptory challenges based on race); *see also* Batson v. Kentucky, 476 U.S. 79, (1986) (explicitly prohibiting the consideration of race as a factor during the juror selection process).

3. *See generally Guzman*, at 244 (holding that in mixed motive strikes, "if the striking party shows that he would have struck the juror based solely on the neutral reasons, then the strike does not violate the juror's Fourteenth Amendment right to equal protection of the law.").

4. Purkett v. Elem, 514 U.S. 765, 768 (1995).

5. Wilson v. Texas, No. 05-01-00999-CR, No. 05-01-01000-CR, 2003 Tex. App. LEXIS 985, at *5 (Dallas [15th Dist.] Jan. 31, 2003, no pet.).

6. Rosales v. Texas, No. 03-00-00201-CR, 2000 Tex. App. LEXIS 7755, at *10 (Austin [3rd Dist.] Nov. 16, 2001, no pet.).

7. Roberts v. Texas, No. 14-96-00899-CR, 1998 Tex. App. Lexis 5925, at *3 (Houston [14th Dist.] Sept. 24, 1998, pet. ref'd).

8. York v. Texas, 764 S.W.2d 328, 330 (Tex. App. – Houston [1st Dist.] 1998, pet. ref'd). *See also* Mandujano v. Texas, 966 S.W.2d 816, 819 (Tex. App. – Austin 1998, pet. ref'd) (holding that a Hispanic veniremen who left "important papers in the courtroom when everyone went to lunch" was a permissible race-neutral explanation for the challenged strike).

9. *See generally Wilson*, No. 05-01-00999-CR, No. 05-01-01000-CR, at *5 (excluding a juror for dislike of her earrings).

Clause prohibits the peremptorial removal of a potential juror based *solely* on the juror's race.[10] But because of a somewhat obscure constitutional analysis, colloquially termed the "mixed motive" or "dual motivation" doctrine, the State of Texas has allowed such pre-textual circumventions of the constitutional protections afforded to the juror selection process.[11]

The purpose of this Comment is to examine the validity of the "mixed motive" or "dual motivation" analysis as applied in the context of *Batson/Edmonson* challenges. The Comment seeks to distinguish the application of this constitutional causation analysis in the context of *Batson/Edmonson* challenges from that of other Fourteenth Amendment contexts. Furthermore, the Comment takes the position that the State of Texas would be better served by readopting its initial stance on the issue and returning to the "taint view," which holds that once discriminatory intent is admitted during the juror selection process, the equal protection component of the Fourteenth Amendment has been violated and the entire juror selection process is tainted.[12]

Initially, this Comment will examine the origination and present state of the Untied States Supreme Court's application of the Equal Protection Clause of the Fourteenth Amendment to racially motivated juror exclusion. Furthermore, the Comment will examine the origins and application of the mixed motive doctrine in Texas courts. Additionally, the Comment seeks to bolster the premise that the mixed motive doctrine is inoperable in *Batson/Edmonson* challenges in the sense that it produces results that are inconsistent with the protections afforded to jurors by the Equal Protection Clause of the Fourteenth Amendment and prior judicial interpretations thereof. The Comment concludes with a brief examination of suggestions to eliminate purposeful discrimination in the juror selection process.

B. *The Peremptory Challenge*

There are two types of challenges parties may avail themselves of during the juror selection process in order to facilitate the removal of prospective jurors from the panel of prospective jurors. These are: challenges for cause and peremptory strikes.[13] Challenges for cause are

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10. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

11. *See generally* Guzman v. State, 85 S.W.3d 242 (Tex. Crim. App. 2002) (accepting the mixed motive doctrine in the context of *Batson/Edmonson* challenges).

12. *See* Speaker v. State, 740 S.W.2d 486, 489 (Tex. App. – Houston [1st Dist.] 1987, no writ).

13. *See* WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 22.3(a), at 289 (2d ed. 1999 & Supp. 2000).

unlimited in number, but are limited in scope and require the rendering of an explanation to be found acceptable by the trial judge.[14] Peremptory challenges, contrarily, are generally limited in number and require no explanation or plausible reason.[15] Generally, they are based on the perceptions of the striking attorney about the bias a particular juror may harbor that is not beneficial to his client.

A peremptory strike, by its nature, is necessarily discriminatory and reflects preconceived notions as to the potential biases a juror will have when evaluating the case. The Supreme Court of the United States has specifically held that one of the features of a peremptory challenge is that it is discriminatory by implication and is beyond the control of the court.[16] Allowing an attorney to peremptorily strike potential jurors without cause is a judicial recognition of the fears and biases that we all foster in one way or another. However, it is the abuse of this power that is the cause of the denial of the equal protection of the law to potential jurors as well as the defendant.

C. *The Effects of Racially Discriminatory Juror Exclusion*

Although the mixed motive doctrine is uniformly applied to the peremptory challenge process and its repercussions can equally affect all races and genders, it is particularly problematic for minority groups. In practice, the mixed motive doctrine can be worked to undo the protections afforded by the Equal Protection Clause in discriminatorily excluding a potential juror based on his or her race. This practice is unconstitutional and violates the rights of both the potential juror who was excluded because of his or her race, as well as the minority defendant.[17]

The practice of peremptorily striking a potential juror based on his or her race is a brand of inferiority on the minority population in general. Implicit in the strike are two underlying stereo-typical misconceptions: one, that minorities are incapable of carrying out justice because of their race or a presumed racial-bond that is inherent to minorities; and two, a misguided preconception that all members of a minority group share the same biases.[18] Such categorical assumptions about minorities not only affect the minority groups themselves, but also further perpetuate the societal stereotyping of minorities.

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14. *Id.*

15. *Id.*

16. Swain v. Alabama, 380 U.S. 202, 220 (1965).

17. Batson v. Kentucky, 476 U.S. 79, 84 (1986); Powers v. Ohio, 499 U.S. 400, 415 (1991).

18. *See Batson*, 476 U.S. at 104-05.

With a minority population of 47.6 percent,[19] the problem is particularly compounded in the State of Texas. Such a large minority population results in more minority persons implicated in the trial process who are likely to feel the sting of purposeful discrimination. As such, the State of Texas, specifically the Court of Criminal Appeals, should act to eliminate the application of the Fourteenth Amendment mixed motive doctrine in the context of *Batson/Edmonson* challenge hearings. Furthermore, the elimination of the mixed motive doctrine would facilitate the furtherance of racial equality in the juror selection process.

II. BACKGROUND: BATSON AND THE MIXED MOTIVE DOCTRINE

A. *Case Studies: A Historical Overview of the Supreme Court of the United States Application of the Fourteenth Amendment to Racially Motivated Juror Exclusion*

The *Batson/Edmonson* decisions were the derivatives of gradual social changes, mass racial integration, and racial equality movements encompassing a time period that commenced in the post-civil war era and whose zenith occurred in the mid-eighties with the rendering of the *Batson* opinion. As such, *Batson* can be best understood as the derivative of a progression of cases that advanced the protections afforded by the Equal Protection Clause. Thus, it is important to examine the historical progression of the application of the Fourteenth Amendment to the juror selection process.

The trail of litigation that ultimately led to the Supreme Court's determination that the Fourteenth Amendment prohibits racially motivated peremptory strikes in *Batson v. Kentucky* spanned well over a century. Once the Court determined that the Fourteenth Amendment precluded the categorical exclusion of minorities from sitting on juries,[20] more than one hundred years would pass before the Court applied similar reasoning to hold that the Fourteenth Amendment also prohibited discriminatorily motivated peremptory strikes during the juror selection process.[21]

The road to the *Batson* decision originated with the Supreme Court's post-civil war recognition that the exclusion of African-Americans from the opportunity to serve as jurors, because of their race, abridged the Equal Protection Clause of the Fourteenth Amendment.[22] This holding,

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19. U.S. Census Bureau, State and County Quick Facts: Texas, 2000, at http://quickfacts.census.gov/qfd/states/48000.html (last visited on Feb. 13, 2004).

20. *See* Strauder v. West Virginia, 100 U.S. 303 (1879) (prohibiting a West Virginian statute forbidding African-Americans from serving as jurors).

21. *Batson*, 476 U.S. at 79-80.

22. *See generally Strauder*, 100 U.S. at 303 (holding that the West Virginia statute excluding African-Americans from sitting as jurors is unconstitutional).

found in *Strauder v. West Virginia*, was the Court's first examination of racially based juror exclusion.[23]

i. *Strauder v. West Virginia*: The Fourteenth Amendment Protects the Rights of African-Americans to Sit on Juries

The Supreme Court's first attempt to cease racially motivated juror discrimination occurred in 1879, when the Court struck down a West Virginia statute that denied African-Americans the right to sit for jury service.[24] The Court overturned a murder conviction of an African-American West Virginian, by an all-white jury, as a violation of the equal protection component of the Fourteenth Amendment to the Constitution.[25] Specifically, the Court held that the exclusion of all members of the defendant's race from the jury violated the Fourteenth Amendment.[26] The Court denounced the denial of the opportunity to African-Americans to participate in the administration of justice as jurors and called this a brand of inferiority.[27]

Although this case involved a statute that prohibited persons who were not white males from jury service,[28] the decision ultimately rested on the denial of the equal protection of the law to African-Americans when criminally accused. Furthermore, the holding did not touch upon the discrimination suffered by potential jurors who were precluded from sitting on the jury as a result of their race.[29]

This decision was further supplemented in *Ex parte Virginia*, where the Court held that although an African-American is not constitutionally entitled to a jury consisting of members of his own race, any racially motivated denial of the right to serve as jurors to African-Americans violates the Equal Protection Clause of the Fourteenth Amendment.[30] The Court later solidified this principal in *Carter v. Texas*, where it held that any State action that resulted in the exclusion of African-Americans, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African-American race, resulted in a de-

23. *Strauder*, 100 U.S. at 303.

24. *Id.*

25. *Id.* at 310.

26. *Id.* at 312.

27. *Id.* at 308.

28. *See id.* at 305 (quoting the West Virginia statute that only permitted white males who were over the age of twenty-one to serve as jurors).

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

30. Ex parte Virginia, 100 U.S. 339, 345 (1879); *see also* Gibson v. Mississippi, 162 U.S. 565, 568 (1896) (arguing that objective factors, such as age, must be used to determine juror eligibility).

nial of the equal protection of the law.[31] Subsequently, the Court extended the ambit of protection to apply to any identifiable group that may be the subject of prejudice.[32]

At the time, the *Strauder* and *Ex parte Virginia* decisions were momentous accomplishments in the expansion of equal protection rights in the context of juror discrimination but did little in application to prevent prosecutors from discriminatorily excluding African-Americans and other minorities from jury panels. Prosecutors could simply exercise peremptory strikes during juror selection to accomplish *de facto*[33] juror discrimination. Moreover, the decisions in *Strauder* and *Carter* were promulgated to address regional legislation and prosecutorial subversions of the Fourteenth Amendment in the context of the total exclusion of an entire race from sitting on juries. The Court had yet to squarely confront the prosecutorial practice of peremptorily striking potential jurors in an effort to achieve homogeneous juries, much less the harm imposed upon the potential jurors who were excluded as a result of their race.

ii. *Swain v. Alabama*: The Use of Peremptory Strikes to Achieve the Systematic Exclusion of African-Americans from Sitting on Juries is Unconstitutional

Nearly a century after the *Strauder* ruling, the Warren Court granted *certiorari*[34] to a case where it confronted a claim that equal protection had been denied through the application of prosecutorial racially motivated peremptory strikes as a device to exclude African-Americans from sitting as jurors.[35]

Robert Swain, an African-American, was sentenced to death by an all-white Alabama jury for raping a Caucasian woman.[36] Swain moved to quash the indictment because the prosecutor struck all the African-Americans from the *venire*.[37] The Court held that in order to meet the

31. Carter v. Texas, 177 U.S. 442, 447 (1900).

32. Hernandez v. Texas, 374 U.S. 475, 478 (1954).

33. The definition of *de facto* is: "In fact, in deed, actually." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

34. A *writ of certiorari* is: "The name of a writ of review or inquiry." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

35. Swain v. Alabama, 380 U.S. 202, 203-04 (1965); *see also* Smith v. Texas 311 U.S. 128, 130 (1940) (holding that "for racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government"); *see also* Cassell v. Texas, 339 U.S. 282, 286 (1950) (stating "jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race").

36. *Swain* 380 U.S. at 231.

37. *Id.* at 210-11.

burden of establishing a *prima facie*[38] case of juror discrimination, the criminal defendant must demonstrate the prosecutorial implementation of a juror selection process that was contrived to achieve the systematic exclusion of African-Americans from sitting on juries.[39] In this instance, the Court ultimately concluded that Swain had failed to overcome the burden of establishing a *prima facie* case of purposeful discrimination with regard to the composition of the jury, and upheld his conviction.[40]

Interestingly though, Swain also contended that the taint of prejudice extended to the selection of the jurors during *voir dire*,[41] in that some of the prosecution's peremptory strikes were used discriminatorily to further affect the composition of the jury.[42] The Court reasoned that the nature of the peremptory challenge was necessarily discriminatory and could be used to strike, "any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants, or those with blue eyes."[43] The Court further refused to apply the Equal Protection Clause to the use of peremptory challenges, however it did recognize that in some instances the racially discriminatorily motivated exercise of the peremptory challenge might violate the Fourteenth Amendment when a defendant could establish, "the prosecutor's systematic use of peremptory challenges against Negroes over a period of time" to the extent that it resulted in the systematic exclusion of the African-American race from serving as jurors.[44] Ultimately, the Court held that peremptory strikes of potential jurors are presumed to be legitimate, absent the establishment of a *prima facie* case of discrimination.[45]

Swain was a progressive step in the curtailment of racially motivated peremptory strikes. The Court recognized the potential abuse of the peremptory strike when prejudicially motivated. However, the burden of proof on the movant to overcome the presumption of legitimacy was practically insurmountable.

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38. The definition of *prima facie* is: "On the face of it." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

39. *See Swain*, 380 U.S. at 224 (holding that a defendant must come forth with, "such proof [that] might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.").

40. *Swain*, 380 U.S. at 221-22 (1965).

41. *Voir dire* is defined as: "The preliminary examination the court may make of one presented as a juror." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

42. *Swain*, 380 U.S. at 210.

43. *Id.* at 212.

44. *Id.* at 227.

45. *Id.* at 223-24.

Lower courts interpreted the holding in *Swain* to require proof of a pattern of striking African-Americans over a number of cases in order to overcome this presumption of legitimacy.[46] In *United States v. Pearson*,[47] the Fifth Circuit acknowledged this cumbersome burden of proof and asserted that overcoming it might require an investigation as to the compositions of juries and the manner in which each side exercised its peremptory challenges.[48] The court then noted: "In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable."[49] This insuperable burden of proof caused a number of State courts to hold that excluding persons from juries because of their race was a violation of the right to an impartial jury in violation of the Sixth Amendment.[50]

With the stringent evidentiary touchstone in place, the racially motivated use of the peremptory strike would remain virtually irrefutable, in practice, for the next twenty years until the Supreme Court's ruling in *Batson v. Kentucky* in 1986.

iii. *Batson v. Kentucky*: Racially Motivated Peremptory Strikes Are Unconstitutional

In *Batson v. Kentucky*, the Supreme Court undertook to clarify the law relative to the prejudicial application of peremptory strikes exercised to effectuate juror discrimination.[51] Despite previously holding that the very essence of the peremptory strike is prejudicial and is beyond the control of the court, the Court now sought to narrow the scope of permissible motivation for peremptory juror strikes and applied the Fourteenth

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46. *See, e.g.*, U.S. v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971); U.S. v. Boykin, 679 F.2d 1240, 1245 (8th Cir. 1982); U.S. v. Jenkins, 701 F.2d 850, 859-60 (10th Cir. 1983); Thigpen v. State, 270 So.2d 666, 673 (1972); Jackson v. State, 432 S.W.2d 876, 878 (1968); Johnson v. State, 262 A.2d 792, 796-97 (1970); State v. Johnson, 311 A.2d 389, 390 (per curium) (1973); State v. Shaw, 200 S.E.2d 585, 588 (1973).

47. U.S. v. Pearson, 448 F.2d 1207, 1213-18 (5th Cir. 1971).

48. Interestingly, when examining the difficult burden of proof *Swain* placed on litigants, the Fifth Circuit sated that, "In the six years which have passed since *Swain*, we have not found a single instance in which a defendant has prevailed on this issue."

49. *See* People v. Wheeler, 583 P.2d 748, 767-68 (1978).

50. *See* Batson v. Kentucky, 476 U.S. 79, 82 (1986). The Supreme Court would later hold that the Sixth Amendment was not applicable to the exclusion of members of any distinctive group during the peremptory challenge stage of trials and refused to permit an objection to the peremptory strike of a prospective juror based on race, under the Sixth Amendment. *See* Holland v. Illinois, 493 U.S. 474, 488 (1990).

51. *See generally Batson*, 476 U.S. at 79 (formulating a three-step process for evaluating claims of alleged racially motivated peremptory strikes).

Amendment for the first time to the racially motivated peremptory strike.[52]

James Batson, an African-American, was charged with second-degree burglary and receipt of stolen goods.[53] During *voir dire*, the prosecutor exercised his peremptory strikes to remove all four African-American persons from the *venire*,[54] and subsequently selected a jury composed only of Caucasian persons.[55] Despite objection by the defense, the trial court ruled that the prosecution was entitled to strike anybody they saw fit and that the defendant failed to overcome the *Swain* evidentiary requirement of showing a prosecutorial systematic exclusion of all African-Americans from sitting as jurors.[56]

Upon review, the Supreme Court abandoned the tenuous evidentiary requirement as to the criteria required to establish a *prima facie* case of purposeful discrimination as proposed in *Swain*.[57] The Court held that a defendant may establish a *prima facie* case of purposeful discrimination in the jury selection process based solely on evidence concerning the prosecutor's exercise of peremptory challenges.[58] Thus, not only did the Court abolish the strict *Swain* evidentiary requirement of proving a systematic exclusion of African-Americans from sitting as jurors, but also subsequently established a three-part test for trial courts to use when a defendant raises a claim of purposeful discrimination during the peremptory challenge stage of a trial.[59]

The first step in establishing a *prima facie* case of purposeful discrimination requires the defendant to establish his membership in a cognizable racial group or the discriminatory intent against a group.[60] Second, the defendant may rely on the undisputed fact that peremptory challenges are inherently discriminatory.[61] Third, the defendant must show that the prosecutor used his peremptory strikes to remove members of the defendant's race from the *venire*.[62] The trial court must consider all relevant

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52. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965) (finding "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control.").

53. *Batson*, 476 U.S. at 82.

54. The term *venire* is defined as: "Originally used as the names of the writ for summoning a jury; commonly used to describe the jury panel." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

55. *Batson*, 476 U.S. at 83.

56. *Id.*

57. *Id.* at 96.

58. *Id.*

59. *Id.* at 96-97.

60. Castaneda v. Partida, 430 U.S. 482, 494 (1977).

61. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

62. *Id.*

circumstances when determining whether the defendant has made this requisite showing.[63] Upon making this *prima facie* showing, the burden shifts to the prosecution, who must offer a racially neutral explanation for striking the jurors.[64] The Court stopped short of proposing acceptable explanations, but did hold that a mere denial of discriminatory intent or the reliance upon the assumption that members of a minority race would be more sympathetic to members of their own race would not be adequate.[65]

The trial court is then charged with making a determination, based on all the facts and circumstances, of whether a defendant's Fourteenth Amendment rights have been violated.[66]

Compelled by the Court's desire to eliminate the crippling burden of proving a systematic perversion of the juror selection process as required under *Swain*,[67] the new evidentiary requirements clarified the disillusion as to the application of the *Swain* evidentiary burden and also resolved the question as to how the Fourteenth Amendment would apply in the case of juror discrimination.

Although *Batson* was a historic step towards ending the insidious practice of purposeful discrimination during the peremptory challenge process, doubt remained as to whether it would actually end racial discrimination in the context of peremptory strikes.[68] Prosecutors could easily assert race-neutral reasons for striking jurors and circumnavigate the evidentiary requirements, and trial judges lacked an objective test for evaluating prosecutorial motives. Attorneys even confess to the ease at which the *Batson* requirements are rebutted.[69] Furthermore, the trial court's subjective evaluation of the discriminatory nature of the strike is

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63. *Id.*

64. *Id.* at 97. And indeed, this step of the three-step *Batson* process is the step with which this Comment primarily takes at issue. Careful reading reveals that this step merely requires the showing of any alternate reason for excluding a juror other than for his race, thus possibly acknowledging prejudicial motivations while at the same time excusing them as incidental.

65. *Batson*, 476 U.S. at 97-98.

66. *Id.* at 98.

67. *See* Swain v. Alabama, 380 U.S. 202, 209 (1965) (requiring the showing of a systematic perversion of the juror selection process in order to prove unconstitutional discrimination in the juror selection process).

68. As Justice Marshall noted in his concurrence, "[T]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process." Batson v. Kentucky, 476 U.S. 79, 102-103 (1986).

69. *See* Tony Mauro, *Jury Selection is Sure to be a Challenge*, USA TODAY, Sept. 26, 1994, at 2A.

difficult, at best, to review upon appeal[70] and all remedial sanctions for a *Batson* violation are largely left to the discretion of the trial court.[71]

As Justice Marshall subsequently noted in dissent,

> "*Batson's* greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors. Assuming good faith on the part of all involved, *Batson's* mandate required the parties to confront and overcome their own racism on all levels,[72] a most difficult challenge to meet. This flaw has rendered Batson ineffective against all but the most obvious examples of racial prejudice - the cases in which a proffered neutral explanation plainly betrays an underlying impermissible purpose."[73]

Notwithstanding its critics, the *Batson* decision was a judicial denouncement of the utilization of racially motivated peremptory strikes during the juror selection process. Moreover, *Batson* spawned a progeny of litigation that would subsequently expand the protections provided by the equal protection component of the Fourteenth Amendment to the juror selection process.

The first in this trilogy of cases is *Powers v. Ohio.*[74] In *Powers*, the Court held that the Fourteenth Amendment protected the rights of the potential jurors who were excluded from a jury because of their race.[75] This was the first decision to extend equal protection rights, in the context of the peremptory challenge stage of the juror selection process, to someone other than the criminal defendant. The decision also settled a standing issue as to whether a criminal defendant could raise the third-party equal protection rights of jurors who were excluded because of their race.[76]

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70. *See* Batson v. Kentucky, 476 U.S. 79, 98 (1986) ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of creditability, a reviewing court ordinarily should give those findings great deference.").

71. *See id.* at 99-100 (1986) ("In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.").

72. *Id.* at 106.

73. Wilkerson v. Texas, 493 U.S. 924, 928 (1989).

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

75. *Id.* at 409.

76. *Id.* at 415. The notion of a criminal defendant raising the equal protection rights of jurors who were excluded because of their race stemmed from the fact that in *Powers*, the criminal defendant's race differed from that of the excluded jurors. The state argued that because the defendant was Caucasian, he lacked standing to object to the exclusion of prospective African-American jurors. The Court held that barring the claims of the defendant because he was of a different race than that of the excluded jurors, "would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service."

Later that same year, the Court extended *Batson* equal protection rights to litigants in civil trials.[77] In *Edmonson v. Leesville Concrete Co.*, the Court held that private litigants could raise equal protection claims based on racially motivated peremptory strikes in civil litigation.[78] Up until that point, *Batson* peremptory strike protections had only been extended (by implication) to criminal defendants.

Subsequently, the *Batson* peremptory strike equal protection analysis would be extended to prohibit criminal defendants from using peremptory strikes in a racially discriminatory manner, and thus applying the reasoning in *Batson* to prohibit any party (not just prosecutors) from asserting a racially motivated peremptory strike.[79]

B. *The Supreme Court of the United States Development and the Proliferation of the Fourteenth Amendment Mixed Motive or Dual Motivation Doctrine*

The Fourteenth Amendment mixed motive, or dual motivation, doctrine holds that equal protection claims may be rebutted by a showing that the same decision would have been reached even in the absence of the alleged protected conduct. Thus, when a movant makes a claim that his or her Fourteenth Amendment equal protection rights have been violated as a result of disparate treatment received from the opposing party, the accused party may rebut this claim by making a showing that the movant would have suffered the same result even if the questionable incident or action had not occurred. Perhaps put more succinctly,

> "In the realm of constitutional law, whenever a 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

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

78. *Id.*

79. *See* Georgia v. McCollum, 505 U.S. 42, 59 (1992). In subsequent decisions, the Court would also hold that the Equal Protection Clause prohibited racially motivated peremptory strikes in the context of ethnicity and gender. *See e.g.*, Hernandez v. New York 111 S. Ct. 1859, 1865-66 (1991) (applying *Batson* to ethnicity); J.E.B. v. Alabama, 511 U.S. 127 (1994) (applying *Batson* to gender). Subsequent cases expanded of the protections afforded by *Batson/Edmonson* to nearly every identifiable racial group and nationality. *See e.g.*, Hernandez v. Texas, 347 U.S. 475, 477-80 (1954) (extending *Batson/Edmonson* to persons of Mexican descent); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (applying *Batson/Edmonson* protections to American Indians); State v. Allen, 616 So. 2d 452, 452 (Fla. 1993) (holding that *Batson/Edmonson* applies to protect Hispanics); State v. Rambersed, 649 N.Y.S.2d 640, 641-2 (N.Y. Sup. Ct. 1996) (affording *Batson/Edmonson* to Italian-Americans).

to the defense that it would have taken the same action in the absence of the improper motive."[80]

This principle is necessarily implicated during the application of a *Batson/Edmonson* hearing regarding the legitimacy of an alleged discriminatorily motivated peremptory strike. The mixed motive doctrine comes into play during the third-step of the *Batson/Edmonson* challenge process. In a *Batson/Edmonson* challenge, a movant makes a motion to the court that the opposing party has peremptorily struck a potential juror because he or she is of a cognizable minority group and raises a claim of purposeful discrimination during the peremptory challenge process (i.e. makes a claim that a juror has been struck on the account of race). Once the movant makes this claim, the opposing party is charged with offering a race-neutral explanation for the peremptory strike.[81] If the court finds the explanation to be race-neutral, the analysis ends and the peremptory strike is validated.

Where the Fourteenth Amendment mixed motive doctrine becomes applicable is in situations where the party accused of making the discriminatorily motivated peremptory strike admits that race played a factor in his or her decision to strike the juror, but was coupled with the consideration of some other race-neutral reason. The effect of this defense is to say that race was a consideration in striking the juror, but it was not the only reason, and therefore, because considerations other than race were at play the strike is constitutional since the potential juror could have been struck for the other causes anyway.

The application of the mixed motive doctrine during a *Batson/Edmonson* hearing requires the party making the peremptory strike to show that it would have reached the same decision as to whether to exclude the potential juror regardless of substance or quantity of any accompanying racial considerations.

The concept that an openly admitted discriminatorily motivated peremptory strike could be negated by offering an accompanying racially-neutral justification for the strike finds its judicial endorsement in two equal protection cases from the late seventies.

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*[82] and *Mt. Healthy City School District Board of Education v. Doyle*,[83] in the context of equal protection claims raised regarding facially neutral zoning legislation and wrongful termination, respectfully, the Su-

80. Gattis v. Snyder, 278 F.3d 222, 235 (3rd Cir. 2002) (quoting *Batson*).

81. Batson v. Kentucky, 476 U.S. 79, 97 (1986).

82. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

83. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

preme Court of the United States enunciated and endorsed the Fourteenth Amendment mixed motive doctrine.

In *Arlington Heights v. Metropolitan Housing Development Corporation*, in determining that the Village of Arlington Heights[84] was not purposefully discriminate in the denial of the petitioner's rezoning request, the Court held that:

> "[P]roof that the decision [denying a request for rezoning] 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."[85]

This was the Court's initial pronouncement of the concept that is colloquially referred to as the Fourteenth Amendment "mixed motive" or "dual motivation" doctrine. In a wrongful termination opinion rendered concurrently with *Arlington Heights*, the Court bolstered the mixed motive doctrine by deferring to precedence from other categories of constitutional law in support for its ubiquitous application of the mixed motive doctrine to Fourteenth Amendment constitutional law analysis.[86]

In *Mt. Healthy City School District Board of Education v. Doyle*, the Court applied the mixed motive doctrine to a wrongful termination case and held that although the lower court applied a pertinent causation test, it should have:

> ". . .gone on to determine whether the [School] Board had shown by the preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[87]

The Court utilized the mixed motive doctrine to hold that even if the school board (employer) had wrongfully terminated the employment of the teacher (employee) based on his constitutionally protected conduct, the employer needed only to show that it could have reached the same decision (regarding whether to terminate the employee) based on some other reason, without taking into account the protected conduct.[88]

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84. A suburb of Chicago, Illinois.

85. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977).

86. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286-287 (1977).

87. *Id.* at 287.

88. *Id.*

The Court appeared to come to the conclusion that the mixed motive doctrine was necessary as a matter of common sense and judicial convenience.[89] In a reference to the lower court's application of a causation test found to be inappropriate, the Court held that the difficulty with utilizing a causation test that was surmised to determine to what degree, if any, the remnants of perception and initial impression regarding the employee's prior conduct, now validated as protected conduct, played a role in the decision not to rehire the employee would:

> "[R]equire reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision – even if the same decision would have been reached had the incident not occurred."[90]

Apparently Justice Rehnquist saw the use of the mixed motive doctrine in Fourteenth Amendment cases as a matter of practicality in application and moreover, he deferred to other areas of constitutional law where the Court had formulated similar tests of causation to determine whether an individual's constitutional rights had been violated (cases involving the constitutionality of criminal confessions made more than once in states of both voluntariness and involuntariness).[91] Although he admitted that the type of causation on which these cases turn upon is distinct, Rehnquist further surmised that they do suggest that the proper test to apply in the employment discrimination context is one that, "likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[92]

This premise appears to advance the idea that such causation tests should take into account the assurance of constitutional rights without an overindulging concern for producing unwanted results. Perhaps in such wrongful termination contexts, the Court is advancing the notion that causation tests like the Fourteenth Amendment mixed motive doctrine are devices of practicality. Implicated by necessity in an effort to prevent an employer from declining to rehire an employee he had previously wrongfully terminated and not having his decision judicially invalidated merely because it was surmised, to some extent, on the account of undesired protected conduct on behalf of the employee.

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89. *Id.* at 285.

90. *Id.* .

91. *Id.* at 286. Specifically, the Court cited to four cases (Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. 471, (1963); Nardone v. United States, 308 U.S. 338 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

92. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

The application of the rulings in *Arlington Heights* and *Mt. Healthy* makes it clear that in the context of equal protection claims, where both impermissible and permissible motivations exist for the defendant's egregious action in violation of the Fourteenth Amendment, the defendant need only show that the plaintiff would have suffered the same outcome because of the permissible motivation, even had the defendant not contemplated an impermissible motivation.[93]

The decisions in *Arlington Heights* and *Mt. Healthy* have been applied in the context of *Batson/Edmonson* challenges to require a party who openly admits to the consideration of race as a factor in exercising a peremptory strike to simply subsequently validate the peremptory strike by offering an accompanying race-neutral reason for the strike.[94] Most of the lower federal courts have applied the mixed motive doctrine in *Batson/Edmonson* challenges without expressly determining its validity in such a context.[95] The Supreme Court has declined the opportunity to determine whether the mixed motive doctrine is applicable to *Batson/Edmonson* challenges.[96] Thus, under the current state of constitutional law, the mixed motive doctrine is the proper causation test in equal protection claims and furthermore, the mixed motive doctrine is properly implicated during juror discrimination Fourteenth Amendment claims.

It is the intent of this Comment to distinguish the mixed motive doctrine in a *Batson/Edmonson* challenge context as applied in other areas of constitutional law and to show that the analysis is flawed to the extent that it would allow a litigant to openly use race as a factor to discriminatorily affect the composition of a jury panel.

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93. *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985).

94. In Howard v. Senkowski, 986 F.2d 24, 26 (2nd Cir. 1993) a Federal Circuit Court addressed for the first time a mixed motive *Batson/Edmonson* challenge case and held that the mixed motive doctrine was applicable in the context of a *Batson/Edmonson* challenge. *See also* Gattis v. Snyder, 278 F.3d 222, 233-34 (3rd Cir. 2002); United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995); Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996); United States v. Tokars, 95 F.3d 1520, 1533 (11th Cir. 1996); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); Rico v. Leftridge-Byrd, 340 F.3d 178, 180 (3rd Cir. 2003). *But see* United States v. Alcantar, 897 F.2d 436, 440 (9th Cir. 1990) (declining to adopt the mixed motive doctrine). Subsequent Ninth Circuit cases have also declined to adopt the analysis. *See e.g.*, Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th Cir. 1993).

95. *See* Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); Gattis v. Snyder, 278 F.3d 222, 234-35 (3rd Cir. 2002); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); Wallace v. Morrison, 87 F.3d 1271, 1274 (11th Cir. 1996); and Howard v. Senkowski, 986 F.2d 24, 30 (2nd Cir. 1993).

96. *See* Wilkerson v. Texas, 493 U.S. 924 (1989) (denying certiorari).

III. The View From Texas Courts: A Chronology of Case Law

Texas courts acquiesced to the federal rule[97] long ago, and have condemned the consideration of race as a factor in the selection of jurors. Texas courts have also held that a defendant is denied the equal protection of the law when potential jurors are excluded based on the consideration of their race.[98] However, the mixed motive doctrine has presented a challenge to the State's highest courts. Case law indicates varying sentiments in regard to the Fourteenth Amendment mixed motive doctrine.[99] A state appellate court decided the case of initial impression in Texas to implicate the federal mixed motive doctrine in a *Batson/Edmonson* challenge context.[100] The Court unequivocally held that any admission of the consideration of race during the juror selection process taints the entire process to the extent that the consideration of other contributing factors would be counterintuitive.[101] In subsequent opinions, both the Texas Supreme Court and the Texas Court of Criminal Appeals, the State's two highest courts, agreed that the "taint view" was an appropriate position.[102] However, this was merely a passing fancy, and the Texas Court of Criminal Appeals would subsequently abrogate these opinions and hold

97. 18 U.S.C. § 243 (2003), based on § 4 of the Civil Rights Act of 1875 (declaring "[n]o citizen possession all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petite juror in any Court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excluded or fails to summon any citizen for such cause, shall be fined not more than $5,000.").

98. Cassell v. State, 216 S.W. 2d 813, 819 (Tex. Crim. App. 1949); Smith v. Texas, 311 U.S. 128, 129-32 (1940).

99. *See* Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991), (holding that "equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror."). *See also* Speaker v. State, 740 S.W. 2d 486, 489 (Tex. App. – Houston [1st Dist.] 1987, no writ), (holding that, "a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure."); *cf.* Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002), (holding, "when the motives behind a challenged peremptory strike are "mixed," i.e., both impermissible (race or gender-based) and permissible (race and gender neutral), if the striking party shows that he would have struck the juror based solely on the neutral reasons, then the strike does not violate the juror's Fourteenth Amendment right to equal protection of the law.").

100. *See generally Speaker*, 740 S.W. 2d at 489 (holding improper influences, such as race, may not be a determining factor in the selection of jurors).

101. *See generally id.*

102. *Powers*, 813 S.W.2d at 491; Hill v. State, 827 S.W.2d 860, 868 (Tex. Crim. App. 1992).

that the federal mixed motive doctrine is applicable in the *Batson/Edmonson* challenge context.[103]

A. *Texas Appellate Courts Reject the Mixed Motive Doctrine*

The Court of Appeals for the First District in Houston was the first court in Texas to hear a *Batson/Edmonson* challenge that implicated the federal mixed motive doctrine. In *Speaker v. State*, a prosecutor used his peremptory strikes to remove nine of the ten African-American *veniremen*[104] from the jury.[105] The defendant contended that he was denied a fair and impartial trial as a result of the prosecutor's racially motivated peremptory strikes.[106] The prosecutor admitted that he had considered race as a factor when selecting jurors, but that it was not an "overriding factor."[107]

Although the court commended the prosecutor for his candor, the court held that the prosecutor's admission that he considered race as an influencing factor during the juror selection process "vitiat[ed] the legitimacy of the entire procedure." [108] The court declined to mitigate the appellant's *Batson/Edmonson* Fourteenth Amendment rights by allowing the prosecutor to offer alternative factors in his decision to strike the African-American *veniremen* and thus rejected the mixed motive doctrine in favor of the "taint view."[109]

The Court of Appeals for the Thirteenth District in Corpus Christi was the next Texas court to adjudicate a *Batson/Edmonson* mixed motive case.[110] In *McKinney v. State*, the court declined to apply the federal mixed motive doctrine and instead followed the "taint view".[111] Specifically, the court held that, "[n]o neutral explanation can serve to rebut the presumption that the condemned practice of exclusion based on race oc-

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103. *See generally* Wamget v. State, 67 S.W.3d 851, 851-60 (Tex. Crim. App. 2001) (reitifying the validity of the mixed motive doctrine, although declining to reconsider it under the circumstances of the case); *Guzman*, 85 S.W.3d at 244.

104. The definition of *veniremen* is: "Members of the panel of jurors." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

105. *Speaker*, 740 S.W. 2d at 488. It should be noted that the tenth and remaining African-American on the venire was struck by the defense counsel.

106. *Id.* at 489.

107. *Id.*

108. *Id.*

109. *Id.* The Court of Appeals for the First District of Houston would later reiterate this holding in Moore v. State, 811 S.W.2d 197, (Tex. App. – Houston [1st Dist.] 1991, writ ref'd).

110. *See* McKinney v. State, 761 S.W.2d 549, 551 (Tex. App. – Corpus Christi 1988, no writ), (upholding the "taint view").

111. *Id.*

curred when the prosecutor admits that such an exclusion did occur."[112] Although the court made no specific mention of the mixed motive doctrine, it can be inferred from the court's reasoning and application of the "taint view" that such further analysis into the prosecutor's motives for excluding the named jurors was not pertinent.[113]

B. Powers v. Palacios: *The Texas Supreme Court Holds That Any Consideration of Race During the Juror Selection Process Violates the Equal Protection Clause*

In *Powers v. Palacios*,[114] the Supreme Court of Texas followed suit and endorsed the "taint view" approach to determining whether equal protection has been denied when race has been considered as a factor during the juror selection process. In the *Powers* case, a party accused of considering race as a factor during jury selection admitted that race contributed to his decision to exclude the respective jurors, but was not the only reason for the strike.[115] In a *per curiam*[116] opinion, the court held that the consideration of race when exercising a peremptory strike is a denial of equal protection.[117]

C. Hill v. State: *The Texas Court of Criminal Appeals Endorses the Mixed Motive or Dual Motivation Doctrine*

Less than a year after the Texas Supreme Court rendered the opinion in *Powers v. Palacios*, a divided Texas Court of Criminal Appeals[118] sitting *en banc*[119] departed from the "taint view" approach and ratified the Fourteenth Amendment mixed motive doctrine.[120] In *Hill v. State*, the Court of Criminal Appeals held that the consideration of race during the juror selection process is unconstitutional, but only to the extent that is the *only* factor considered in the exclusion of a juror.[121] Specifically, the court held that, "race may be a factor coexisting with a non-racial reason for the strike, however, race may not be the reason for the strike."[122] The

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112. *Id.*

113. *See generally id.* (arguing that the court was not persuaded that race was a mere factor and not the reason for striking the individual from the jury).

114. *See* Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991).

115. *Id.* at 490.

116. "A phrased used to distinguish an opinion written by the Chief Justice or presiding judge." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

117. *Powers*, 813 S.W.2d at 491.

118. The state's highest criminal court.

119. "All justices sitting for trial." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).

120. *See* Hill v. State, 827 S.W.2d 860, 866 (Tex. Crim. App. 1992).

121. *Id.* at 866.

122. *Id.*

Hill court proffered the mixed motive concept in its reasoning to hold that potential jurors who are struck due to the consideration of race are not automatically entitled to an equal protection claim under *Batson/Edmonson* if they would have been struck for a race-neutral reason anyway.[123]

In a sweeping blow to Fourteenth Amendment protections the state's highest criminal court abandoned the "taint view" endorsed by the State Supreme Court and two state appellate courts and upheld a mixed motive doctrine to a *Batson/Edmonson* challenge.[124] Interestingly, the court chose not to address or distinguish *Speaker*, *Powers*, *or McKinney* in rendering its opinion.[125]

D. Benavides v. American Chrome & Chemicals, Inc.: The Texas Supreme Court Reiterates its Position in Powers *and the Validity of the "Taint View"*

In *Benavides v. American Chrome & Chemicals, Inc.*, a *Batson/Edmonson* case out the Court of Appeals for the Thirteenth District in Corpus Christi, the court diverged from *Hill* and the mixed motive doctrine to once again endorse the "taint view".[126] The court went so far as to say that the Texas Supreme Court had further extended the *Batson/Edmonson* protections beyond that of other jurisdictions to the extent that it had reversed cases where race was a factor in the consideration of the selection of jurors even when coupled with alternative race-neutral reasons.[127]

Benavides was subsequently appealed to the Texas Supreme Court. In a published order of denial of application for *writ of error*,[128] the State Supreme Court purposely restated its position, presumably in light of *Hill*, that equal protection is denied when a race is considered as a factor in the exclusion of a juror during *voir dire*.[129] While in approval of the of the appellate court's application of "taint view" approach, the court rejected the appellate court's suggestion that it was advancing the protections of *Batson/Edmonson*. The court stated that it disagreed with the appellate court's language that, "we and the Texas Supreme Court have gone a step further than some jurisdictions [in this area of equal protec-

123. *Id.* at 868.
124. *Id.* at 866.
125. *Id.*
126. Benavides v. American Chrome & Chem., Inc., 803 S.W.2d 624, 626 (Tex. 1994).
127. *Id.*
128. A *writ of error* is defined as: "A writ used from a court of appellate jurisdiction directed to the judge of record requiring him remit to the appellate court the record before him." BLACK'S LAW DICTIONARY 479 (4th ed. 1968).
129. Benavides v. American Chrome & Chem., Inc. 907 S.W.2d 516, 517 (Tex. 1995). The ninth judge concurred in part.

tion law in that both courts have reversed decisions in which was a factor considered during *voir dire*, even to the extent that other race-neutral were also present]."[130]

Although the court appeared to waffle at the suggestion that it was a progressive step ahead of the federal mixed motive doctrine in equal protection law, it did unequivocally endorse the "taint view" approach to determining whether purposeful discrimination has vitiated the juror selection process.[131]

E. *The Court of Appeals for the Fifth District Departs from Hill and the Mixed Motive Doctrine and Follows* Benavides

Five years would pass after the Texas Supreme Court's decision in *Benavides v. American Chrome & Chemicals, Inc.* before the Court of Appeals for the Fifth District in Dallas would have an opportunity to revisit the *Batson/Edmonson* mixed motive doctrine. In *Guzman v. State*, an attorney admitted that race was a factor he considered during the peremptory challenge stage of trial.[132]

In a strange turn of events, Justice Miller, who while sitting on the Texas Court of Criminal Appeals concurred in the result of *Hill*, reconsidered and dismissed *Hill* in a case before the Dallas Court of Appeals.[133] In *Guzman*, Justice Miller abandoned the mixed motive doctrine in *Hill* by alluding to its splintered plurality decision in which four of the judges supported and the four other judges joined in the concurring opinion that held that race may never be a factor for a peremptory strike, even when coupled with a race-neutral reason.[134]

While the *writ of error* to *Guzman* was pending in the Texas Court of Criminal Appeals, the Court of Appeals for the Fifth District in Dallas struck down the *Batson/Edmonson* mixed motive doctrine once again in favor of the "taint view."[135] In *Sparks v. State*, the state prosecutor admitted that he considered race as a factor in striking a potential juror, and then asserted *Hill's* adoption of the *Batson/Edmonson* mixed motive doctrine in his defense.[136] The court disagreed with the assertion that the *Hill* decision reflected the current state of the law and held that the State

130. *See id.* (quoting Powers v. Palacios, 813 S.W. 2d 489, (Tex. 1991).

131. *Id.*

132. *See generally* Guzman v. State, 20 S.W.3d 237 (Tex. App. – Dallas 2000, no pet.).

133. Guzman v. State, 20 S.W.3d 237, 242-43 (Tex. App. – Dallas 2000, no pet.).

134. *Id.* at 242. Incidentally, Justice Miller also reitified that he merely concurred in the result of *Hill.*

135. Sparks v. State, 68 S.W.3d 6, 15 (Tex. App. – Dallas 2001, pet. ref'd).

136. *Id.* at 11.

could not insulate itself from the effects of racial bias by merely proffering an accompanying racially neutral reason for the peremptory strike.[137]

F. State v. Guzman: *The Texas Court of Criminal Appeals Overturns the Fifth District's Decision and Endorses the Mixed Motive Doctrine*

The fallout from the Texas Court of Criminal Appeals decision in *Hill v. State*,[138] coupled with the Fifth Circuit's dereliction of the mixed motive doctrine affirmed therein, led the Court of Criminal Appeals to avail itself of the opportunity to reaffirm its opinion in *Hill v. State*.[139] The court acquiesced to the federal standard *Batson/Edmonson* mixed motive doctrine in *Guzman v. State*.[140] In *Guzman*, a capital murder case where a *Batson/Edmonson* challenge implicated the mixed motive doctrine, the Texas Court of Criminal Appeals vehemently denounced the application of the "taint view" and once again endorsed the *Batson/Edmonson* mixed motive doctrine.[141]

In its analysis, the court dismissed the "taint view" alluding to the fact that it was not constitutionally mandated.[142] Furthermore, the Supreme Court of the United States had yet to examine the legitimacy of the mixed motive doctrine in the *Batson/Edmonson* context.[143] Moreover, the Court cited the ominous application of the mixed motive doctrine in other Fourteenth Amendment implications, such as Title VII employment discrimination cases stemming from the decisions in the *Arlington Heights* and *Mt. Healthy* cases.[144] The court deduced the mixed motive doctrine was just as germane to the context of a *Batson/Edmonson* challenge.[145]

Once again, a splintered[146] Texas Court of Criminal Appeals impetuously adhered to the federal standard when it dismissed the "taint view" approach as a superfluous expansion of Fourteenth Amendment protec-

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137. *Id.* at 12.

138. *See* Hill v. State, 827 S.W.2d 860, (Tex. Crim. App. 1992, pet. granted).

139. *Id.*

140. Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002) (en banc) (reiterating that race may be a factor among other considerations during the peremptory challenge stage of trial, but it may not be the only factor).

141. *Id.*

142. *Id.* at 248.

143. *Id.*

144. *Id.* at 249-50 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)). An employment discrimination case where the mixed motive doctrine was applied.

145. *Guzman*, 85 S.W.3d at 250.

146. The Texas Court of Criminal Appeals reversed the Fifth Circuit's decision in a 5 to 4 vote.

tions in the *Batson/Edmonson* challenge context.[147] Although the majority of the court displayed its intransigence with regard to expanding the protections afforded by the Fourteenth Amendment in this context, the *Guzman* decision was hardly devoid of critics[148].

In his dissent, Judge Womack stated, "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."[149]

Despite such criticism, in a 5-4 decision, the Texas Court of Criminal Appeals confronted the Fifth Circuit's application of "taint view" analysis to the Fourteenth Amendment in a *Batson/Edmonson* setting that was inapposite to the *Hill* decision and reaffirmed the mixed motive doctrine.[150] The opinion in *Guzman* is the most recent ruling from any Texas court regarding the application of the *Batson/Edmonson* mixed motive doctrine, and thus is the current state of the law as applied by the Texas Court of Criminal Appeals. Although the Supreme Court of Texas has previously adopted the "taint view" in *Powers* and reaffirmed it in *Benavides*, one can only wonder if *Guzman* has paved the way for the Supreme Court of Texas to fall into line with federal standard. This would abrogate *Powers* and depart from the bright line rule it endorsed with the "taint view."

Presently, Texas case law in the area espouses a split in opinion between the state's two highest courts. On one hand, the Supreme Court of Texas (the state's highest civil court) has held that the "taint view" is the appropriate analysis for situations where an attorney has both permissible and non-permissible reasons for peremptorily striking a juror. On the other, the Texas Court of Criminal Appeals (the state's highest criminal court) has more recently denounced the "taint view" and continues to adhere to the federal mixed motive doctrine.[151] Although the courts of Texas have made this area of law somewhat inchoate, it is the position of this Comment that the Fourteenth Amendment should be impermeable to such erosion as the mixed motive doctrine.

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147. *Guzman*, 85 S.W.3d at 249. This holding reversed the Fifth Circuit's decision in a 5 to 4 vote.

148. *See* Mary Alice Robbins, *Dual-Motive Jury Strikes Don't Always Violate Equal Protection Rights in Texas PREDICTING THE FUTURE*, THE LEGAL INTELLIGENCER, Vol. 226, No. 104; pg. 4, May 30, 2002 (quoting Guzman's defense attorney who states that the mixed motive doctrine negates the protections afforded by *Batson/Edmonson*).

149. *Guzman*, 85 S.W.3d at 251 (Womack, J. with whom Meyers, Price, and Johnson J.J., join, dissenting).

150. *Id.* at 244.

151. *See* Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991); Benavides v. American Chrome & Chem., Inc. 907 S.W.2d 516, 517 (Tex. 1995); Guzman v. State, 85 S.W.3d 242, 244 (Tex. Crim. App. 2002) (en banc).

IV. The Texas Court of Criminal Appeals Should Abandon the Mixed Motive Doctrine

The thesis of this Comment is that the State of Texas, specifically the Texas Court of Criminal Appeals, should ameliorate the federal equal protection component of the Fourteenth Amendment to the extent that it is incompatible with the application of the mixed motive doctrine in the context of *Batson/Edmonson* hearings. The corollary of this assertion is that once discriminatory intent is found to have occurred during the juror selection process, the entire process becomes tainted to the extent that the defendant can no longer be ensured of a fair trial. Just as one bad apple ruins the entire barrel, an admission of the consideration of race as a factor in the juror selection process spoils the entire process.[152] Once an attorney is found to have considered race as a factor, he or she should not be subsequently allowed to offer an ancillary reason for exercising the peremptory strike discriminatorily and then participate with impunity in a trial in light of perfunctory *voir dire*.

The federal mixed motive doctrine operates unmindfully of the purpose of *Batson* and *Edmonson*. Thus, it is nothing less than enigmatic as to why the Texas Court of Criminal Appeals would exacerbate the constitutional rights of its citizens by departing from the Supreme Court of Texas and the "taint view" approach. The mixed motive doctrine is a paradigm of reciprocity gone awry in that it allows one rule of law to accomplish the undoing of the protections afforded by another.

A. *The Mixed Motive Doctrine Is Inconsistent with the Intent and Purpose of Batson/Edmonson*

The federal mixed motive doctrine operates as a systematic perversion of the intent and purpose of *Batson/Edmonson*, in that its application in this context makes the equal protection requirements afforded therein all but illusory in practice. The mixed motive doctrine allows attorneys to openly consider the race of the prospective juror as one of the factors for selection as a juror and the opportunity to participate in the trial process. This is a patent contravention of *Batson v. Kentucky* where the Supreme Court of the United States held that the Equal Protection Clause forbids peremptorily challenging jurors *solely* on account of their race.[153]

Arguments have been made that a literal interpretation of the word "solely" in the aforementioned statement would lead one to believe that the Supreme Court anticipated such situations where an attorney has admitted that he or she considered the race of a potential juror and then

152. Guzman v. State, 85 S.W.3d 242, 256 (Tex. Crim. App. 2002) (en banc).
153. Batson v. Kentucky, 476 U.S. 79, 79-80 (1986).

peremptorily struck him or her on account of race and other, permissible considerations.[154] However, implicit in this argument is the assumption that the Court considered the situation where an attorney openly admits he or she used race as a factor in the selection of jurors and not just situations where the consideration of race is subjectively determined by the trial judge to have lurked, latently, in the juror selection process. There is no language or analysis in *Batson* or *Edmonson* that would support such an assertion and it would be difficult to contend that Justice Powell was pondering just such a scenario and used the word "solely" as a caveat. The United States Second Circuit Court of Appeals addressed this question in *Howard v. Senkowski*,[155] and declined to interpret the word "solely" in a manner that would facilitate the inapplicability of the mixed motive doctrine to *Batson/Edmonson* challenges. However, as an aside, the court back-peddled before asserting such a fiat and noted, "it is always hazardous to seize upon a single word or phrase in a judicial opinion and build upon it a rule that was not in issue in the case being decided."[156] Until the Supreme Court of the United States decides to hear a case where the Fourteenth Amendment mixed motive doctrine is implicated in a *Batson/Edmonson* hearing, any determinations of judicial intent regarding the application of the mixed motive doctrine in such occasions based on the term "solely" are purely speculative and should be highly suspect.

Advocates of the mixed motive doctrine argue that because *Batson* could be read to allow the mixed motive doctrine in such scenarios where an attorney openly admits he or she used race as a factor during the juror selection process, it is therefore reasonable to conclude that the Supreme Court would subsequently apply it in such a scenario.[157] However, this position of sanguinity is easily rebutted because *Batson* clearly stands for the notion that the consideration of race as a factor during *voir dire* is unconstitutional.[158] The *Batson* court uninhibitedly denounced the consideration of race in the juror selection process and noted: "a person's race simply is unrelated to his fitness as a juror."[159] Justice Powell also

154. Geoffrey A. Gannaway, *Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defense to Batson Challenges*, 21 Rev. Litig. 375, 394 (2002).

155. Howard v. Senkowski, 986 F.2d 24, 28 (2d Cir. 1993).

156. *Id.*

157. Holly E. Engelmann, *Note: Guzman v. State*, 56 SMU L. Rev. 2117, 2124 (2003).

158. Batson v. Kentucky, 476 U.S. 79, 80 (1986).

159. *See id.* at 87 (quoting, in part, Theil v. Southern Pacific Co., 328 U.S. 217, 223-224 (1946)).

clearly stated that, "the Constitution prohibits all forms of purposeful racial discrimination in [the] selection of jurors."[160]

It is problematic to reconcile this sentiment with the mixed motive notion that discriminatorily motivated peremptory strikes are permissible in the event that the striking attorney can merely offer an accompanying racially neutral reason for the strike. Given the aforementioned subsequent expansions of *Batson* protections to civil litigants[161] and in the areas of gender[162] and ethnicity,[163] it is just as easily deduced that the Supreme Court would supplant the mixed motive doctrine in favor of the more expansive protections afforded by the "taint view."

Put simply, it is difficult to square the mixed motive doctrine with the Fourteenth Amendment protections of *Batson/Edmonson*. The opportunity given to an attorney to proffer a neutral explanation for a discriminatorily exercised peremptory strike undermines the standards and plain language of *Batson*, which outlawed the consideration of race during the juror selection process. The disparity between *Batson* and *Edmonson's* purpose and the end results caused by the implementation of the mixed motive doctrine are inapposite and should to be reconciled by abandoning the mixed motive doctrine in favor of the "taint view."

B. *The "Taint View" is a Better Alternative and is More Consistent with* Batson

The "taint view" is a bright line rule and is the antithesis of the mixed motive doctrine. Under the "taint view" discriminatory intent revealed in a peremptory strike, even if coupled with nondiscriminatory reasons, taints the entire juror selection process requiring a reversal.[164] Thus the "taint view" expands the protection of the Equal Protection Clause beyond that which has been interpreted to be required under the United States Constitution.

The "taint view" is more consistent with *Batson* to the extent that it reconciles the disparate results afflicted by the application of the mixed motive doctrine in *Batson/Edmonson* contexts. The "taint view's" bright line rule curtails a *Batson/Edmonson* hearing at the second step, discussed *infra*, by rejecting the notion that once discriminatory intent is

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160. *See id.* at 88 (quoting, in part, Theil v. Southern Pacific Co., 328 U.S. 217, 223-224 (1946)).

161. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (extending *Batson* to civil litigants).

162. *See generally* J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending *Batson* to gender cases).

163. *See generally* Hernandez v. New York 111 S. Ct. 1859 (1991) (extending *Batson* to ethnicity cases).

164. Wagmet v. State, 67 S.W.3d 851, 869 (Tex. Crim. App. 2001).

found that a race-neutral explanation may be offered to negate the protected conduct. The "taint view" ends any further examination of the striking party's motive once discriminatory intent is revealed and cuts the *Batson* three-step process one step short by disallowing the implicated party to justify his discriminatory actions by simply offering an accompanying race-neutral motive for the strike.[165] Thus, the "taint view" supports the unqualified requirement in *Batson* that the consideration of race as a factor during the juror selection process is unconstitutional.[166]

Whereas the mixed motive doctrine provides an avenue for the unscrupulous attorney to backdoor his or her way out of vitiating the juror selection process, the "taint view" abruptly slams that door on those attorneys who would otherwise peremptorily strike a potential juror because of his or her race. Thus, it is hard to understand why the Texas Court of Criminal Appeals continues to adhere to the mixed motive doctrine since the "taint view" not only furthers the purpose of *Batson*, but also expands Fourteenth Amendment protections for litigation participants with little, if any, additional repercussions upon the trial process, save the administrative and fiscal implications of ordering a new trial in the event that a discriminatorily motivated peremptory strike occurs.

The "taint view" analysis or theory is a product of litigation, which has been devised and implicated to combat just such situations where an attorney considered race as a factor in the juror selection process coupled with other racially neutral factors.[167] In contrast, the mixed motive doctrine is a derivative of wrongful termination actions and was subsequently applied to other actions that fall under the purview of the Equal Protection Clause of the Fourteenth Amendment (such as the juror selection process).[168] Thus, the "taint view" analysis was initially contrived as a Fourteenth Amendment protection applicable in the juror selection process and its counterpart, the mixed motive doctrine, arose in another context and then was applied to the equal protection context of juror discrimination.[169] Hence, it is somewhat perplexing as to why federal courts continue to ominously apply the mixed motive doctrine to all Fourteenth Amendment equal protection claims when a more suitable alter-

165. Sparks v. State, 68 S.W.3d 6, 10 (Tex. App. – Dallas 2001, pet. ref'd.).

166. *See* Batson v. Kentucky, 476 U.S. 79, 80 (1986).

167. *See generally* Guzman v. State, 85 S.W.3d 242, 256 (Tex. Crim. App. 2002) (noting that the mixed motive doctrine is inconsistent as applied in the juror selection context).

168. *See generally* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, (1977) (applying and construing the mixed motive doctrine in the context of a wrongful termination proceeding).

169. *See generally Guzman*, 85 S.W.3d at 242 (applying the mixed motive doctrine to the juror selection process).

native of examining protected conduct in the juror selection process is available.

Although the five federal circuit courts that have addressed the application of the mixed motive doctrine in the *Batson/Edmonson* context have adopted and upheld the constitutionality of the doctrine,[170] at least five states have rejected it in favor of the "taint view."[171] In addition, Justice Marshall of the United States Supreme Court has also denounced the mixed motive doctrine in favor of the "taint view" in a dissent from the denial of a petition for *writ of certiorari.*[172]

C. *The Mixed Motive Doctrine as Initially Implicated in the Employment Context can be Categorically Distinguished as Applied in the Context of* Batson/Edmonson *Challenges*

The origin of the Fourteenth Amendment mixed motive doctrine is espoused in the context of equal protection claims arising from employment discrimination and wrongful termination claims.[173] The Supreme Court has also applied the mixed motive doctrine to Title VII gender discrimination cases.[174] The Court has yet to confront the mixed motive doctrine in the context of a *Batson/Edmonson* challenge hearing,[175] however it has held that the mixed motive doctrine is an exculpatory defense that rebuts a *prima facie* showing of purposeful discrimination in other Fourteenth Amendment applications.[176] Guided by this precedent, five Federal Circuit Courts have interpreted the decisions in these employ-

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170. Robbins, *supra*, note 149, at pg. 4. Specifically, the 2nd, 3rd, 4th, 8th, and 11th Circuits have adopted the mixed motive defense.

171. *See* State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (rejecting the mixed motive doctrine in favor of the "taint view" in a case where the attorney claimed that Southern men are prejudicial against working pregnant women); Payton v. Kearse, 495 S.E.2d 205, 210 (S.C. 1998) (rejecting the mixed motive doctrine in a case where the attorney struck a Caucasian juror because she was of "redneck variety"); Rector v. State, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994) (denouncing the mixed motive doctrine in a case where an African-American woman was struck because she "had a big gold tooth with a pattern on it right in the front of her mouth"); Powers v. Palacios, 813 S.W.2d 489, 490 (Tex. 1991); and McCray v. State, 738 So.2d 911, 914 (Ala. Crim. App. 1998). Additionally, a United States court of military review has also adopted the "taint view." United States v. Greene, 36 M.J. 274, 282 (CMA 1993).

172. Wilkerson v. Texas, 493 U.S. 924, 926 (1989).

173. *See generally* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, (1977) (applying the mixed motive doctrine in the context of a wrongful termination proceeding); and *see generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (implicating the mixed motive defense in a wrongful termination case).

174. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, (1989) (applying the mixed motive doctrine in an employment discrimination case).

175. Guzman v. State, 85 S.W.3d 242, 250 (Tex. Crim. App. 2002).

176. Robbins, *supra*, note 149, at pg. 4.

ment discrimination equal protection claims to apply to discrimination claims in the juror selection process.[177] The expansion of the application of the mixed motive defense in the juror selection context is counterintuitive to the extent that it would supersede the more expansive *Batson/Edmonson* protections to render them all but illusory. This ancillary application of the mixed motive doctrine effectively lessens the protections afforded by the Equal Protection Clause to the juror selection process.

When the mixed motive doctrine is applied in a situation where an attorney openly admits to peremptorily striking a juror because she was an African-American who "had a big gold tooth with a pattern on it right in the front of her mouth,"[178] it gives the attorney a subsequent opportunity to supplement this consideration by coupling it with a race-neutral cause for the strike; thereby farcically negating the effect of such purposeful discrimination. This set of circumstances is qualitatively distinct from the application of the mixed motive doctrine in the employment context.

The mixed motive doctrine is commonly applied in employment discrimination circumstances where the employer did consider the race of an employee as a factor for his or her termination, but would have terminated him or her anyway because he or she was consistently late to work or made personal calls on the company phone all day.[179] The mixed motive doctrine is applied in this instance to prevent the employer from having to rehire the employee on the account of the employer's impermissible conduct and then subsequently terminate the employee again because of legitimate reasons.[180]

These two fact patterns are categorically distinct in two ways. One, the application of the Supreme Court's holding in *Purkett v. Elem*,[181] which states that the *Batson* mandated neutral reason explanation for an alleged discriminatory peremptory strike, "need not be persuasive or even plausible," is not applicable in the employment discrimination context. Instead it is a ruling specifically concerned with the functionality of the *Batson/Edmonson* analysis.[182] Thus, as applied to the context of a *Batson/Edmonson* hearing, the mixed motive doctrine has a lesser threshold of proof than when applied in the employment discrimination context.

Two, in the employment context, courts have the opportunity to examine evidence of the employer's treatment of similar employees or ap-

177. *Id.* These five Federal Circuit Courts formed what is colloquially referred to as the "federal standard" in this regard.

178. *See* Rector v. State, 444 S.E.2d 862, 865 (1994).

179. Guzman v. State, 85 S.W.3d 242, 249-50 (Tex. Crim. App. 2002).

180. *See generally* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977).

181. Purkett v. Elem, 514 U.S. 765, 768 (1995).

182. *Id.*

plicants to objectively determine his culpability with regard to his prejudicial conduct.[183] In the *Batson/Edmonson* context, the alleged discriminating attorney's motives and discriminatory track record with regard to juror selection patterns are privileged, and go unchecked so the trial court must subjectively surmise the validity of his or her race-neutral explanation.[184]

These two fundamental distinctions coupled with the fact that the mixed motive doctrine operates in a manner that inadvertently accomplishes the undoing of the protections afforded by *Batson*, distinguish its application in the context of the juror selection process from that of the employment discrimination context. The mixed motive doctrine found its genesis in the area of employment law and as applied, ineffectuates the purpose of *Batson*. The mixed motive doctrine has no place in the juror selection process except to exacerbate the conundrum of ceasing purposeful discrimination.

V. Preventing Purposeful Discrimination in the Juror Selection Process

Preventing discrimination in the juror selection process is a problem unique to non-heterogeneous societies such as ours. Total racial equality at all levels may someday be obtainable, but we are far from it today. Until that time, precautionary measures must be in place during the juror selection process to safeguard the equal protection of the law to all races and minority groups.

The juror selection process, in particularly the peremptory challenge system, is uniquely vulnerable to discriminatory conduct in that it is discriminatory by its very nature.[185] Although the participating attorneys in the juror selection process are charged as the vanguards of its creditability, it is far too often suspect to purposeful discrimination. This is precisely the reason the *three-step* Batson analysis was promulgated by the Supreme Court of the United States.[186]

A. *Eliminating The Peremptory Challenge System*

There is some question as to whether *Batson* does enough to eliminate purposeful discrimination in the peremptory challenge system. The per-

183. *Compare* Wilkerson v. Texas, 493 U.S. 924, 926 (1989), *with* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).

184. Wilkerson v. Texas, 493 U.S. 924, 926 (1989).

185. *See* Swain v. Alabama, 380 U.S. 202, 220 (1965).

186. *See generally* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

emptory challenge has long been a fixture in our courtrooms, but many are now urging for its elimination.[187]

Peremptory challenges are merely judicially, "created means to the constitutional end of an impartial jury and a fair trial" and are not constitutionally protected rights.[188] Therefore, the right to exercise peremptory challenges is a privilege and could be withheld without abridging any Fourteenth Amendment rights.[189]

United States Supreme Court Justice Marshall urged just this in his concurring opinion to *Batson*[190] and Justice Meyers of the Texas Court of Criminal Appeals recently agreed with him.[191] Other critics of the peremptory challenge system have advocated for its elimination, and the enlargement of the challenge for cause system.[192]

I do not advocate the drastic elimination of the peremptory challenge system, but do agree that more than a modest proposal is necessary to eliminate the problem of racial discrimination in the juror selection process.

B. *Jury Quotas*

Perhaps a more modest solution to the racially discriminatory exclusion of jurors in the juror selection process would be the requirement of proportional representation of race on a jury. Much in the way affirmative action works to facilitate the hiring and promotion of minorities in the job market, this system would ensure minority representation on juries, at least to the extent of the minority's proportional representation in their respective community or state. Although this measure may be somewhat drastic, there is precedence for the successful implementation of a quota system in the affirmative action context. Undoubtedly, it would categorically exclude claims of racially based juror exclusion during *voir dire.*

Although the Supreme Court has held that a defendant does not have the constitutional right to a jury composed in whole or part of members

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187. *See id.* at 102-03, 107 (dissenting from the opinion, Justice Marshall makes an argument for the elimination of the peremptory challenge system). *See also* Jeffrey Abramson, *Abolishing The Peremptory But Enlarging The Challenge For Cause*, APA NEWSLETTER, Vol. 96, Spring 1997 (arguing for the elimination of the peremptory challenge system); *see also* Wamget v. State, 67 S.W.3d 851, 860-61 (Tex. Crim. App. 2001) (concurring in the opinion, Justice Meyers of the Texas Court of Criminal Appeals advocated for the elimination of the peremptory challenge system).

188. Georgia v. McCollum, 505 U.S. 42, 52 (1992).

189. *Id.*

190. *Batson*, 476 U.S. at 102-03, 107.

191. Wamget v. State, 67 S.W.3d 851, 860-61 (Tex. Crim. App. 2001).

192. *See also* Abramson, *supra*, note 189 (arguing for the elimination of the peremptory challenge system).

of his own race or minority group, he does have a "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria."[193] Many years ago the Court dismissed such a quota proposal as "impossible."[194] While a quota proposal is presently plausible as a somewhat complicated measure, there is no doubt that such a system would succinctly end the problem.

C. *Attorney Accountability and Professional Responsibility*

The simplest way to end purposeful discrimination by attorneys during the peremptory challenge process is for the individual attorneys to operate unmindfully of racial considerations while selecting jurors. Obviously, no one is counting on that. What complicates this further is that the penalties for *Batson* violations appear to be highly ineffectual and have never been enforced.[195]

The American Bar Association (ABA) condemned the practice of racially motivated juror exclusion just eight years ago.[196] Since that time, the ABA has yet to admonish a single member for carrying out this practice.[197] Nor has a single state ever disciplined an attorney for exercising a peremptory challenge discriminatorily.[198] Although the practice has been condemned, racially motivated juror exclusion has not been viewed as professional misconduct to the extent that no attorney has been disciplined for it, yet apparently it occurs frequently.[199]

Until greater accountability in the juror selection process is enforced and changes are made to ethical rules and disciplinary processes, attorneys are left to be guided by their own consciences with little reinforcement from their profession.

VI. Conclusion

Until the day comes when preventative safeguards are no longer necessary to protect the juror selection process from purposeful discrimination, the judicial system must progress proactively to secure the right to a fair and impartial jury and to protect the right of citizens to fulfill the public duty of serving on juries.

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193. *See* Engelmann, *supra*, note 158, at 2123 (quoting Batson v. Kentucky, 476 U.S. 79, 85, 107 (1986)).

194. Cassell v. Texas, 339 U.S. 282, 286-87 (1950).

195. Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 266 (2003).

196. Brown, Jr., *supra*, note 197, at 271-72.

197. *Id.* at 272.

198. *Id.* at 282.

199. *Id.* at 288-89.

An individual's right to participate in the criminal and civil justice process as a juror is a right that is essential to our system of justice. Additionally, the criminal or civil defendant has the right to be judged by an impartial jury representative of his peers. The safeguarding of this right is of significant importance and should be done with the utmost of diligence. Any additional minor inconvenience this places on the trial court should be endured to the extent that would otherwise exacerbate the Fourteenth Amendment equal protection rights.

It is for these reasons that the Texas Court of Criminal Appeals should abandon the federal mixed motive doctrine in favor of the "taint view." Texas should support a "bright line" rule holding that any consideration of race in the juror selection process, specifically in the peremptory challenge stage, violates the Equal Protection Clause of the Fourteenth Amendment. Discrimination has no place in the courtroom, especially in the selection of jurors. The mixed motive doctrine is a derision of the principals enunciated in *Batson* and casts back the penumbral Fourteenth Amendment rights *Batson* established ensuring the non-discriminatory selection of jurors. It is asinine to believe that our highest criminal court would allow an attorney to brazenly acknowledge that he struck a juror because of his or her race and then validate the strike because of an ancillary incidental factor that does not even have to be plausible or persuasive. It is pure balderdash to believe that one could articulate a race-neutral explanation for exercising a peremptory strike discriminatorily when race is, itself, part of that explanation.[200]

200. Hill v. State, 827 S.W.2d 860, 875 (Tex. Crim. App. 1992).