
NOTE

THE FRAMEWORK COMES CRUMBLING DOWN: JURYQUEST IN A *BATSON* WORLD

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“There is a joke among lawyers about the difference between jury trials in England and the United States: in England, the trial starts once the jury selection ends; in America, the trial is already over.”¹

INTRODUCTION

A venire has been assembled and jury selection for a criminal trial has begun. The judge has excused prospective jurors who have a previous relationship with either of the parties, who have already formed an opinion about the case, or who feel – for whatever reason – that they will be unable to analyze the case in an unbiased manner. The defendant has exercised

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¹ Daniel Goleman, *Study Finds Jurors Often Hear Evidence With Closed Minds*, N.Y. TIMES, Nov. 29, 1995, at C1.

challenges for cause² to eliminate partial or biased jurors and has exhausted his allotment of peremptory challenges.³ Thirteen prospective jurors remain; only twelve are needed. The prosecutor has one peremptory challenge remaining but finds himself torn between two of the remaining jurors. His tried and tested instincts are at a loss. He could flip a coin but that approach seems reckless. If only there was a way to determine which of the two jurors is more likely to be sympathetic to the State's case.

Enter JuryQuest, a computer program which claims to provide an empirical, scientifically-tested basis for determining, *ex ante*, the attitudinal predispositions of prospective jurors.⁴ By relying on seven demographic characteristics – race, gender, age, education, occupation, marital status, and prior jury service – JuryQuest claims to be able to determine whether a prospective juror is likely to be more sympathetic (or just plain biased) towards a particular side.⁵ Once such determinations are made, an attorney need only exercise his peremptory challenges to eliminate the unfavorable jurors.

This method of selecting jurors through reliance on “characteristic based statistical probabilities”⁶ is known as “scientific jury selection,” and has been used by jury consultants since as early as 1972.⁷ Only recently, however, has computer software such as JuryQuest become commercially available.⁸ The advent of this technology has been met with both opposition and support from members of the legal community, with much of the disagreement centering on normative and ethical implications.⁹ In a sense, however, this debate puts the cart before the horse because it assumes that programs such as JuryQuest do, in fact, have predictive capabilities.

² See generally 47 AM. JUR. 2D *Jury* § 200 (2007) (“A defendant has the statutory right to challenge for cause any juror harboring actual bias or the inability to remain fair and impartial.”).

³ See generally *id.* § 206 (“A peremptory challenge is a challenge to a prospective juror for which no reason need be given or cause assigned.”).

⁴ JuryQuest, <http://www.juryquest.com> (last visited Jan. 15, 2008).

⁵ JuryQuest, Scientific Jury Selection Software, http://www.juryquest.com/index.php?option=com_content&task=view&id=58&Itemid=84 (last visited Jan. 15, 2008).

⁶ *Commonwealth v. Gibson*, 567 A.2d 724, 735-36 (Pa. Super. Ct. 1989).

⁷ The first mainstream use of scientific jury selection was in the “Harrisburg Seven” trial which involved seven Catholic antiwar protesters accused of conspiring to destroy draft records during the Vietnam War. JEFFREY ABRAMSON, *WE THE JURY* 148, 155-59 (Harvard Univ. Press 2000) (1994).

⁸ JuryQuest itself was released in 2005. Jeff Horwitz, *Jury-Rigging: Can a Computer Pick a Better Jury than a High-Priced Consultant?*, SLATE, Aug. 10, 2006, <http://www.slate.com/id/2147351/fr/rss/>.

⁹ See, e.g., Tresa Baldas, *Software Program Used To Strike Biased Jurors Sparks Debate*, NAT'L L.J., Sept. 4, 2006, at 1, 17.

Although most commentators agree that jurors' demographic characteristics are not wholly irrelevant in the exercise of peremptory challenges,¹⁰ the efficacy of statistical demographic analysis is widely debated.¹¹ Fundamentally, this skepticism comes from the fact that a statistical analysis of demographic characteristics is only as good as the underlying model on which it is based.¹² JuryQuest, however, seems to answer this criticism. Rather than relying on a static model, "[e]mpirical results from JuryQuest trials are promptly fed back into its database, gradually supplanting and improving its original data."¹³ Therefore, the underlying model – and thus presumably the predictive capabilities – are getting better.

Ethics and effectiveness aside, JuryQuest poses a troubling constitutional issue which has received surprisingly little attention. In the 1986 landmark decision *Batson v. Kentucky*,¹⁴ the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause¹⁵ prohibits race-based peremptory challenges.¹⁶ This holding was later extended to peremptory challenges based on gender.¹⁷ At first brush then, attorneys who exercise peremptory challenges on the basis of JuryQuest – which unabashedly considers race and gender – should, at the very least, pause to consider whether their use of JuryQuest implicates *Batson* and its progeny.

Unfortunately, there is a pittance of case law on the issue, as no court has ever examined computer-based jury selection software in the *Batson* context. In fact, only one reported case has even so much as mentioned scientific jury selection – let alone software such as JuryQuest – in the *Batson* context.¹⁸ Similarly, although several commentators have observed, in passing, the potential conflict between *Batson* and scientific jury selection techniques

¹⁰ See, e.g., HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 156 (1993); M. Juliet Bonazzoli, Note, *Jury Selection and Bias: Debunking Invidious Stereotypes Through Science*, 18 QUINNIPIAC L. REV. 247, 248 (1998); Michael J. Saks, *Social Scientists Can't Rig Juries*, PSYCHOL. TODAY, Jan. 1976, at 48, 49-50 (finding scientific jury selection more reliable than human intuition).

¹¹ See, e.g., ABRAMSON, *supra* note 7, at 145-46. Other commentators have taken up the middle-ground position, admitting that scientific jury selection works better in some circumstances than in others. See Douglas D. Koski, *Jury Selection: A Social Scientific Analysis*, in THE JURY TRIAL IN CRIMINAL JUSTICE 242, 253-55 (Douglas D. Koski ed., 2003).

¹² See generally V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 6.04 (3d ed. 2001) ("It is important to remember that the reliability of the demographic analysis is dependent on the criteria employed in determining the values for categories of demographic variables and assigning weight to demographic variables.").

¹³ Horwitz, *supra* note 8.

¹⁴ 476 U.S. 79 (1986).

¹⁵ U.S. CONST. amend. XIV, § 1.

¹⁶ *Batson*, 476 U.S. at 89.

¹⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

¹⁸ *Commonwealth v. Gibson*, 567 A.2d 724, 736 (Pa. Super. Ct. 1989).

generally,¹⁹ none have analyzed the interaction of *Batson* and computer-based jury selection software in particular. Moreover, none have examined the ways in which such jury selection techniques impact the operation of the tripartite *Batson* framework.²⁰ This Note seeks to fill both of these voids.

As background, Part I will provide a brief history of the jurisprudence leading up to and following the *Batson* decision. Part II will unpack the three-step *Batson* framework in order to provide necessary insight into the operation of each step. Part III will introduce JuryQuest and explain its methodology. Part IV will then analyze the interaction between JuryQuest and the *Batson* framework, arguing that the use of JuryQuest – and, indeed, JuryQuest itself – violates *Batson* in certain jurisdictions, but not in others. Additionally, Part IV will argue that, in jurisdictions that would find a *Batson* violation, JuryQuest will ultimately turn the three-step framework into a one-step evidentiary showing. Part V discusses proposals designed to foster disclosure of JuryQuest’s use, and is followed by a brief conclusion.

I. BATSON’S HISTORY AND PROGENY

In *Strauder v. West Virginia*, the Supreme Court struck down a West Virginia statute prohibiting blacks from serving as jurors²¹ on the grounds that the statute violated equal protection under the newly enacted Fourteenth Amendment.²² Although *Strauder* eliminated all facially discriminatory juror selection statutes, some states continued to *administer* facially neutral statutes

¹⁹ See, e.g., ABRAMSON, *supra* note 7, at 175 (“The basic method of scientific jury selection contradicts the new ethic the Supreme Court set for jury selection, when it outlawed race- or sex-based peremptory challenges.”); Jeffrey J. Rachlinski, *Scientific Jury Selection and the Equal Protection Rights of Venire Persons*, 24 PAC. L.J. 1497, 1566 (1993) (“Although it arises from benign motives, [scientific jury selection’s] traditional emphasis on immutable demographic characteristics mimics the bigotry in jury selection that the Court condemns.”).

²⁰ The *Batson* Court created a three-part, burden-shifting framework to determine whether a peremptory challenge was exercised with purposeful discrimination. *Batson*, 476 U.S. at 96-98. For an in depth discussion of the operation of the framework, see *infra* Part II.

²¹ The statute at issue stated as follows: “All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided.” *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879) (citing 1872-73 W. Va. Acts 102).

²² *Id.* at 310. The Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as *jurors*, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. (emphasis added). The Court subsequently extended this holding to grand jurors. See *Carter v. Texas*, 177 U.S. 442, 447 (1900).

in a discriminatory manner. More than fifty years after *Strauder*, the Court finally addressed this problem in *Norris v. Alabama*, holding such discriminatory administration unconstitutional.²³ Having thus razed the front-end discriminatory impediments to jury service, *Strauder* and *Norris* effectively guaranteed black men the right to be called for and sit on a petit jury. Unfortunately, this guarantee proved to be rather hollow. Although getting blacks to the jury box was an accomplishment in itself, keeping them there was an entirely different challenge.

While *Strauder* and *Norris* took significant strides towards eliminating discrimination from jury service, the effort was dealt a substantial setback in *Swain v. Alabama*, where the Court refused to extend *Strauder* and *Norris* to peremptory challenges.²⁴ The Court reasoned that subjecting peremptory challenges – which, by nature, do not require explanation²⁵ – to the demands and strictures of the Equal Protection Clause would eliminate the peremptory nature of the challenge.²⁶ The Court, however, left open the possibility of a successful equal protection challenge when a prosecutor systematically and consistently exercises peremptory strikes to prevent blacks on petit jury venires from sitting on the petit jury itself.²⁷

The stage was now set for *Batson v. Kentucky*, where the Court, for the first time, applied the Fourteenth Amendment to peremptory challenges and held that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.”²⁸ Moreover, the Court held that a systematic pattern of racial discrimination was not a necessary predicate to a violation of the Equal Protection Clause.²⁹ Rather, “a defendant may make a prima facie showing of purposeful discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*.”³⁰

²³ *Norris v. Alabama*, 294 U.S. 587, 598 (1935) (“If . . . the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision – adopted with special reference to their protection – would be but a vain and illusory requirement.”).

²⁴ *Swain v. Alabama*, 380 U.S. 202, 221 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

²⁵ See, e.g., STARR & MCCORMICK, *supra* note 12, § 2.13, at 48-49.

²⁶ *Swain*, 380 U.S. at 221-22 (“The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.”).

²⁷ *Id.* at 224.

²⁸ *Batson*, 476 U.S. at 89. The Court, however, “express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel.” *Id.* at 89 n.12.

²⁹ *Id.* at 95-96 (“For evidentiary requirements to dictate that ‘several must suffer discrimination’ before one could object would be inconsistent with the promise of equal protection to all.” (citation omitted) (quoting *McCray v. New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting))).

³⁰ *Id.* at 95.

In the years following, the Court expanded *Batson*'s holding in several important respects. First, in *Powers v. Ohio*,³¹ the Court found that an individual juror has an equal protection right not to be excluded on account of race.³² Thus the defendant and the dismissed juror do not have to be of the same race in order for the defendant to lodge a viable *Batson* objection.³³ The second major expansion came in *Edmonson v. Leesville Concrete Co., Inc.*,³⁴ where the Court held that civil litigants may not discriminatorily exercise peremptory challenges,³⁵ reasoning that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."³⁶ Finally, in *Georgia v. McCollum*,³⁷ the Court held that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."³⁸ Thus, where *Powers* protected jurors from prosecutorial strikes and *Edmonson* protected from civil litigants' strikes, *McCollum* brought the doctrine full circle by extending *Batson* protection to jurors excluded by criminal defendants.

In more recent years, the Court has extended *Batson* and its progeny to prohibit peremptory strikes based on gender³⁹ and ethnicity.⁴⁰ Lower courts have also addressed peremptory strikes based on religion⁴¹ or sexual orientation,⁴² but the Supreme Court has yet to address either issue.⁴³

³¹ 499 U.S. 400 (1991).

³² *Id.* at 409.

³³ *Id.* at 402.

³⁴ 500 U.S. 614 (1991).

³⁵ *Id.* at 630.

³⁶ *Id.*

³⁷ 505 U.S. 42 (1992).

³⁸ *Id.* at 59.

³⁹ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

⁴⁰ See *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (plurality opinion).

⁴¹ See, e.g., *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003); *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997); *State v. Purcell*, 18 P.3d 113, 120 (Ariz. Ct. App. 2001). But see *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (declining to extend *Batson* to strikes on the basis of religious affiliation). See generally 28 U.S.C. § 1862 (2000) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.").

⁴² See, e.g., *People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Cal. Ct. App. 2000) (finding gays and lesbians to be a class protected from the discriminatory use of peremptory challenges based on state law); *People v. Viggiani*, 431 N.Y.S.2d 979, 982 (N.Y. Crim. Ct. 1980) (holding that denying homosexuals the right to serve as jurors "is tantamount to a denial of equal protection under the U.S. Constitution"). See generally Cal. Civ. Proc. Code § 231.5 (West 2004) ("A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her . . . sexual orientation . . ."); Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 26 (2001) (arguing that

II. UNPACKING THE FRAMEWORK

In *Batson v. Kentucky*, the Court constructed a three-step, burden-shifting framework for use in analyzing allegations of discriminatory use of peremptory strikes. At the first step, the burden is on the challenging party to make out a prima facie case of purposeful discrimination “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”⁴⁴ Once this showing is made, the court then proceeds to the second step of the analysis where the burden shifts to the challenged party to “come forward with a neutral explanation” for the strikes.⁴⁵ Finally, “[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.”⁴⁶ Each of these three steps is expounded upon below.

A. Step One – Clearing the Prima Facie Hurdle

The burden in *Batson*’s first step is on the challenging party to make a prima facie showing of purposeful discrimination in the opposing party’s exercise of a peremptory challenge.⁴⁷ In expounding upon the way in which this requisite showing is to be made, the *Batson* Court originally stated that the challenging party must first prove the objective fact that he is a member of a cognizable racial group and that the opposing party has exercised peremptory challenges to strike members of that racial group from the venire.⁴⁸ This requirement, however, was later rejected in *Powers v. Ohio*, which held that racial identity between the challenging party and the excluded juror is not a prerequisite to raising a *Batson* objection.⁴⁹ Next, the challenging party “is entitled to rely on

sexual orientation should be analyzed under *Batson*); John J. Neal, Note, *Striking Batson Gold at the End of the Rainbow?: Revisiting Batson v. Kentucky and its Progeny in Light of Romer v. Evans and Lawrence v. Texas*, 91 IOWA L. REV. 1091, 1109 (2006) (same).

⁴³ See, e.g., *Davis v. Minnesota*, 511 U.S. 1115, 1115 (1994) (denying certiorari to an appeal from the Minnesota Supreme Court which declined to apply *Batson* to religion-based peremptory challenges); *United States v. DeJesus*, 347 F.3d 500, 510 n.7 (3d Cir. 2003) (stating that the Supreme Court has not ruled on the constitutionality of religion-based peremptory challenges under *Batson* and its progeny), *cert. denied*, *DeJesus v. United States*, 541 U.S. 1086 (2004).

⁴⁴ *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986) (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)).

⁴⁵ *Id.* at 97.

⁴⁶ *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam); *Batson*, 476 U.S. at 98 (stating that once a neutral explanation is articulated, “[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination” (footnote omitted)).

⁴⁷ *Batson*, 476 U.S. at 93-94.

⁴⁸ *Id.* at 96. Although the *Batson* Court spoke only in terms of race, the Court’s subsequent peremptory challenge jurisprudence makes clear that the test applies equally to membership in a cognizable gender or ethnic group. See *supra* Part I.

⁴⁹ *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

the fact . . . that peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”⁵⁰ Finally, the challenging party must show that the combination of all the relevant facts and circumstances raises an inference that discrimination has occurred.⁵¹

It is important to emphasize that *Batson*’s first step is merely an evidentiary threshold requirement.⁵² Although the *Batson* determination will ultimately turn upon the persuasiveness of the evidence proffered in this first step – as well as the justification offered by the challenged party in the second step – it is not until the third step that such persuasiveness becomes relevant.⁵³ Thus, a “more likely than not” or preponderance of the evidence standard would be inappropriate to measure the sufficiency of a prima facie case.⁵⁴ Rather, the burden requires only that the challenging party produce evidence “sufficient to permit the trial judge to *draw an inference* that discrimination has occurred.”⁵⁵

Satisfaction of the first step, therefore, is inherently fact specific. Rather than formulate fixed rules for determining the sufficiency of the factual evidence, the Court simply expressed “confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a prima facie case of discrimination.”⁵⁶ Accordingly, the Court gave trial judges broad

⁵⁰ *Batson*, 476 U.S. at 96 (citing *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (pertaining to discriminatory practices in the empanelling of a jury venire)); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 319 (1997) (“This is an important, and in many respects rare, acknowledgment by the Court that discretion provides an opportunity for discrimination, and it was this acknowledgment that provided a framework for inferring discrimination in the use of peremptory challenges.”); Lawrence W. Williamson, Jr., Note, *Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment*, 42 WASHBURN L.J. 657, 676 (2003) (“[A]s a direct result of potential danger that discretion holds, *Batson* allows defendants to invoke the protection of the Fourteenth Amendment by relying on one single incident.”).

⁵¹ *Id.*

⁵² See *Johnson v. California*, 545 U.S. 162, 170 (2005) (“[A] defendant satisfies the requirements of *Batson*’s first step by *producing evidence* sufficient to permit the trial judge to draw an inference that discrimination has occurred.” (emphasis added)).

⁵³ See *id.* (“We did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination.”); *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (holding that the Court of Appeals erred in combining the second and third steps, by “requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive”).

⁵⁴ *Johnson*, 545 U.S. at 168.

⁵⁵ *Id.* at 170 (emphasis added).

⁵⁶ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986); see also *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (“It remains for the trial courts to develop rules, without unnecessary disruption

discretion⁵⁷ to act as gatekeepers to the protections afforded by the *Batson* framework.

Several courts, however, have expressed concern about the potential for inconsistency this type of case-by-case analysis creates. Instead, these courts have opted for a bright-line rule to determine when *Batson*'s first step has been satisfied. For instance, the Supreme Court of South Carolina has held that merely "requesting a *Batson* hearing in effect sets out a *prima facie* case of discrimination."⁵⁸ The court reasoned that such a rule not only promotes consistency in administration of *Batson* but also ensures a complete record for appellate review.⁵⁹ Thus, in South Carolina, a challenging party need only raise a *Batson* objection in order to make the required *prima facie* showing. This approach effectively eliminates the evidentiary burden of *Batson*'s first step altogether, thereby condensing the traditional three-step framework into a two-step analysis.

Finally, the Supreme Court has also recognized a procedural nicety by which a party who appeals a trial court's rejection of a *Batson* objection may satisfy the requisite *prima facie* showing by default. In *Hernandez v. New York*,⁶⁰ the Court was faced with a trial record in which the prosecutor, upon defense counsel's *Batson* objection, volunteered explanations for his peremptory strike without first giving the trial court a chance to decide the preliminary issue of whether the defendant had made the requisite *prima facie* showing of purposeful discrimination.⁶¹ The Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a *prima facie* showing becomes moot."⁶²

of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.").

⁵⁷ Robert W. Gurry, *The Jury Is Out: The Urgent Need for a New Approach in Deciding When Religion-Based Peremptory Strikes Violate the First and Fourteenth Amendments*, 18 REGENT U. L. REV. 91, 112 (2005) (attacking this broad discretion as one of *Batson*'s weaknesses).

⁵⁸ *State v. Chapman*, 454 S.E.2d 317, 319-20 (S.C. 1995) (stating that the rule is aimed at ensuring consistency in the evaluation of *Batson* challenges), *abrogated on other grounds* by *State v. Hicks*, 499 S.E.2d 209 (S.C. 1998). The United States Court of Military Appeals has adopted a similar per se rule. *See United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989) (reasoning that such a per se rule would simplify the *Batson* process as well as make it fairer for the accused). *See generally United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (applying *Batson* to military courts).

⁵⁹ *See State v. Jones*, 358 S.E.2d 701, 703 (S.C. 1987), *abrogated by Chapman*, 454 S.E.2d at 319.

⁶⁰ 500 U.S. 352 (1991).

⁶¹ *Id.* at 356.

⁶² *Id.* at 359.

B. *Step Two – Tendering a Neutral Explanation*

Once the challenging party has made a prima facie showing of purposeful discrimination, the burden shifts to the challenged party to offer a neutral explanation for the peremptory strike.⁶³ A neutral explanation is one based on something other than the race, gender, or ethnicity of the struck juror.⁶⁴ Although this explanation need not rise to the level required to justify a challenge exercised for cause,⁶⁵ a mere denial of discriminatory intent or affirmation of good faith in the exercise of the peremptory challenge is insufficient to carry the burden.⁶⁶

Most importantly, however, although the proffered explanation must be legitimate – in the sense that it does not deny equal protection⁶⁷ – it need not be persuasive.⁶⁸ This is because, as was discussed in connection with the evidentiary burden in step one, the explanation’s persuasiveness does not become relevant until the third step of the analysis. It is only then that the trial judge must decide whether the challenging party has established purposeful discrimination.⁶⁹ Therefore, an “implausible,” “fantastic,” “silly,” or “superstitious” explanation – although unlikely to ultimately carry the day in step three – is sufficient to satisfy the burden imposed by *Batson*’s second step so long as it is neutral.⁷⁰

Courts, however, are split on the issue of whether a *Batson* violation has occurred when the challenged party offers both discriminatory and nondiscriminatory explanations for a peremptory strike.⁷¹ This divide results from the Supreme Court having “yet to address the question of whether the existence of a single discriminatory reason for a peremptory strike results in an automatic *Batson* violation when race-neutral reasons also have been

⁶³ *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (“If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, [then the prosecutor loses the *Batson* challenge].”).

⁶⁴ *Hernandez*, 500 U.S. at 360.

⁶⁵ *Batson*, 476 U.S. at 97 (citing *McCray v. Abrams*, 750 F.2d 1113, 1132 (1984)).

⁶⁶ *Id.* at 98 (“If these general assumptions were accepted as rebutting a defendant’s prima facie case, the Equal Protection Clause ‘would be but a vain and illusory requirement.’” (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935))).

⁶⁷ *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam).

⁶⁸ *Id.* at 767-68 (“The second step of this process does not demand an explanation that is persuasive, or even plausible.”).

⁶⁹ *Id.* at 768.

⁷⁰ *Id.* Justice Stevens dissented from the decision, lamenting that “[t]he Court does not attempt to explain why a statement that ‘the juror had a beard,’ or ‘the juror’s last name began with the letter ‘S’ should satisfy step two, though a statement that ‘I had a hunch’ should not.” *Id.* at 775 (Stevens, J., dissenting).

⁷¹ See discussion *infra* Part II.B.1-2.

articulated.”⁷² Accordingly, left to their own devices, courts have reached incongruous conclusions as to the proper resolution of this “mixed-motive” problem. Generally speaking, jurisdictions have subscribed to one of two methodologies which have become colloquially known as the “tainted” and “dual motivation” approaches.⁷³

1. Tainted Jurisdictions

Six states,⁷⁴ Texas civil courts,⁷⁵ the District of Columbia,⁷⁶ and the United States Court of Military Appeals⁷⁷ follow the “tainted” approach, under which a court will find that any consideration of a discriminatory characteristic in the exercise of a peremptory challenge violates *Batson*.⁷⁸ These jurisdictions reason that any such consideration taints the entire challenge, despite the presence of other, nondiscriminatory motivations.⁷⁹ The tainted approach, therefore, solves the mixed-motive problem by holding that a party who offers both neutral and discriminatory explanations in the second step of the tripartite analysis commits a per se *Batson* violation.

⁷² *McCormick v. State*, 803 N.E.2d 1108, 1112 (Ind. 2004). *But see Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of certiorari) (opining that dual motivation analysis is contrary to the goals of *Batson*).

⁷³ Judge Cureton of the Court of Appeals of South Carolina appears to be the judge who first coined the “tainted” and “dual motivation” jargon in the context of *Batson* challenges. *See State v. Gill*, 460 S.E.2d 412, 421-22 (S.C. Ct. App. 1995) (Cureton, J., concurring and dissenting), *vacated*, 489 S.E.2d 478, 478 (S.C. 1997). The “dual motivation” terminology, however, first originated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *See infra* Part II.B.2.

⁷⁴ *See Sockwell v. State*, 675 So. 2d 38, 40-41 (Ala. 1995); *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001); *Rector v. State*, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994); *McCormick*, 803 N.E.2d at 1113; *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998); *State v. Jagodinsky*, 563 N.W.2d 188, 191 (Wis. Ct. App. 1997).

⁷⁵ *See Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991) (per curiam), *abrogated in part by Guzman v. State*, 85 S.W.3d 242, 252-54 (Tex. Crim. App. 2002) (en banc) (adopting the dual motivation approach to the mixed-motive problem for Texas *criminal* courts).

⁷⁶ *See, e.g., Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006) (“We now hold that even where the exclusion of a potential juror is motivated in substantial part by constitutionally permissible factors (such as the juror’s age), the exclusion is a denial of equal protection and a *Batson* violation if it is partially motivated as well by the juror’s race or gender.”).

⁷⁷ *See, e.g., United States v. Greene*, 36 M.J. 274, 280 (C.M.A. 1993).

⁷⁸ *See, e.g., Payton*, 495 S.E.2d at 210.

⁷⁹ *Id.*

By finding such a per se violation, the tainted approach curtails the tripartite *Batson* framework at the second step.⁸⁰ The rationale is that by offering both neutral and discriminatory explanations for the exercise of the peremptory strike, the challenged party expressly admits to having engaged in prohibited considerations.⁸¹ Once such a concession has been made, “there is no reason to proceed to the third prong . . . because discriminatory intent is inherent in the explanation.”⁸² The third step determination of whether the opponent of the strike has actually proven purposeful discrimination is, therefore, no longer necessary.⁸³

Eliminating the third step of the analysis is distinguishable from the rationale of *Purkett v. Elem*.⁸⁴ There, the Supreme Court found that “[t]he Court of Appeals erred by combining *Batson*’s second and third steps into one,”⁸⁵ because such conflation “violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.”⁸⁶ In contrast, the tainted approach’s curtailment of the *Batson* analysis does not violate such principle. Rather, it merely recognizes that the challenging party’s “ultimate burden” has been satisfied by the challenged party’s admission of impermissible considerations and that the third step determination is, therefore, no longer necessary.⁸⁷

Supporters of the tainted approach argue that a neutral explanation “means just what it says – that the explanation must not be tainted by *any*

⁸⁰ See Ross P. Brooks, Note, *Mixed Messages: Texas’ Two Highest Courts Deliver Conflicting Opinions Regarding the Fourteenth Amendment Mixed Motive Doctrine as Applied in the Context of Batson/Edmonson Juror Exclusion Hearings*, 6 SCHOLAR 311, 338-39 (2004).

⁸¹ See Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 311 (2007) (“A mixed-motive explanation is not a neutral explanation . . . because the prosecutor has in effect admitted that an improper purpose was ‘a motivating factor’ in her decision to strike a juror.”).

⁸² *Sparks v. State*, 68 S.W.3d 6, 12 (Tex. App. 2001); see also *Payton*, 495 S.E.2d at 208 (“Here, because the reason offered was not race-neutral on its face, we need not reach the third step of the analysis.”).

⁸³ Anthony Pellegrino, Comment, *Batson v. Kentucky, Its Kin, and a Solution to the Problem of Race-Based Peremptory Challenges (or Jury Selection)*, 76 TEMP. L. REV. 901, 917 (2003).

⁸⁴ 514 U.S. 765 (1995) (per curiam). In *Purkett*, the Eighth Circuit had held that a challenged party must articulate at least a *plausible* neutral explanation for exercising the strike in order to satisfy *Batson*’s second step. *Id.* at 767 (reversing *Elem v. Purkett*, 25 F.3d 679, 683 (8th Cir. 1994)). The Supreme Court reversed, holding that the “[t]he second step . . . does not demand an explanation that is persuasive, or even plausible” since “[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant.” *Id.* at 767-68.

⁸⁵ *Id.* at 768.

⁸⁶ *Id.*

⁸⁷ See, e.g., *Payton*, 495 S.E.2d at 208.

impermissible factors.”⁸⁸ Courts have also stated that, although they “realize that it may be unrealistic to expect the [parties] to put aside every improper influence when selecting a juror, . . . that is exactly what the law requires.”⁸⁹ Furthermore, “[t]o excuse . . . prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. . . . If such ‘smoking guns’ are ignored, we have little hope of combating the more subtle forms of racial discrimination.”⁹⁰

2. Dual Motivation Jurisdictions

On the other side of the debate, “a small but steadily growing number of courts, including all five federal circuit courts of appeals that have ruled on the issue, have permitted or affirmatively endorsed” the “dual motivation” approach.⁹¹ In jurisdictions following the dual motivation approach, a party who offers both neutral and discriminatory explanations in the second step of the *Batson* analysis does not necessarily violate *Batson*. Rather, nondiscriminatory reasons can salvage a peremptory strike, even in the face of concomitant discriminatory rationales, so long as the strike would have been exercised even absent the impermissible considerations.⁹² In other words, dual motivation jurisdictions have rejected the bright-line “tainted” approach in favor of an inquiry which focuses on whether the striking party would not have exercised the strike “but for” the impermissible motivation.⁹³

Unlike the tainted approach, which immediately curtails the tripartite analysis after the second step if the challenged party admits to using prohibited considerations, the dual motivation approach allows the challenged party to

⁸⁸ *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting from denial of certiorari).

⁸⁹ *Speaker v. State*, 740 S.W.2d 486, 489 (Tex. App. 1987), *abrogated by* *Guzman v. State*, 85 S.W.3d 242 (Tex. Crim. App. 2002).

⁹⁰ *Wilkerson*, 493 U.S. at 928 (Marshall, J., dissenting from denial of certiorari). Commentators have similarly argued that ignoring such smoking guns could cause public confidence in our justice system to decline. *See, e.g., Pellegrino, supra* note 83, at 917 (“How would an outside observer feel about the system if a racial motivation for a peremptory challenge were voiced at a trial, but the challenge was allowed because there were also other, non-racial reasons? Our legal system’s reputation could be publicly harmed if we allow racial considerations to permeate trials at law.”).

⁹¹ *Covey, supra* note 81, at 282 (citing *Howard v. Senkowski*, 986 F.2d 24, 27 (2d Cir. 1993), *Gattis v. Snyder*, 278 F.3d 222, 234-35 (3d Cir. 2002), *Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995), *United States v. Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), and *Wallace v. Morrison*, 87 F.3d 1271, 1274-75 (11th Cir. 1996) (per curiam)); *see also id.* at 300-01 (observing that “the current trend unmistakably favors an embrace of dual- or mixed-motive analysis”).

⁹² *See, e.g., McCormick v. State*, 803 N.E.2d 1108, 1112 (Ind. 2004).

⁹³ *See* Lisa M. Cox, Note, *The “Tainted Decision-Making Approach”: A Solution for the Mixed Messages Batson Gets from Employment Discrimination*, 56 CASE W. RES. L. REV. 769, 782 (2006).

salvage the strike by articulating legitimate explanations in addition to the prohibited one.⁹⁴ Moreover, since the neutral explanation need not be persuasive, or even plausible,⁹⁵ the dual motivation approach takes the bite out of *Batson*'s second step. Inevitably, the third step of the framework then becomes paramount in weeding out impermissibly motivated peremptory challenges.

The dual motivation approach in the *Batson* context borrows from Fourteenth Amendment equal protection analysis in employment discrimination cases.⁹⁶ The genesis of the approach was *Mt. Healthy City School District Board of Education v. Doyle*,⁹⁷ in which the Court held that the appropriate test was to require the employer to show that he "would have reached the same decision" regarding the employee even in the absence of the prohibited racial considerations.⁹⁸ Both commentators and judges, however, have questioned the judiciousness of applying this test to the peremptory challenge context.⁹⁹

For instance, in a noteworthy dissent to a denial of certiorari, Justice Marshall wrote that "[a] 'but-for' test is inappropriate in the *Batson* inquiry . . . because of the special difficulties of proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter."¹⁰⁰ Whereas employment discrimination claims "involve witness testimony, examination of the employer's prior employment decisions, the plaintiff's testimony, the plaintiff's personnel file, and many other tangible factors,"¹⁰¹ *Batson* claims "can only be proven with transcripts of questions, the racial composition of the petit jury and the prosecutor's . . . excuses for striking a juror."¹⁰² Another criticism is that the dual motivation approach –

⁹⁴ See, e.g., *McCormick*, 803 N.E.2d at 1112.

⁹⁵ *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam).

⁹⁶ *Cox*, *supra* note 93, at 783-84.

⁹⁷ 429 U.S. 274, 286 (1977) ("In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.").

⁹⁸ *Id.* at 267.

⁹⁹ See, e.g., *Wilkerson v. Texas*, 493 U.S. 924, 926 (1989) (Marshall, J., dissenting from denial of certiorari); *Cox*, *supra* note 93, at 769 ("The dual motivation approach has been imposed on *Batson* challenges, as a result of courts' use of an imperfect analogy between jury discrimination and employment discrimination."); Geoffrey A. Gannaway, Comment, *Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defenses to Batson Challenges*, 21 REV. LITIG. 375, 417 (2002) ("By borrowing the equal protection analysis of *Arlington Heights* and *Mt. Healthy*, which provide guidance for judges weighing allegedly racist legislative and administrative acts, lower federal and state courts have tried unsuccessfully to fit a square peg into a round hole.")

¹⁰⁰ *Wilkerson*, 493 U.S. at 926 (Marshall, J., dissenting from denial of certiorari).

¹⁰¹ *Cox*, *supra* note 93, at 797.

¹⁰² *Id.*

which allows the parties to openly consider a potential juror's race and gender – “could not be more antithetical to the decision in *Batson* that forbade the use of race as a motive in making peremptory challenges.”¹⁰³

C. *Step Three – Evaluating the Challenge*

Once the challenging party has shown a prima facie case of purposeful discrimination and the challenged party has come forward with a satisfactorily neutral explanation for the challenged strike, *Batson*'s third step requires the court to determine whether the challenging party has established purposeful discrimination.¹⁰⁴ If the court ultimately determines that the challenging party has established purposeful discrimination, then the challenged strike is voided.¹⁰⁵ “The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected.”¹⁰⁶

Although this third step will always be reached in dual motivation jurisdictions – assuming, that is, that the first two steps are also satisfied – tainted jurisdictions will not always have occasion to proceed this deeply into the framework. This is due to the fact that tainted jurisdictions will terminate the analysis in the second step if it is determined that impermissible considerations in any way factored into the exercise of the peremptory strike.¹⁰⁷ Thus, while this third step will almost always be reached in dual motivation jurisdictions – considering the ease with which an unpersuasive and implausible neutral explanation can be conjured up – tainted jurisdictions will not always reach this point.

¹⁰³ *Id.* at 783; see also *Wilkerson*, 493 U.S. at 928 (Marshall, J., dissenting from denial of certiorari).

¹⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (noting, however, that because the trial judge's findings “largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference” (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575-76 (1985))).

¹⁰⁵ The *Batson* Court wrote that it:

[E]xpress[ed] no view on whether it is more appropriate in a particular case, upon a finding of discrimination against . . . jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. at 99-100 n.24 (internal citations omitted).

¹⁰⁶ *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (decided on the same day as *Johnson v. California*, 545 U.S. 162 (2005)).

¹⁰⁷ See *supra* notes 80-83 and accompanying text.

III. JURYQUEST

JuryQuest is a computer software program which claims to provide attorneys with an “empirical basis” for challenging jurors during *voir dire*.¹⁰⁸ JuryQuest L.L.C., the Houston-based makers of JuryQuest,¹⁰⁹ surveyed over 45,000 juror-eligible individuals using questionnaires containing a variety of verdict-related questions.¹¹⁰ The questionnaires were “designed to identify authoritarian (prosecution-friendly) versus egalitarian (defense-sympathetic) bias” in the respondents.¹¹¹ The answers from those surveys, along with the demographic characteristics of the respondents who gave them, were then entered into a computer to create a four million item database.¹¹² The database was then sorted in an attempt to distill statistical correlations between demographic characteristics and decision-making predispositions or bias.¹¹³

For as little as a few hundred dollars a trial, JuryQuest will provide an attorney with access to this database.¹¹⁴ An attorney willing to pay this fee can load the software onto a laptop, take the laptop into the courtroom during jury selection,¹¹⁵ and input the demographic characteristics of the prospective jurors – race, gender, age, education, occupation, marital status, and prior jury service – into the program.¹¹⁶ Although only the first two of these characteristics are visibly observable, the remaining five are usually provided by the jury questionnaires each prospective juror is required to complete upon arriving for jury duty.¹¹⁷ Once each juror’s individual set of demographic information is

¹⁰⁸ JuryQuest, *supra* note 4.

¹⁰⁹ Agustina Guerrero, *Jury Still Out on How, When to Use Computer-Assisted Panel Selection*, TAMPA BAY BUS. J., Sept. 1, 2006, available at <http://www.tampabay.bizjournals.com/tampabay/stories/2006/09/04/story11.html>.

¹¹⁰ JuryQuest, *supra* note 4.

¹¹¹ Horwitz, *supra* note 8 (“Instead of using subtle behavioral clues to plumb for concealed opinions, JuryQuest seeks meaning in only superficial traits.”).

¹¹² *Id.*

¹¹³ See Scientific Jury Selection http://www.juryquest.com/index.php?option=com_content&task=view&id=59&Itemid=85 (last visited Jan. 15, 2008) (“JuryQuest technology reveals how various verdict related attitudes and opinions are distributed among the jury eligible population.”); see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 59 (1988) (“It is a strictly actuarial matter guided by the theory that although many important facts about an individual cannot be measured directly, they can be inferred from other readily accessible facts.”).

¹¹⁴ Horwitz, *supra* note 8.

¹¹⁵ See Horwitz, *supra* note 8 (stating that Wendell Odom, defense counsel for Andrea Yates, was running JuryQuest on a laptop computer in the courtroom during jury selection).

¹¹⁶ Scientific Jury Selection Software, *supra* note 5; see also Horwitz, *supra* note 8.

¹¹⁷ Scientific Jury Selection Software, *supra* note 5 (“The input data is gathered from the juror cards . . .”). This Note’s author was required to attend jury duty on September 25, 2007 at the Boston Municipal Court – Roxbury Division and upon arrival was required to complete a juror questionnaire containing questions pertaining to all seven of the demographic inputs.

entered, JuryQuest evaluates each juror according to their demographic match with the respondents in the database.¹¹⁸ Each juror is then ranked on a scale of one to one hundred with scores of forty-seven and below indicating prosecutorial bias and scores of fifty-three and above indicating defense bias.¹¹⁹ Peremptory challenges can then be exercised to strike those jurors biased in favor of the opposing party.

So, just how good is JuryQuest? Does it really have the predictive edge over human intuition that it claims?¹²⁰ In short, the answer appears to be yes. Of the nearly two hundred criminal jury trials in which the defense used JuryQuest, defendants were acquitted fifty percent of the time.¹²¹ When compared to the national average acquittal rate – twenty-six percent for retained defense attorneys and fifteen percent for public defenders – JuryQuest’s potential advantage becomes stark.¹²² Claimed success rates in civil trials are even more impressive.¹²³

Such success rates, assuming they are accurately reported,¹²⁴ beg the question of whether JuryQuest has crossed the line from “zealous advocacy”¹²⁵ to simply “stacking the deck.”¹²⁶ If the latter is true, JuryQuest will no doubt

¹¹⁸ JuryQuest, *supra* note 4 (“The individual juror is thus assessed as a representative of the group as a whole.”).

¹¹⁹ Scientific Jury Selection Software, *supra* note 5.

¹²⁰ *See Saks, supra* note 10, at 49-50 (conducting a study which found that “[w]hen the same information is available to a human decisionmaker and a mathematical model, almost without exception the mathematical model makes more reliable and accurate predictions. After 60 studies comparing clinical versus statistical prediction, the humans beat the computer only once.”).

¹²¹ JuryQuest, Success Rates, http://www.juryquest.com/index.php?option=com_content&task=view&id=44&Itemid=77 (last visited Jan. 15, 2008).

¹²² *Id.*

¹²³ *Id.* (claiming that JuryQuest clients in civil suits have prevailed eighty-three percent of the time).

¹²⁴ Of course, even if such success rates are accurately reported, they do not necessarily mean that JuryQuest is the sole cause of the lawyers’ success. It could be that lawyers who use JuryQuest are better than those who don’t, or that they simply have more resources and, therefore, are more likely to win. The more meaningful comparison would be between a lawyer’s success rate before using JuryQuest and that lawyer’s success rate while using JuryQuest. Unfortunately, these data are not available.

¹²⁵ *See* MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2007) (“A lawyer should act with . . . zeal in advocacy upon the client’s behalf.”). *But see* MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 3 (2007) (“A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of [Rule 8.4].”). *See generally* José Felipé Anderson, *Catch Me if You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW. ENG. L. REV. 343, 386 (1998) (“Until someone sanctions the lawyers, they will not and indeed might believe that they cannot stop using the tools that their professional judgment suggests might actually help their clients.”).

¹²⁶ Baldas, *supra* note 9, at 17; *see also* JuryQuest, *supra* note 4 (“Jury Selection is not intended to obtain a stacked jury, although it sometimes happens.”).

lead to increased public skepticism towards the jury system¹²⁷ and, perhaps, even undermine confidence in the justice system as a whole.¹²⁸ This concern becomes particularly troubling in light of the increased public awareness of JuryQuest resulting from its use in high-profile cases.¹²⁹

For instance, JuryQuest was successfully used by the defense team in the Andrea Pia Yates trial, arguably one of the most high-profile cases of 2006.¹³⁰ Yates stood trial for drowning her five children in a bath tub and, after having an initial conviction reversed for prosecutorial misconduct, was eventually found not guilty by reason of insanity.¹³¹ Yates's defense attorney, Wendell Odom, in a public admission of JuryQuest's "role in helping him seat a jury sympathetic to his client's battle with mental illness," said: "You can't overemphasize the importance of the software. It was very valuable in our jury selection."¹³² Indeed, JuryQuest gave eight of the twelve-member jury a score of forty-nine or higher.¹³³ More importantly, as a testament to the predictive ability of JuryQuest, the first ballot vote was – you guessed it – eight to four in favor of not guilty.¹³⁴

This is not to say, however, that JuryQuest's use is limited to high-profile criminal attorneys or defense teams with deep coffers. Rather, use appears to be spread across the legal industry. For instance, JuryQuest's current client list includes civil law firms in Texas, Colorado, and California; criminal attorneys

¹²⁷ See, e.g., ABRAMSON, *supra* note 7, at 176 ("Scientific jury selection grew out of, and in turn pushed further, the prevailing skepticism about juries as impartial institutions of justice."); Mark Miller, *The Road to Panama City: How a Jury Consultant Got O.J. Back to the First Tee*, NEWSWEEK, Oct. 30, 1995, at 84, 84 (quoting the jury consultant for the O.J. Simpson defense team as saying: "Unfortunately, . . . what we do is viewed as suspect by people – always has been, always will be.").

¹²⁸ But see FUKURAI ET AL., *supra* note 10, at 161 ("Jury selection that has been revolutionized by computers and statistical methods does not necessarily make a mockery of the justice system."). It is interesting to note that ensuring public confidence in the justice system was one of the underlying concerns motivating the *Batson* court. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."); *id.* at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

¹²⁹ See Baldas, *supra* note 9, at 17 (stating that the plaintiffs' legal team used JuryQuest in a recent wrongful death litigation against Vioxx).

¹³⁰ See *id.* Incidentally, JuryQuest donated its services to her defense team. JuryQuest Defends Andrea Yates, <http://www.juryquest.com/articles/YatesJury1.pdf> (last visited Jan. 15, 2008).

¹³¹ See *Woman Not Guilty in Retrial in the Deaths of Her 5 Children*, N.Y. TIMES, July 27, 2006, at A20.

¹³² See Baldas, *supra* note 9, at 17.

¹³³ Scientific Jury Selection Software, *supra* note 5.

¹³⁴ *Id.*

in Texas, Colorado, and Tennessee; and public-defender offices in Texas, California, Florida, and Oklahoma.¹³⁵ For now, the use of JuryQuest is less than rampant, but a geographically diverse group of attorneys as well as practitioners on both sides of the civil-criminal divide appear to be catching on.

IV. THE FRAMEWORK COMES CRUMBLING DOWN

After unpacking the mechanics of the *Batson* framework and describing the operation and methodology of JuryQuest, this Note is now able to deal with the interaction of the two. In particular, this Part will examine the ways in which JuryQuest will impact the operation of *Batson*'s individual steps as well as the framework as a whole. For the sake of clarity and accessibility, this examination will operate on the assumption that a criminal defendant is the party raising the *Batson* objection,¹³⁶ and that the prosecutor – the challenged party – has used JuryQuest in determining how to exercise his peremptory strikes. The following analysis, however, is wholly independent of these identities and the same conclusions would be reached if the roles were reversed. The only necessary constant is that the challenged strikes have been exercised in reliance on JuryQuest.

Since the first two steps of the *Batson* framework both allow for the production of evidence, there are two stages during which the parties could present evidence of the prosecutor's use of JuryQuest to the court. First, the defendant may offer such evidence in step one as part of its effort to make the requisite prima facie showing of purposeful discrimination. Alternatively, the prosecutor may offer such evidence in step two as part of its effort to explain a neutral reason for exercising the challenged strike. In order to fully analyze the interaction between the *Batson* framework and the JuryQuest methodology, however, it is necessary to approach the *Batson* framework in reverse order. As such, Section A will assume the defendant has satisfied his burden in step one,¹³⁷ and will examine the effect of offering evidence of JuryQuest's use during step two. Section B will then move backward through the framework and examine the effect of offering evidence of JuryQuest's use during step one.

¹³⁵ JuryQuest, Testimonials, http://www.juryquest.com/index.php?option=com_content&task=view&id=37&Itemid=69 (last visited Jan. 15, 2008) (providing a client list of six civil law firms, twenty three criminal law firms and practitioners, and eight public-defender offices).

¹³⁶ This assumption is very much grounded in reality as empirical research has shown that the overwhelming majority of *Batson* objections are raised by criminal defendants. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 457 (1996) (stating that of the 1156 reported state and federal cases from April 30, 1985 to December 31, 1993 in which a *Batson* objection was raised, the objecting party was a criminal defendant 95.24% of the time).

¹³⁷ See *id.* at 460 (reporting that during the survey period, criminal defendants were successful in establishing a prima facie case 60.61% of the time but ultimately succeeded in the *Batson* objection only 15.87% of the time).

Having examined the first two steps in isolation, Section C will take a more macro view, and analyze the impact that the evidence of JuryQuest's use will ultimately have on the operation of the *Batson* framework as a whole.

A. *Impact on Step Two*

1. Dual Motivation Jurisdictions

As discussed in Part II.B.2, dual motivation jurisdictions solve the mixed-motive problem by utilizing a “but-for” analysis, which asks whether the challenged peremptory strike would not have been exercised in the same manner *but for* the discriminatory consideration.¹³⁸ Although both discriminatory and nondiscriminatory considerations motivated the peremptory strike, the prosecutor will satisfy *Batson*'s second step by showing that the strike would have been exercised in the same manner, even in the absence of the discriminatory consideration; i.e., the prosecutor must demonstrate that the discriminatory consideration was not a but-for cause of the challenged strike's exercise. Because a single discriminatory consideration will not automatically cause the prosecutor to fail *Batson*'s second step, this Part argues that, in a dual motivation jurisdiction, JuryQuest will have a minimal impact on the operation of the second step of the framework.

Suppose a prosecutor in a dual motivation jurisdiction peremptorily strikes a black female juror¹³⁹ from the venire solely because her JuryQuest score indicated that she was biased towards the defense.¹⁴⁰ If the defendant raises a *Batson* objection and satisfies the first step of the framework by making a prima facie showing of purposeful discrimination (by whatever means), the prosecutor – assuming he responds honestly – will then point to JuryQuest as the motivation behind the challenged strike. By doing so, he would manifestly admit that prohibited considerations (race and gender) factored into his decision, but so too would he offer unequivocal proof that other permissible considerations (age, education, occupation, marital status, and prior jury service) also played motivating roles.¹⁴¹ Faced with both discriminatory and

¹³⁸ See *supra* Part II.B.2.

¹³⁹ Once again, this is a reasonable assumption since Melilli found that 87.38% of the cases in his survey involved peremptory challenges exercised against black jurors. Melilli, *supra* note 136, at 462.

¹⁴⁰ Of course, peremptory challenges will rarely – if ever – be exercised *solely* in reliance on JuryQuest. See Baldas, *supra* note 9 (quoting various lawyers as stating that although JuryQuest is a useful tool, it is not a substitute for intuition and must be used in conjunction with face-to-face assessments). For the present purposes, however, such an assumption helps to make the analysis clearer.

¹⁴¹ Cf. William C. Slusser, et al., *Batson, J.E.B., and Purkett: A Step-by-Step-by-Step Guide to Making and Challenging Peremptory Challenges in Federal Court*, 37 S. TEX. L. REV. 127, 151 (1996) (“While the use of a scientific jury consultant provides evidence that strikes were based upon neutral criteria, it does not put those strikes beyond attack . . .”).

nondiscriminatory considerations, the dual motivation court would proceed by applying the but-for test.¹⁴²

Although perhaps not immediately obvious, JuryQuest will make this type of but-for testing extremely straightforward.¹⁴³ Bear in mind that the ultimate purpose of the test is to determine whether the prosecutor would have struck the juror absent the prohibited considerations.¹⁴⁴ The answer to this question is obtained easily enough by simply leaving the race and gender parameters blank and observing the impact on the juror's profile score.¹⁴⁵ If, as a result of this alteration, her score changes from indicating defense bias to indicating prosecutorial bias, then the prosecutor will fail the but-for test since *but for* the prohibited considerations, the strike would not have been exercised. If, on the other hand, the new score still suggests that the juror is biased towards the defense, then the prosecutor will pass the test because he would have exercised the strike even in the absence of the impermissible considerations.¹⁴⁶

There is, however, still a loose string. Rather than admitting to using JuryQuest, the prosecutor could conceal this information and instead come up with a myriad of other neutral explanations for the challenged strike.¹⁴⁷ This is no doubt possible – and, as Part IV.A.2 will show, is potentially more than likely¹⁴⁸ – but in such a situation, the framework's second step will continue to operate as it would in the absence of JuryQuest. Therefore, regardless of whether the prosecutor admits to using JuryQuest during the second step of the framework, the important observation is that, other than reducing the administrative costs of but-for testing, JuryQuest does not impact the operation of *Batson's* second step in dual motivation jurisdictions. This conclusion will

¹⁴² See *supra* Part II.B.2 (describing the dual motivation court's application of the but-for test).

¹⁴³ Charles Nesson, *Peremptory Challenges: Technology Should Kill Them?*, 3 LAW PROBABILITY & RISK 1, 6-7 (2004) (identifying how computer programs like SmartJury allow for easy but-for testing by controlling the race variable).

¹⁴⁴ See *supra* notes 92-93 and accompanying text.

¹⁴⁵ Nesson, *supra* note 143, at 7. Nesson also suggests that, in the alternative, the prosecutor could simply toggle the race input from black to white or the gender input from female to male. *Id.* Under this proposal race and gender would still enter the analysis. The but-for test, however, operates in the absence of such considerations altogether (e.g., would the strike have been exercised if race or gender had not been considered *at all*). Therefore, leaving the race and gender fields blank is likely the only legitimate approach.

¹⁴⁶ Of course, even if the prosecutor satisfies the framework's second step, the court is ultimately free to conclude in the third step that the proffered explanation ("JuryQuest told me to") is merely a pretext for purposeful discrimination. See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

¹⁴⁷ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (observing that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror").

¹⁴⁸ See Cox, *supra* note 93, at 796 (recognizing that "there is the incentive for dishonest attorneys to be untruthful under both" the dual motivation and tainted approaches).

stand in stark contrast to the one reached in the context of tainted jurisdictions in Part IV.A.2.

2. Tainted Jurisdictions

Recall from Part II.B.1 that courts adopting the tainted approach will find that any consideration of race or gender taints the entire jury selection process and constitutes a *Batson* violation.¹⁴⁹ In contrast to dual motivation jurisdictions, nondiscriminatory explanations cannot salvage a peremptory strike once an impermissible motivation has been revealed.¹⁵⁰ Therefore, a prosecutor who admits that both discriminatory and nondiscriminatory considerations factored into his decision to exercise the challenged peremptory strike will automatically fail *Batson*'s second step and the analysis will terminate.¹⁵¹ Accordingly, this Part argues that JuryQuest significantly impacts the operation of the framework's second step in a tainted jurisdiction.

Consider again the situation in which a prosecutor strikes a black female juror from the venire solely because that juror's JuryQuest score indicated she was biased towards the defense. This time, however, imagine that jury selection is taking place in a tainted jurisdiction rather than in a dual motivation jurisdiction. If the defendant raises a *Batson* objection and makes a prima facie showing of purposeful discrimination (by whatever means), the prosecutor – again assuming he responds honestly – will then point to JuryQuest as his motivation behind the challenged strike. As was the case in the dual motivation jurisdiction, by doing so the prosecutor would admit that prohibited considerations (race and gender) factored into his decision to exercise the strike.¹⁵² But this is exactly what tainted jurisdictions forbid; even a single non-neutral consideration violates *Batson*.¹⁵³ Inevitably, then, a prosecutor who admits to using JuryQuest in a tainted jurisdiction will necessarily fail to satisfy the framework's second step,¹⁵⁴ and thus will lose the *Batson* objection altogether.¹⁵⁵

¹⁴⁹ *E.g.*, *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001).

¹⁵⁰ *See, e.g.*, *McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998).

¹⁵¹ *See, e.g.*, *Payton v. Kears*, 329 S.E.2d 205, 208 (S.C. 1998); *Sparks v. State*, 68 S.W.3d 6, 11 (Tex. App. 2001).

¹⁵² *Cf. Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1464 (1997) (“Although [jury] consultants prepare large amounts of research, when the time comes to select jurors, employing invidious stereotypes is still inherently part of their business.”); Marc Davis & Ken Davis, *Star Rising for Simpson Jury Consultant*, A.B.A. J., Dec. 1995, at 14 (quoting one jury consultant as admitting that part of her job is to use “some sort of stereotypes”).

¹⁵³ *E.g.*, *Robinson v. United States*, 890 A.2d 674, 681 (D.C. 2006); *Payton*, 495 S.E.2d at 210.

¹⁵⁴ *See, e.g.*, *McCormick v. State*, 803 N.E.2d 1108, 1113 (Ind. 2004).

¹⁵⁵ *But see* Bonazzoli, *supra* note 10, at 304 (arguing that “[a]lthough *Batson* clearly would prohibit race-based challenges, it cannot be construed to prohibit challenges based on juror attitudes that correlate with race”).

Presumably, though, the average prosecutor – seasoned in exercising peremptory challenges under tainted jurisdiction scrutiny – will realize that evidence of JuryQuest usage will cause him to fail the second step.¹⁵⁶ Accordingly, such a prosecutor will likely conceal such information and instead offer an alternative explanation for the challenged strike (read: lie);¹⁵⁷ even an implausible or silly one will do, so long as it is neutral.¹⁵⁸ Once such an explanation is proffered, the court will then proceed to the third step of the analysis to determine whether the defendant has proven purposeful discrimination in the prosecutor’s exercise of the peremptory strike against the black female juror.¹⁵⁹

Thus, there are two possible scenarios that could occur in a tainted jurisdiction. First, if the prosecutor admits to using JuryQuest, then he will necessarily fail the second step and the analysis will end; the court *will not* proceed to the third step.¹⁶⁰ Second, if the prosecutor does not admit to using JuryQuest, then he will almost certainly be able to satisfy *Batson*’s second step and the court *will* proceed to the third step of the analysis. Faced with these two possibilities, the rational prosecutor in a tainted jurisdiction will always choose not to reveal his use of JuryQuest.¹⁶¹

This is a worthwhile observation in and of itself, but the interaction between JuryQuest and tainted jurisdictions leads to a much more provocative conclusion. This Note has already argued that a prosecutor who admits to using JuryQuest in a tainted jurisdiction necessarily violates *Batson*. In theory, however, this violation is wholly independent of prosecutorial disclosure. Rather, any prosecutor who uses JuryQuest in a tainted jurisdiction, regardless of whether he admits it, necessarily violates the *Batson* jurisprudence adhered to therein. Whether he will be caught is, of course, another issue altogether.¹⁶² Therefore, since *use* of JuryQuest in a tainted jurisdiction necessarily violates

¹⁵⁶ See *United States v. Tokars*, 95 F.3d 1520, 1534 (11th Cir. 1996); Sheri Lynn Johnson, *The Language and Culture (Not To Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993) (“If prosecutors exist who . . . cannot create a ‘racially neutral’ reason for discriminating on the basis of race, bar examinations are too easy . . .”).

¹⁵⁷ See Gurry, *supra* note 57, at 114 (“The current *Batson* burden shifting test encourages litigants’ counsel to lie to the court about the real reason for which they are striking a juror.”).

¹⁵⁸ *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam).

¹⁵⁹ See *supra* note 104 and accompanying text.

¹⁶⁰ See, e.g., *Payton v. Kears*, 329 S.E.2d 205, 208 (S.C. 1998); *Sparks v. State*, 68 S.W.3d 6, 11 (Tex. App. 2001).

¹⁶¹ Judge Richard A. Posner defines “rationality” as “a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (6th ed. 2003). Under this definition, concealing the use of JuryQuest is rational because it is an “apt means” to the prosecutor’s “end” of eliminating (potentially) biased jurors through the exercise of peremptory challenges.

¹⁶² See *infra* Part V (discussing enforcement of the prohibition against JuryQuest in tainted jurisdictions).

Batson in that jurisdiction, JuryQuest *itself* violates *Batson* in such a jurisdiction.¹⁶³

These conclusions have alarming and, more importantly, immediate real-world significance because JuryQuest's client list contains lawyers in tainted jurisdictions.¹⁶⁴ In particular, JuryQuest's website states that at least four civil law firms in Texas use JuryQuest.¹⁶⁵ Recall that although Texas's highest criminal court – the Court of Criminal Appeals of Texas – follows the dual motivation approach,¹⁶⁶ Texas's highest civil court – the Supreme Court of Texas – follows the tainted approach.¹⁶⁷ Thus, if the above conclusions are sound, JuryQuest provides a paper trail implicating numerous Texas civil attorneys in *Batson* violations.¹⁶⁸

Despite these per se violations, from a practical standpoint, JuryQuest will continue to fly beneath the constitutional radar unless one of the parties reveals its use to the court. As the previous analysis has shown, a prosecutor in a tainted jurisdiction has an extremely strong *disincentive* to reveal his use to the court. Accordingly, in a tainted jurisdiction the necessary disclosure almost certainly will not be made during the second step of the framework. In contrast to the prosecutor, however, the defendant has an extremely powerful *incentive* to disclose such information to the court;¹⁶⁹ since JuryQuest per se violates *Batson* in tainted jurisdictions, evidence of its use would effectively ensure that the court will sustain the defendant's objection. Therefore a rational defendant in a tainted jurisdiction should always disclose the prosecutor's use of JuryQuest to the court during the first step of the framework.¹⁷⁰

In this vein, the next section will examine how the first step of the *Batson* analysis would be affected if the defendant offered evidence of the prosecutor's use of JuryQuest in step one rather than waiting for the prosecutor to reveal such information in step two. Of course, the defendant may not always have such information, but the next Section will assume he does.

¹⁶³ See ABRAMSON, *supra* note 7, at 175 (“The basic method of scientific jury selection contradicts the new ethic the Supreme Court set for jury selection, when it outlawed race- or sex-based peremptory challenges.”); Rachlinski, *supra* note 19, at 1566 (“Although it arises from benign motives, [scientific jury selection's] traditional emphasis on immutable demographic characteristics mimics the bigotry in jury selection that the Court condemns.”).

¹⁶⁴ See JuryQuest, Testimonials, *supra* note 135.

¹⁶⁵ *Id.*

¹⁶⁶ Guzman v. State, 85 S.W.3d 242, 252-54 (Tex. Crim. App. 2002) (en banc).

¹⁶⁷ Powers v. Palacios, 813 S.W.2d 489, 491 (Tex. 1991) (per curiam), *abrogated in part* by Guzman, 85 S.W.3d at 246.

¹⁶⁸ See Rachlinski, *supra* note 19, at 1526-27.

¹⁶⁹ See *infra* Part IV.B.

¹⁷⁰ Cf. Rachlinski, *supra* note 19, at 1526 (suggesting that “litigants who suspect that their opponent has employed [a scientific jury consultant] should object to the opponent's first peremptory challenge” and then argue that the challenge “has an unconstitutional element”).

Proposals aimed at remedying the likely informational disparity between the parties are discussed in Part V.

B. *Impact on Step One*

Recall that in the *Batson* framework's first step, the defendant will be required to make a prima facie showing of purposeful discrimination.¹⁷¹ This burden, however, does not require the defendant to *persuade* the judge at the outset of the framework that the challenge was exercised with purposeful discrimination.¹⁷² Rather, the defendant may satisfy the burden merely by "producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."¹⁷³ Because JuryQuest explicitly considers race and gender, evidence that the prosecutor relied on JuryQuest in exercising peremptory challenges should be sufficient to raise the necessary inference of discrimination and, thereby, to satisfy the prima facie burden of *Batson*'s first step regardless of which approach a court takes to the mixed-motive problem.¹⁷⁴

The original *Batson* opinion supports this conclusion. In particular, the Court stated that "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."¹⁷⁵ A broad reading of this statement suggests that the prosecutor's behavior *in general* – such as using a program which explicitly considers race and gender to determine how to exercise his peremptory strikes – may be sufficient to establish the requisite prima facie showing.

More importantly, the Court stated that "the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria,"¹⁷⁶ and that "[a] person's race simply 'is unrelated to his fitness as a juror.'"¹⁷⁷ Taken together, these statements strongly support the conclusion that concrete proof of racial and gender considerations in the exercise of peremptory challenges should be sufficient to satisfy the prima facie burden.

The soundness of this conclusion becomes even clearer when the analysis is moved into the realm of a tainted jurisdiction. Because even a single discriminatory consideration in the exercise of a peremptory challenge violates *Batson*, evidence that such considerations occurred must be sufficient to constitute a prima facie case. After all, the framework would be utterly

¹⁷¹ See *supra* Part II.A.

¹⁷² *Johnson v. California*, 545 U.S. 162, 170 (2005).

¹⁷³ *Id.*

¹⁷⁴ See Rachlinski, *supra* note 19, at 1528.

¹⁷⁵ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

¹⁷⁶ *Id.* at 85-86.

¹⁷⁷ *Id.* at 87 (citing *Thiel v. S. Pac. Co.* 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

nonsensical if a defendant was unable to satisfy the first step by proving that the prosecutor did that which the framework forbids.

C. *Impact on the Framework as a Whole*

As the previous Sections have demonstrated, JuryQuest will certainly impact the first two steps of *Batson*'s framework individually. However, the more important observation is that the combination of all of these impacts will significantly alter how the *Batson* framework operates as a whole. In particular, this Section argues that, in tainted jurisdictions, JuryQuest has the potential to condense the three-step framework into a single step.

Recall that the tainted approach requires a party's exercise of a peremptory strike to be completely and utterly devoid of non-neutral considerations.¹⁷⁸ Consequently, using JuryQuest in tainted jurisdictions necessarily violates *Batson*. If this is the case, then it shouldn't matter when evidence of such use is disclosed to the court. If, at any time, it becomes apparent that non-neutral considerations have factored into the prosecutor's decision to exercise the challenged peremptory strike, then the *Batson* analysis ends.¹⁷⁹

Thus, in tainted jurisdictions, once evidence of the prosecutor's use of JuryQuest has been offered by the defendant in the first step, the analysis should end, and the defendant should win the *Batson* objection. Not only should such evidence be *sufficient* to carry the defendant's burden of making a prima facie showing¹⁸⁰ in step one of the framework, but such evidence should end the analysis altogether.¹⁸¹ The three-step framework, therefore, turns into a one-step evidentiary showing. Thus, JuryQuest causes the *Batson* framework to come crumbling down.

This necessarily begs the question whether a single step analysis is prudent in light of the fact that the original analysis had three steps. The response to this line of thought is that the challenging party has rarely before been able to unequivocally prove that the striking party made impermissible considerations in the exercise of a peremptory challenge.¹⁸² Courts are essentially required to engage in a guessing game to try to determine what the real rationale is behind the striking party's strike. Now that this rationale has been brought to the fore, courts in tainted jurisdictions no longer need to guess, and the analysis no longer needs to proceed in three separate steps.

¹⁷⁸ See *supra* notes 78-79, 88-89 and accompanying text.

¹⁷⁹ *State v. Jagodinsky*, 563 N.W.2d 188, 191 (Wis. Ct. App. 1997) (concluding that even if the defendant did not satisfy the prima facie burden in step one, the trial court nonetheless "heard the prosecutor admit that he used gender" and hence the court faced plain evidence of gender discrimination).

¹⁸⁰ See *Rachlinski*, *supra* note 19, at 1528.

¹⁸¹ See *Brooks*, *supra* note 80, at 339.

¹⁸² See *Slusser et al.*, *supra* note 141, at 142; see also *Cox*, *supra* note 93, at 792 ("*Batson* challenges are inherently . . . difficult to prove because of the lack of meaningful evidence.").

V. EXPOSING THE USE OF JURYQUEST

Part IV argued that JuryQuest constitutes a per se violation of *Batson* in tainted jurisdictions. In order for such violations to be policed, however, evidence of JuryQuest's use must somehow make its way onto the record. Part IV.A.2 argued that no rational prosecutor will offer such evidence – since doing so in a tainted jurisdiction is tantamount to conceding a *Batson* violation – and, consequently, the party raising the *Batson* objection must take the initiative to offer such evidence during the first stage of the framework. Although this conclusion is theoretically sound, the reality of the matter is that it is difficult to put into practice due to the informational disparity that exists between the parties; litigants will rarely know whether the opposing party has used JuryQuest in exercising its peremptory challenges. Therefore, enforcing a prohibition against JuryQuest's use in tainted jurisdictions will require that the challenging party be able to discover and prove such use.

One possible solution would be to require litigants to disclose their use of JuryQuest to the opposing party as well as to the court. This proposal has received some support in the context of scientific jury selection generally.¹⁸³ Advocates of this disclosure regime argue that it would reduce comparative advantages arising out of the wealth disparities that often occur between adverse litigants.¹⁸⁴ The inherent problem with such a reporting requirement, however, is the problem of enforcement. The fact that litigation is inherently adversarial amplifies this concern, as parties will likely be loathe to give up any competitive advantage.¹⁸⁵

Moreover, this proposal may run into a roadblock: the work-product doctrine.¹⁸⁶ Existing work product case law protects *voir dire* notes from discovery.¹⁸⁷ Work performed by a trial consultant in preparation for trial has been similarly protected.¹⁸⁸ Drawing from these precedents, a strong argument exists that the work-product doctrine similarly protects JuryQuest results.

¹⁸³ See, e.g., Jeremy W. Barber, Note, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1247 (1994) (suggesting that such mandatory disclosure rules “might also facilitate study into the frequency and depth of the use of jury science”); Bonazzoli, *supra* note 10, at 302 (citing Barber, *supra*, at 1245-47)).

¹⁸⁴ See Barber, *supra* note 183, at 1247 (“Finally, disclosure would be inexpensive and provide neither side with a competitive edge, except perhaps by reducing the advantage of stealth strategies and tactics.”).

¹⁸⁵ See, e.g., Stanley D. Davis & Thomas D. Beisecker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?*, 17 AM. J. TRIAL ADVOC. 581, 635-36 (1994) (arguing against required disclosure).

¹⁸⁶ See FED. R. CIV. P. 26(b)(3).

¹⁸⁷ *People v. Mack*, 538 N.E.2d 1107, 1115 (Ill. 1989); see also *Foster v. State*, 374 S.E.2d 188, 192 (Ga. 1988); *Goode v. Shoukfeh*, 943 S.W.2d 441, 449 (Tex. 1997).

¹⁸⁸ See *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 665 (3d Cir. 2003).

Jose Felipe Anderson, however, has made a novel argument in an attempt to surmount this work-product barrier. He starts with the premise that scientific jury selection may very well be illegal in that it considers race and gender in violation of *Batson* and *J.E.B.*¹⁸⁹ If, in fact, scientific jury selection is illegal, then it cannot be protected by the work-product privilege since “[i]t is well settled that such protections do not operate when illegal conduct is taking place.”¹⁹⁰ But Anderson doesn’t stop there. He further posits that “under the *Batson* doctrine, hiring a jury consultant and discussing the racial and gender composition of a jury in a particular case might well constitute the crime of conspiracy to violate the equal protection rights of potential prospective jurors.”¹⁹¹ This argument surely applies with equal force to JuryQuest.

Another possibility for inducing the necessary disclosure would be to require JuryQuest, rather than the parties, to mandatorily disclose its client list in tainted jurisdictions.¹⁹² Unfortunately, because such disclosure would ultimately lead to the loss of a client in such a jurisdiction, adverse incentives will once again cause significant enforcement problems. If nothing else, courts in tainted jurisdictions, upon realizing the constitutional infirmity of JuryQuest, should begin to experiment with various procedures aimed at discovery and eventual elimination of JuryQuest’s use.

CONCLUSION

“New technologies can revolutionize the practice of law.”¹⁹³ Nevertheless – or, perhaps, as a result – courts “must be ever vigilant against the evisceration of Constitutional rights at the hands of modern technology.”¹⁹⁴ In the jury selection context, the *Batson* Court explicitly stated that a defendant “ha[s] the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.”¹⁹⁵ Therefore, today’s courts should stop to consider the implications of a jury selection tool which unabashedly operates,

¹⁸⁹ Anderson, *supra* note 125, at 347.

¹⁹⁰ *Id.* at 385.

¹⁹¹ *Id.* at 384. “Conspiracy” is defined as “[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose.” BLACK’S LAW DICTIONARY 329 (8th ed. 2004). Anderson argues that “[a]lthough planning for jury selection is not illegal, discussing how to challenge jurors based on race or gender, while at the same time developing neutral reasons to mask those intentions,” would seem to be an agreement to commit an unlawful act. Anderson, *supra* note 125, at 384 n.251.

¹⁹² JuryQuest already has a client list on its website. See JuryQuest, Testimonials, *supra* note 135.

¹⁹³ Tom W. Bell, *The Impact of Blogging on the Practice of Law: Hit the Snooze Button*, 11 NEXUS 75, 75 (2006).

¹⁹⁴ *United States v. Scarfo*, 180 F. Supp. 2d 572, 583 (D.N.J. 2001).

¹⁹⁵ *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).

at least in part, on the basis of constitutionally impermissible characteristics, directly contravening *Batson* and its progeny.

Of more immediate importance, however, this Note has argued that JuryQuest violates *Batson* in tainted jurisdictions and, as a result, will ultimately collapse *Batson*'s three-step framework into a single evidentiary showing. These observations are, in themselves, significant for tainted jurisdictions on a going forward basis, but their long-term implications may very well not be limited to such jurisdictions. Rather, such observations have the potential to catalyze the Court and spur the Justices to finally address the mixed-motive divide in the *Batson* context, or possibly even to revisit the debate over the judiciousness of the peremptory challenge system altogether.

Indeed, some of the Court's recent jurisprudence has suggested just that. In particular, concurring in *Miller-El v. Dretke*, Justice Breyer actually mentioned one of JuryQuest's predecessors – SmartJury¹⁹⁶ – and observed that “the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before.”¹⁹⁷ In connection with such software and other scientific jury selection techniques, Justice Breyer went on to state:

These examples reflect a professional effort to fulfill the lawyer's obligation to help his or her client. Nevertheless, the outcome in terms of jury selection is the same as it would be were the motive less benign. And as long as that is so, the law's antidiscrimination command and a peremptory jury-selection system that permits or encourages the use of stereotypes work at cross-purposes.¹⁹⁸

Finally, in concluding his concurrence, Justice Breyer asserted that he “believe[d] it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.”¹⁹⁹ This Note's claims regarding JuryQuest's violation of *Batson* and collapse of the *Batson* framework will hopefully serve as additional motivation to reexamine *Batson*'s framework, the mixed-motive divide, and the current peremptory challenge system in its entirety.

¹⁹⁶ *Miller-El v. Dretke*, 545 U.S. 231, 271 (2005) (Breyer, J., concurring).

¹⁹⁷ *Id.* at 270.

¹⁹⁸ *Id.* at 271-72 (internal citation omitted).

¹⁹⁹ *Id.* at 273.