

FROM PROVING PRETEXT TO PROVING DISCRIMINATION: THE REAL LESSON OF *MILLER-EL AND SNYDER*

*Joshua C. Polster**

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* Law Clerk to the Honorable Dennis Jacobs, U.S. Court of Appeals for the Second Circuit. J.D., 2011, New York University School of Law; M.S., 2007, Pace University; A.B., 2005, Princeton University. I am grateful to Bryan Stevenson, Deborah Malamud, and Cindy Estlund for their comments and advice. Thank you also to Florencia Marotta-Wurgler and the members of the Academic Writing Seminar.

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INTRODUCTION

Dyed-red hair,¹ too passive,² too vocal,³ too old,⁴ too young,⁵ employed as an engineer,⁶ employed as a Sunday school teacher;⁷ these are all recent explanations given to deny minorities a place on juries. When prosecutors presented these reasons, courts did not reject them as laughable, but accepted them as part of parties' legitimate discretion over who to seat on their juries.

Prosecutors offered these reasons as explanations for peremptory challenges, which parties exercise during jury selection to eliminate prospective jurors from a venire unilaterally. Federal and state courts provide peremptory challenges to all parties, in civil and criminal cases, so that attorneys can strike veniremembers who they believe will be unfavorable to their case.

¹ See *infra* note 229 and accompanying text.

² See *infra* note 215 and accompanying text.

³ See *infra* note 214 and accompanying text.

⁴ See *infra* note 212 and accompanying text.

⁵ See *infra* note 213 and accompanying text.

⁶ See *infra* note 227 and accompanying text.

⁷ See *infra* note 131 and accompanying text.

Historically, prosecutors used challenges to eliminate African American veniremembers, who they theorized were unfit for service and would be sympathetic to black defendants. The Supreme Court tried to put an end to this shameful practice in *Batson v. Kentucky*, holding that the Equal Protection Clause prohibits parties from challenging jurors on the basis of race, guiding lower courts in detecting discrimination, and dictating that appellate courts reverse convictions found by juries from which veniremembers had been struck discriminatorily.⁸ But as the explanations above may suggest,⁹ and as much scholarship has argued,¹⁰ peremptory challenges are still used by some prosecutors as vehicles for discrimination.

The Court has held that the Equal Protection Clause also prohibits discrimination based on gender and discrimination by defense attorneys and attorneys for civil litigants.¹¹ Accordingly, the arguments in this Article can also be applied to such situations. Because of the history of¹²—and likely still-occurring—prosecutorial discrimination, however, this Article will focus on prosecutors using peremptory challenges to eliminate African Americans. This focus corresponds to courtroom practices: The vast majority of *Batson* objections are made by criminal defendants to prosecutorial challenges of African American veniremembers.¹³

Much of the inability of courts to detect discrimination can be attributed to the inherent difficulty of distinguishing when a challenge is based on a prediction that a prospective juror will be

⁸ 476 U.S. 79, 88 (1986).

⁹ See *supra* notes 1-7 and accompanying text.

¹⁰ See *infra* Part I.D. for a discussion of studies that suggest that prosecutors continue to discriminate.

¹¹ See *infra* notes 40-42 and accompanying text.

¹² See *infra* notes 27-32 for a brief overview of peremptory challenges as tools of racial discrimination.

¹³ See Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 458 tbl.A-5 (“*Batson* Complainants”) (1996) (finding that more than eighty-eight percent of *Batson* challenges were raised by criminal defendants); *id.* at 462 tbl.E-1 (“Targeted Groups”) (finding that in more than eighty-seven percent of cases in which a party raised a *Batson* challenge, the objection was to the challenge of black veniremembers).

unfavorable and when a challenge is based on race.¹⁴ But this Article argues that the inability of courts to detect prosecutorial discrimination is also due to judicial application of the framework implemented by the Supreme Court for that purpose.

In *Batson*, the Court adopted the *McDonnell Douglas* framework, which it had previously applied in cases of employment discrimination. The three-part framework requires, on a finding of a prima facie case, that the alleged discriminator articulate a nondiscriminatory reason for its action. The alleged victim then has the burden of proving that the proffered reason is a pretext for discrimination. As traditionally applied, the framework therefore hinges on the ability of defendants to prove pretext.¹⁵

In two recent cases—*Miller-El v. Dretke*¹⁶ and *Snyder v. Louisiana*¹⁷—the Supreme Court used this framework to find that prosecutors had discriminated. Lower courts have interpreted these decisions as enumerating factors that they should consider in determining whether nondiscriminatory reasons are pretextual. This Article argues that this interpretation—and, more generally, this focus on pretext—is not suited to detecting discrimination in peremptory challenges.

To illustrate the problem, this Article compares courts' application of the framework in employment cases—for which the Supreme Court initially applied the framework—and *Batson* challenges. Employers generally present business-related reasons, substantiated by business records. Employees can prove that the reasons are pretextual by showing that the records are inaccurate, that the reasons do not plausibly explain employers' personnel decisions, or that the reasons apply to nonminority employees against whom the employers did not take similar actions.¹⁸

Prosecutors, however, explain their challenges with strategic reasons, which they base on veniremembers' background, demeanor, and statements during voir dire. Because the reasons

¹⁴ Lawyers may believe prospective jurors will be unfavorable *because* of their race or gender. A strike based on such a belief is discriminatory, although some studies have shown connections between race and juror sympathies. *See infra* note 71.

¹⁵ *See infra* Part I.B. for a more detailed discussion of the tripartite framework.

¹⁶ 545 U.S. 231, 266 (2005).

¹⁷ 552 U.S. 472, 476-77 (2008).

¹⁸ *See infra* note 172.

are often just assertions about veniremember characteristics, defendants generally cannot show that they are inaccurate; because prosecutors and courts can theorize numerous reasons why a veniremember might be sympathetic to a defendant, defendants generally cannot show a reason is implausible; because so many reasons are available to prosecutors, defendants often cannot compare between veniremembers about whom the prosecution has applied the same reason. Judicial focus on defendants' ability to prove that reasons are pretextual thereby effectively prevents most defendants from proving discrimination.

The Supreme Court's recent cases, *Miller-El* and *Snyder*, suggest that courts should no longer focus on pretext. The Court presaged such a shift in its post-*McDonnell Douglas* employment cases, which held that at the third step of the framework, courts must determine whether an employer has discriminated, not whether an employer's reason is pretextual. The Court has been less explicit in the peremptory challenge context, but in *Miller-El* and *Snyder*, rather than considering defendants' ability to show the falsity of individual proffered reasons to be dispositive, the Court evaluated all of the prosecutors' actions that suggested a discriminatory intent.

Part I of this Article provides an overview of peremptory challenges and the adoption of the *McDonnell Douglas* framework, discussing how the framework naturally gave rise to a focus on pretext. Part II argues that the focus on pretext effectively prevents defendants from proving intentional discrimination. In illustrating this argument, Part II uses two recent cases, one employment discrimination claim and one *Batson* challenge, as lenses through which to understand the broader case law. The cases show that judicial conceptions of prosecutors' jury-selection decisions—in contrast with judicial conceptions of employers' personnel decisions—render prosecutors' proffered nondiscriminatory reasons nearly impossible to disprove.

Part III proposes that *Miller-El* and *Snyder* prescribe that courts move away from a narrow focus on pretext. Instead of looking at each challenged veniremember and determining if the defendant has proven the prosecution's reasons for that challenge to be false, courts should frame their analyses around the prosecution's pattern of strikes, determining if this pattern, given

the totality of the prosecution's actions, is more likely explained by the proffered reasons or by discrimination.

I. "SMOKING OUT" DISCRIMINATION BY PROVING PRETEXT

This Part provides a brief background of peremptory challenges, explaining their historical use by prosecutors to exclude African Americans from jury service. In *Batson v. Kentucky*, the Supreme Court prohibited this practice. Borrowing from employment law, the Court instituted the *McDonnell Douglas* framework to help defendants detect and demonstrate prosecutorial discrimination. Scholars have concluded that the use of the *McDonnell Douglas* framework has not succeeded in ending discrimination. Two recent Supreme Court cases model a way to improve the framework, but lower courts, because of their focus on pretext, have yet to realize it.

A. An Overview of Peremptory Challenges

Peremptory challenges allow parties to strike prospective jurors from a venire without stating a reason. Parties can eliminate veniremembers who they believe will be partial, thereby, as asserted by the Supreme Court, increasing the accuracy of trials and parties' confidence in their results.¹⁹ While not required by the Constitution,²⁰ nearly every court in the United States allows peremptory challenges. In federal capital trials, parties are allowed twenty challenges while in other felony trials, the government is allocated six challenges and the defendant ten.²¹ In federal civil trials, both parties have three challenges.²² Every state also provides parties with challenges. While the number varies widely by state, parties in felony trials

¹⁹ See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) ("The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them . . .").

²⁰ See *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases . . .").

²¹ FED. R. CRIM. P. 24(b)(1)-(2).

²² 28 U.S.C. § 1870 (2006).

often have between six and ten challenges and as many as twenty-five in capital cases.²³

The procedures for using peremptory challenges also vary by court, but there are two primary types. In the “struck jury” method, after the parties have made their challenges for cause,²⁴ a panel is seated with a number of prospective jurors equaling the number of jurors that will ultimately serve on the petit jury, plus the number of alternates needed, plus the total number of peremptory challenges allocated to the parties. The parties then use their challenges, either in alternating fashion or—blind to the other party’s selections—simultaneously. The remaining jurors constitute the final panel.²⁵

In the “jury box” method, a panel is seated with the number of prospective jurors that will ultimately serve on the petit jury. The parties, generally in alternating fashion, challenge prospective jurors for cause and peremptorily. Whenever a juror is struck, a new prospective juror is seated, so that the panel retains its original number. When the parties have used all of their allotted challenges, the remaining jurors constitute the petit jury.²⁶

Adopted from English common law,²⁷ peremptory challenges became tools of discrimination in the United States. Historically,

²³ See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS: STATE COURT ORGANIZATION 2004, at 228-32 tbl.41 (“Trial Juries: The Allocation of Peremptory Challenges”) (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf> (charting peremptory challenges by state). Like the federal government, some states provide fewer challenges to the prosecution. *Id.* States also provide fewer challenges in civil cases; generally, around three per party. *Id.*

²⁴ The grounds for challenges for cause vary by state but are generally based on a showing that a prospective juror is actually biased or, because of a certain characteristic, is impliedly biased. See William P. Barnette, *Ma, Ma, Where’s My Pa? On Your Jury, Ha, Ha, Ha!: A Constitutional Analysis of Implied Bias Challenges for Cause*, 84 U. DET. MERCY L. REV. 451, 456-59 (2007) (providing an overview of actual and implied bias); see also N.Y. CRIM. PROC. LAW § 270.20(1) (McKinney 2002) (providing that prospective jurors may be challenged for cause based on reasons such as a state of mind that will preclude the veniremember from impartiality; a relationship to a party; and service on or appearance before the indicting grand).

²⁵ Kathleen M. McKenna, *Jury Trial Issues*, in CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2010, at 581, 587-88 (Practicing Law Inst. 2010).

²⁶ *Id.* at 588.

²⁷ See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 812-30 (1997), for a history of the peremptory challenge.

African Americans were completely excluded from juries.²⁸ When the Supreme Court held that the Fourteenth Amendment prohibits laws explicitly excluding African Americans from jury service,²⁹ states used other methods of exclusion, such as “intelligence” requirements and the “key man system,” which allowed designated local officials to handpick jury pools.³⁰ When the Court restricted these practices—at least in the criminal context—by holding that the Sixth Amendment dictates that juries must be drawn from a fair cross-section of the community,³¹ parties increasingly relied on peremptory challenges to exclude minorities.³²

The Supreme Court tried to limit this discrimination in *Swain v. Alabama*, holding that a state violates the Equal Protection Clause³³ when prosecutors deny jurors the right to serve on the basis of their race.³⁴ The Court held, however, that a prosecutor’s exercise of challenges in any given case could not constitute a constitutional violation.³⁵ A defendant could only claim a violation if “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,” a prosecutor used challenges to remove all African Americans from the venire.³⁶

In *Batson v. Kentucky*, the Court found that this requirement, especially as interpreted by lower courts, placed a “crippling burden of proof” on defendants,³⁷ making peremptory challenges “largely immune from constitutional scrutiny.”³⁸ The *Batson* Court accordingly held that a defendant could make an

²⁸ See *id.* at 828 n.96 (describing state laws that prevented African Americans from serving on juries).

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

³⁰ EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 9-10 (2010); see also Hoffman, *supra* note 27, at 828 (summarizing state methods of excluding African American jurors).

³¹ *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

³² EQUAL JUSTICE INITIATIVE, *supra* note 30, at 11-12; Hoffman, *supra* note 27, at 827-29.

³³ U.S. CONST. amend. XIV, § 1.

³⁴ 380 U.S. 202, 203-04 (1965).

³⁵ *Id.* at 221.

³⁶ *Id.* at 223-24.

³⁷ 476 U.S. 79, 92 (1986).

³⁸ *Id.* at 92-93.

Equal Protection claim based just on challenges exercised by the prosecution in the defendant's specific case.³⁹ *Batson* thereby prohibits prosecutors from using peremptory challenges to strike any juror because of the juror's race. Subsequent cases have extended the holding to discrimination based on gender⁴⁰ and by defendants⁴¹ and civil litigants.⁴²

But, as argued by Chief Justice Burger in dissent to *Batson*, and as reflected in the majority opinion in *Swain*, it is one thing to prohibit discrimination, but quite another to enforce the prohibition. Lawyers use peremptory challenges to eliminate prospective jurors who may be biased against their case,⁴³ but they cannot conclusively know *ex ante* whether a juror will be biased. Lawyers must therefore make hunches based on the limited information gathered during *voir dire*.⁴⁴ To allow for these hunches, peremptory challenges can be exercised "without a reason stated."⁴⁵ Accordingly, how is a court to separate legitimate challenges, which may be based on an "assumption" or "intuitive judgment," from those made because of race?⁴⁶

B. Supreme Court Adopts McDonnell Douglas Framework to Detect Discrimination

To solve the problem of proof, the *Batson* Court borrowed from employment law, where a similar problem exists. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, sex, religion, and national

³⁹ *Id.* at 96.

⁴⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 130-31 (1994).

⁴¹ *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

⁴² *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991).

⁴³ *See supra* note 19 (describing the purposes of peremptory challenges).

⁴⁴ *Swain v. Alabama*, 380 U.S. 202, 220 (1965) ("[T]he peremptory permits rejection for a real or imagined partiality It is often exercised upon the 'sudden impressions and unaccountable prejudices'" (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892))).

⁴⁵ *Swain*, 380 U.S. at 220.

⁴⁶ *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (Burger, C.J., dissenting) ("A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right'" (quoting *Swain*, 380 U.S. at 219); *see also* *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) ("The rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature").

origin.⁴⁷ But employers, under the common law doctrine of employment at will, have discretion in managing or terminating their employees.⁴⁸ Accordingly, while employment discrimination is governed by statute and preemptory challenges by the Equal Protection Clause, in both situations, factfinders⁴⁹ must determine if a party acted on the basis of legitimate discretion or discriminatory motives.

Now that courts and legislators have imposed consequences on employers and prosecutors for overt discrimination, there is unlikely to be direct evidence of discrimination. Employers generally do not produce memoranda stating that a manager did not hire an applicant because of race, and prosecutors will rarely explain to courts that they challenged a potential juror because of race. In *McDonnell Douglas Corp. v. Green*,⁵⁰ the Court applied a three-step framework to allow proof of discrimination through circumstantial evidence.⁵¹ In *Batson*, the Court adopted this framework for preemptory challenges: (1) the employee or defendant must make a prima facie case; (2) the employer or prosecutor must rebut it by giving a nondiscriminatory reason for the employment decision or challenge; and (3) the employee or defendant must prove that there was, contrary to the reason proffered, purposeful discrimination.⁵²

⁴⁷ 42 U.S.C. § 2000e-2(a) (2006).

⁴⁸ See, e.g., *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 273-74 (1975) (“The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management.”); *Adair v. United States*, 208 U.S. 161, 175-76 (1908) (“In the absence, however, of a valid contract . . . it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employee in his personal service . . .”).

⁴⁹ The Civil Rights Act of 1964, Pub. L. No. 88-352, § 706, 78 Stat. 241, initially only provided for bench trials. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977a(c)(1), 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a(c)(1) (2006)), gave plaintiff employees the right to juries.

⁵⁰ 411 U.S. 792, 802-03 (1973). The three-step method had also been used to show discrimination in selection of jury venires. *Batson*, 476 U.S. at 94 (citing *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

⁵¹ *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (“The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the ‘plaintiff [has] his day in court despite the unavailability of direct evidence.’” (brackets in original) (citations omitted)).

⁵² *Batson*, 476 U.S. at 96-98.

The prima facie case “eliminates the most common nondiscriminatory reasons” for an action.⁵³ For instance, in the employment hiring context, a plaintiff must show that he or she applied for a job, was qualified and rejected, and that after the rejection, the employer continued to solicit applicants. This evidence, along with the plaintiff’s membership in a protected class,⁵⁴ raises an inference that the employer rejected that plaintiff not for legitimate reasons, but because of discrimination.⁵⁵

Similarly, a defendant must show that a prospective juror of a given race or gender—the defendant need not be of the same race or gender⁵⁶—was qualified for service. This means only that a veniremember was not struck for cause, but was struck peremptorily.⁵⁷ The defendant must show that this fact, along with any other relevant facts, raises an inference of discrimination.⁵⁸

At the second step, to avoid a finding of discrimination, an employer or prosecutor must provide a nondiscriminatory explanation. Accordingly, instead of speculating about what an alleged discriminator’s motives might be,⁵⁹ an employee or defendant is armed with “clear and reasonably specific”⁶⁰ reasons and can “smok[e] out”⁶¹ discrimination by showing, at the third

⁵³ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

⁵⁴ *McDonnell Douglas*, 411 U.S. at 802.

⁵⁵ *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”).

⁵⁶ *Powers v. Ohio*, 499 U.S. 400, 415-16 (1991).

⁵⁷ *Batson*, 476 U.S. at 96-97.

⁵⁸ *Id.*

⁵⁹ *See Johnson v. California*, 545 U.S. 162, 172 (2005) (“The *Batson* framework is designed to produce actual answers to suspicions and inferences The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.”) (citations omitted).

⁶⁰ *Batson*, 476 U.S. at 98 n.20 (citing *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

⁶¹ *See Deborah C. Malamud, The Last Minuet, Disparate Treatment after Hicks*, 93 MICH. L. REV. 2229, 2275 (1995) (“As originally envisioned, *McDonnell Douglas-Burdine* probably functioned as a primitive quasi-discovery device, aimed at ‘smoking out’ the employer’s evidence as to why it acted adversely to the plaintiff.”).

step, that the proffered reason was not the true reason for the employer or prosecutor's action.

C. Despite Batson, Discrimination Through Peremptory Challenges Persists

Despite the prohibition of intentional discrimination, prosecutors seemingly continue to target minority veniremembers with peremptory challenges. Studies of jury-selection patterns reveal shocking disparities in prosecutorial use of peremptory challenges against white and minority prospective jurors. In Jefferson Parish, Louisiana, between 1994 and 2002, prosecutors challenged more than fifty-five percent of African American veniremembers but less than seventeen percent of white veniremembers.⁶² Between 2005 and 2009, in Houston County, Alabama, which is twenty-seven percent African American, prosecutors used peremptory challenges to eliminate eighty percent of African American veniremembers so that the resulting juries were either all white or had only one African American member.⁶³ Exclusion of African Americans is not confined to the South. In Philadelphia, between 1981 and 1997, prosecutors in capital murder cases challenged fifty-one percent of African American veniremembers but only twenty-six percent of white veniremembers.⁶⁴

Part of these disparities is likely caused by unintentional or unconscious discrimination,⁶⁵ which, while undesirable, does not

⁶² RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE 7 (2003).

⁶³ EQUAL JUSTICE INITIATIVE, *supra* note 30, at 14.

⁶⁴ David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 53 tbl.2 (2001). The statistics were reversed for defendants, who struck twenty-six percent of black veniremembers and fifty-four percent of white veniremembers. *Id.*

⁶⁵ Psychological research has shown that people's actions are influenced by unconscious stereotypes and biases. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973-75 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199-1216 (1995). Professor Anthony Page explains how these mechanisms might lead prosecutors to perceive African Americans as hostile to their case and thereby as

violate the Equal Protection Clause as it is currently understood.⁶⁶ But part of the disparities is also likely due to intentional prosecutorial discrimination against African Americans. Some treatises instruct lawyers to consider race while selecting juries,⁶⁷ and some jury-selection consultants advertise their ability to select jurors of the ideal “demographic.”⁶⁸ More directly, in interviews, lawyers admit to considering the race of veniremembers.⁶⁹

Prosecutorial use of peremptory challenges may no longer depend on beliefs of racial inferiority.⁷⁰ Instead, it may stem from prosecutors’ pursuit of zealous advocacy: Some empirical studies suggest that African Americans are less likely to find defendants guilty.⁷¹ As long as this is true, or is widely believed to be true,⁷²

targets for peremptory challenges. See Anthony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 218-19 (2005) (explaining effects of unconscious biases on prosecutorial questioning); *id.* at 227-29 (explaining that prosecutors are more likely to attribute any negative observations of minority veniremembers to character flaws).

⁶⁶ See Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511, 609 (1994) (“*Batson’s* lower court progeny would demonstrate conclusively that . . . proof of discriminatory purpose dominated the Court’s jury-related equal protection jurisprudence.”); Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 32-38 (1997) (analyzing the progression of Supreme Court peremptory challenge cases to conclude that “it appears to be subjective motivation that is determinative.”); Page, *supra* note 65, at 171-72 (finding that the Supreme Court requires subjective “discriminatory intent”).

⁶⁷ See, e.g., V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* 193-200 (3d ed. 2001) (explaining how to weigh demographic variables, including race, to determine the best veniremembers for a case).

⁶⁸ In 2005, Justice Breyer cited jury-selection literature referencing race, *Miller-El v. Dretke*, 545 U.S. 231, 270-71 (2005) (Breyer, J., concurring), and consultants continue to suggest race plays a role. See, e.g., JURY RES. INST., *Juror Profiles*, <http://www.juryresearchinstitute.com/services/juror-profiles/> (last visited Dec. 18, 2011) (“Juror profiles developed by JRI professionals provide you with clear, concise summaries of the experiences, attitudes and demographic characteristics of jurors who are favorably or unfavorably predisposed toward your case.”).

⁶⁹ See Leonard Post, *A Loaded Box of Stereotypes: Despite ‘Batson,’ Race, Gender Play Big Roles in Jury Selection*, NAT’L L.J., Apr. 25, 2005, at 1 (discussing lawyers’ use of peremptory challenges).

⁷⁰ See *supra* notes 28-32 (summarizing the historical exclusion of black jurors).

⁷¹ See David C. Baldus et al., *The Use of Preemptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 15-22 (2001) (summarizing empirical studies of juror voting tendencies).

⁷² See, e.g., Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak about Voir Dire*, 51 WAYNE L. REV. 163, 303 (2005) (interviewing

prosecutors will likely continue to target African Americans with peremptory challenges. Needless to say, excluding potential African American jurors because of beliefs about their likely sympathies is no less an action of intentional discrimination than is excluding them because of beliefs about their mental capacities.

Along with this evidence that prosecutorial discrimination still exists, there is also strong evidence that defendants are often unable to demonstrate it using the *McDonnell Douglas* framework. While the success rate of parties raising *Batson* challenges varies widely by jurisdiction, Professor Kenneth Melilli found that in many states and federal circuits the rate is shockingly low. For example, in Georgia, parties prevailed less than 13% of the time; in Missouri, less than 9%; in the Fifth Circuit, 4%; and in Louisiana and the Eight Circuit, less than 3%.⁷³ Professor Jeffrey Brand found similarly low success rates in his study of federal courts.⁷⁴ While both Brand and Melilli examined pre-1994 decisions,⁷⁵ a recent study suggests that success rates, at least at the appellate level, have not improved. Surveying federal decisions from 2000 through 2009, Professors Jeffrey Ballin and Junichi Semitsu found that federal courts reversed or remanded less than eleven percent of trial court denials of *Batson* challenges.⁷⁶

These numbers may even overstate the success rates of defendants bringing *Batson* challenges against the exclusion of African American veniremembers. Melilli found an overall success

attorneys and finding that “[p]erhaps the most common theme . . . is that African Americans were likely to favor criminal defendants and civil plaintiffs.”)

⁷³ Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 468 tbl.F-4 (1995-1996). Some states have substantially higher success rates: nearly 22% in Alabama, nearly 25% in Texas, and about 39% in New York. *Id.*

⁷⁴ Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 586 tbls.1 & 2 (1994) (finding that district courts found discrimination in twelve percent of cases, and circuit courts found discrimination or remanded in less than sixteen percent of cases in which a *Batson* challenge was made). Melilli coded the success rate of a *Batson* challenge based on its ultimate resolution, so trial court decisions were not counted if they were reversed on appeal. Melilli, *supra* note 73, at 456 n.67.

⁷⁵ Brand, *supra* note 74, at 584; Melilli, *supra* note 73, at 456.

⁷⁶ Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092 (2011).

rate of less than eighteen percent, but found that criminal defendants were successful less than sixteen percent of the time.⁷⁷ Melilli also found that *Batson* challenges regarding African American veniremembers, by far the most common challenge made, were less successful than challenges regarding both genders and every other race, except for Hispanic and Native American veniremembers.⁷⁸

Based on these statistics, Melilli concluded that “*Batson* is almost surely a failure.”⁷⁹ Other scholars have similarly concluded that despite *Batson*, discrimination “continue[s] to flourish.”⁸⁰ This view has also been voiced on the Supreme Court: Justice Breyer has asserted that *Batson* has not achieved its goal of eradicating racial discrimination in jury selection.⁸¹

D. Miller-El and Snyder Reinvalidate *Batson*

A surefire way to end the use of peremptory challenges to discriminate would be to eliminate peremptory challenges. Justices Marshall and Breyer have advocated for elimination,⁸² and scholars frequently propose elimination as the best solution.⁸³ But Justices Marshall and Breyer’s opinions have not gained

⁷⁷ Melilli, *supra* note 13, at 459 tbl.B-1.

⁷⁸ *Id.* at 464 tbl.E-4.

⁷⁹ *Id.* at 503.

⁸⁰ David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 128 (2001).

⁸¹ *Miller-El v. Dretke*, 545 U.S. 231, 266-67 (2005) (Breyer, J., concurring).

⁸² *Miller-El*, 545 U.S. 231, 266-69 (2005) (Breyer, J., concurring); *Batson v. Kentucky*, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring).

⁸³ See, e.g., Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 502-03 (1995-1996); Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 245 (2005); Baldus et al., *supra* note 80, at 129. Instead of elimination, the use of peremptory challenges could be restricted. See, e.g., Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981 (1996) (proposing that voir dire be exercised through questionnaires, so that parties could not see the veniremembers); Baldus et al., *supra* note 80, at 130 (proposing that courts limit the percentage of its peremptory challenges that a party could use against a given minority).

support within the Court,⁸⁴ and every state—and the federal rules—continues to provide parties with peremptory challenges.⁸⁵

In two recent decisions—*Miller-El v. Dretke*,⁸⁶ decided in 2005, and *Snyder v. Louisiana*,⁸⁷ decided in 2008—the Supreme Court has, however, for the first time, reversed trial courts to hold that the prosecution discriminated. In reaching these decisions, the Court followed the *McDonnell Douglas* framework that it adopted in *Batson*, evaluating whether the prosecution's step-two explanations were pretext for discrimination.⁸⁸ The Court's decisions were based on fact-intensive evaluations of the reasons given by the prosecution and the statements made by veniremembers. As such, the precedent of *Miller-El* and *Snyder* is unclear; the Court found pretext and discrimination because the facts, as interpreted by the Court, suggested pretext and discrimination. Whether peremptory challenges in future cases are discriminatory will depend on the precise reasons given by the prosecution and the specific statements and attributes of the veniremembers.

Scholars have argued that the fact-intensive nature of the analyses is the lesson lower courts should take from the Supreme Court. While defendants bear the burden of proving pretext, courts must not quickly accept prosecutors' nondiscriminatory reasons, but must probe the facts to make sure such reasons are supported.⁸⁹ Through its analysis in *Miller-El* and *Snyder*, the

⁸⁴ Justice Souter signed onto Justice Breyer's concurrence calling for the Court to "reconsider *Batson*'s test and the peremptory challenge system as a whole." Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring).

⁸⁵ See *supra* notes 21-23 and accompanying text (providing an overview of the number of peremptory challenges available to parties in state and federal courts).

⁸⁶ *Miller-El v. Dretke*, 545 U.S. 231 (2005).

⁸⁷ *Snyder v. Louisiana*, 552 U.S. 472 (2008).

⁸⁸ *Snyder*, 552 U.S. at 476-77; *Miller-El*, 545 U.S. at 239-40. The Court's analysis is more complicated because it is reviewing a lower court decision. Because *Miller-El* was an appeal for habeas corpus relief, the Court could only find for the defendant if it found that the state decision was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Miller-El*, 545 U.S. at 240 (quoting the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(2)). *Snyder* was not a habeas case, but even on direct appeal, the trial court's ruling was entitled to deferential review. *Snyder*, 552 U.S. at 477.

⁸⁹ See, e.g., John P. Bringewatt, Note, *Snyder v. Louisiana: Continuing the Historical Trend towards Increased Scrutiny of Peremptory Challenges*, 108 MICH. L. REV. 1283, 1301 (2010) ("Snyder took the type of 'meticulous facts and circumstances

Supreme Court demonstrated the types of facts courts should consider when evaluating these reasons.

The Court analyzed whether the prosecution used voir dire to question veniremembers about the issues that the prosecution later claimed were the grounds for challenge⁹⁰ and inquired whether these grounds seemed like plausible reasons to use a challenge.⁹¹ The Court analyzed whether these reasons, which supposedly lead the prosecution to challenge African American veniremembers, also applied to white veniremembers who the prosecution did not challenge.⁹² The Court considered the percentage of African American veniremembers who were challenged by the prosecution relative to the percentage of white veniremembers⁹³ and compared the questions that the prosecution asked to African American and white veniremembers.⁹⁴ The Court inquired whether there were historical practices of discrimination within the district attorney's office that was trying the case.⁹⁵

review' called for by [*Miller-El*] In doing so, the Court made it more difficult for pretextual explanations of peremptory challenges to slide by" (citation omitted); Heather Davenport, Note, *Blinking Reality: Race and Criminal Jury Selection in Light of O'Neal, Miller-El, and Johnson*, 58 BAYLOR L. REV. 949, 979 (2006) ("[T]he Court advanced—by way of example—the extremely detailed factual analysis that lower courts should undertake."); Jennifer Ross, Comment, *Snyder v. Louisiana: Demand for Judicial Scrutiny of the Use of Peremptory Challenges*, 4 DUKE J. CONST. L. PUB. POLY SIDEBAR 305, 305 (2009) ("*Snyder* demands a higher level of scrutiny from trial courts when they determine the presence of racially discriminatory intent and urges a more critical analysis of the race-neutral explanations proffered by lawyers using peremptory challenges.").

⁹⁰ *Miller-El*, 545 U.S. at 250 n.8 (noting that the prosecution did not question a black veniremember about a convicted brother despite this being the stated reason for the challenge); see also *Snyder*, 552 U.S. at 484 (finding that, in contrast with the African American veniremember who the prosecution challenged, the prosecution questioned a white veniremember who had substantial out-of-court obligations to obtain assurances that he could serve).

⁹¹ *Snyder*, 552 U.S. at 482 (finding that the prosecution's assertion that a veniremember who was a student-teacher would find the defendant guilty only of a lesser included offense so as to speed deliberations and return to the classroom was "highly speculative"); see also *Miller-El*, 545 U.S. at 252 ("[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.").

⁹² See *Snyder*, 552 U.S. at 483-84; *Miller-El v. Dretke*, 545 U.S. 231, 241-52 (2005).

⁹³ *Miller-El*, 545 U.S. at 240-41.

⁹⁴ See, e.g., *id.* at 255, 261.

⁹⁵ *Id.* at 263-64. The Court made clear that evidence outside the specific case can be used to show pretext. See *id.* at 240 ("[A]lthough some false reasons are shown up

Many lower courts have responded to *Miller-El* and *Snyder* by using the above considerations in their analyses,⁹⁶ and even before the Supreme Court cases, many states had adopted similar lists of factors for courts to consider.⁹⁷ Factor tests are likely beneficial for detecting discrimination. Studies have found that when courts find that proffered reasons are pretextual, they often do so based on many of the factors described above.⁹⁸ Establishing and scrutinizing factors can also incentivize trial courts to make findings on the record for each factor, thereby aiding in appellate review.⁹⁹ Nonetheless, lower courts that read *Miller-El* and *Snyder* as merely confirming the appropriateness of factor tests miss a key aspect of the opinions and are unlikely to meaningfully increase their detection of discrimination.

E. Courts Focus on Proof of Pretext

Lower courts err by focusing their analyses on whether defendants have proven the prosecution's nondiscriminatory reasons to be pretextual. This focus on pretext is unsurprising; it is a natural result of the *McDonnell Douglas* framework. While

within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand.”).

⁹⁶ See, e.g., *United States v. Nelson*, 450 F.3d 1201, 1207-08 (10th Cir. 2006) (summarizing the factors used in *Miller-El*); *Jones v. State*, 938 A.2d 626, 634 (Del. 2007) (same); *Watkins v. State*, 245 S.W.3d 444, 448-49 (Tex. Crim. App. 2008) (same).

⁹⁷ See, e.g., *Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); *State v. Parker*, 836 S.W.2d 930, 939-40 (Mo. 1992); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000); *People v. Ritchie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002).

⁹⁸ See, e.g., Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 478-83 (1996) (examining decisions in which courts rejected proffered reasons and finding that courts gave rationales such as disparate treatment or insufficient voir dire of challenged jurors or cited prosecution reasons that were unsupported by the record, unpersuasive, or based on stereotypes); William C. Slusser, David Hricik & Matthew P. Eastus, *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, 154-55 (1996) (finding that parties can show pretext using factors such as disparate treatment, disparate examination, insufficient voir dire of challenged jurors, reasons unrelated to case, or reasons based on stereotypes).

⁹⁹ Tracy M.Y. Choy, Note, *Branding Neutral Explanations Pretextual under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577, 596 (1997).

the framework has three steps, the Court set low thresholds for the first two. When making a prima facie case, the Court held that a defendant does not need to persuade the court that discrimination likely occurred, but only needs to produce evidence that would permit the judge to draw such an inference.¹⁰⁰ Similarly, at the second step, the Court dictated that nondiscriminatory reasons do not have to be “persuasive, or even plausible”;¹⁰¹ so as long as they are not inherently discriminatory, they survive.¹⁰²

Because the first two steps can be so easily satisfied,¹⁰³ courts focus their analyses on the third step. In *Batson*, the Court articulated the third step as a determination of whether “the defendant has established purposeful discrimination.”¹⁰⁴ The employment cases from which the Court adopted the framework suggest that this determination depends on whether an alleged victim of discrimination has proven the proffered nondiscriminatory reason to be pretextual. In *McDonnell Douglas*, the Court remanded the case to allow the plaintiff-employee an “opportunity to show that [the employer’s] stated reason for [the employee’s] rejection was in fact pretext.”¹⁰⁵ Similarly, in *Texas Department of Community Affairs v. Burdine*, the Court articulated the third step of the analysis as requiring the plaintiff to prove “that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”¹⁰⁶ In *Batson*, the Court cited *Burdine* for the proposition that a prosecutor must give “clear and reasonably

¹⁰⁰ *Johnson v. California*, 545 U.S. 162, 170 (2005).

¹⁰¹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¹⁰² *Id.*

¹⁰³ Despite the low thresholds, judges do screen out some claims at the preliminary steps. See Melilli, *supra* note 98, at 460-61 (1996) (finding that judges rejected about thirty-eight percent of prima facie cases and about twenty-two percent of neutral explanations). There is significant variation between jurisdictions. See *id.* at 467 (showing prima facie success rate by state and federal circuit). Jeffrey Brand found that courts reject prima facie cases a majority of the time, although his study just examined federal courts, a relatively small sample size. Jeffrey S. Brand, *The Supreme Court, Equal Protection And Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 586 (1994).

¹⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

¹⁰⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

¹⁰⁶ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

specific” nondiscriminatory reasons,¹⁰⁷ which, in *Burdine*, the Court said are necessary to provide “a full and fair opportunity to demonstrate pretext.”¹⁰⁸

Given these statements in *Batson* and in the employment cases from which *Batson* is drawn, when evaluating peremptory challenges, lower courts generally focus on proof of pretext. Many states courts that developed factor tests before *Miller-El* and *Snyder*—including Alabama,¹⁰⁹ Florida,¹¹⁰ Mississippi,¹¹¹ New York,¹¹² and Texas¹¹³—pronounced that the factors are to be used to determine whether a proffered reason is pretextual, and after *Miller-El* and *Snyder*, courts often continue to focus on pretext, a trend that is demonstrated—and criticized—in Part II.

II. PROBLEM WITH PROVING PRETEXT

To understand the problem with the judicial focus on proof of pretext, it is helpful to compare the application of the *McDonnell Douglas* framework in peremptory challenges with its application in employment discrimination cases. In both types of cases, courts focus on proof of pretext. But because of the differences between jury selection and employment, the methods that employees use for proving pretext are generally unavailing for defendants making *Batson* challenges. Section A introduces a recent employment case and peremptory challenge case, and Section B presents two differences between the judicial conceptions of jury selection and employee selection. Section C, drawing from the examples in Section A and the case law more generally,

¹⁰⁷ *Batson*, 476 U.S. at 98 n.20 (citing *Burdine*, 450 U.S. at 258).

¹⁰⁸ *Burdine*, 450 U.S. at 256.

¹⁰⁹ See *Ex parte* Branch, 526 So. 2d 609, 624 (Ala. 1987) (“[T]he following are illustrative of the types of evidence that can be used to show sham or pretext . . .”).

¹¹⁰ See *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) (“The following will weigh heavily against the legitimacy of any race-neutral explanation . . .”).

¹¹¹ See *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000) (“This Court has identified five indicia of pretext when analyzing proffered race-neutral reason for peremptory strikes under *Batson* . . .”).

¹¹² See *People v. Ritchie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995) (“The determination as to whether a given explanation is or is not pretextual will also depend on a variety of factors . . .”).

¹¹³ See *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002) (“Factors the trial court may consider in determining whether the explanation for a peremptory challenge is merely a pretext include . . .”).

demonstrates that even when courts utilize the factors enumerated in *Miller-El* and *Snyder*, these differences often prevent defendants from proving pretext.

A. Proof of Pretext in Practice

This section introduces two discrimination cases recently decided by the Louisiana courts: *Mbarika v. Board of Supervisors*, an employment case decided in 2008,¹¹⁴ and *State v. Jacobs*, a peremptory challenge case decided in 2010.¹¹⁵ In both cases, the courts focused their analyses on whether the nondiscriminatory reasons proffered by the alleged discriminators—the employer and the prosecutor—were pretexts for discrimination.

1. Employment Discrimination: *Mbarika v. Board of Supervisors*

Upon conclusion of Professor Victor Mbarika's three-year term at Louisiana State University (LSU), the school did not offer him tenure. Dr. Mbarika sued, claiming that LSU had discriminated on the basis of his African American race.¹¹⁶ LSU countered that Dr. Mbarika was not offered tenure because of his performance.¹¹⁷ The trial court granted summary judgment for LSU, and the Louisiana Court of Appeals reviewed the decision, applying the *McDonnell Douglas* framework to determine if performance was the real reason for LSU's action or a pretext for racial motivations.

To determine the genuineness of LSU's proffered reason, the court examined evidence offered by LSU. At hiring, LSU provided Dr. Mbarika with its tenure policy, which dictated that offers would be based on research, evaluated by publication in leading academic journals.¹¹⁸ Over the course of his term, Dr. Mbarika received annual performance reviews, which noted that his

¹¹⁴ *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 553-54 (La. Ct. App. 2008).

¹¹⁵ *State v. Jacobs*, 32 So. 3d 227 (La. 2010).

¹¹⁶ *Mbarika*, 992 So. 2d at 553-54.

¹¹⁷ *Id.* at 562. LSU also contended that Dr. Mbarika was not offered tenure because of his unsatisfactory teaching and lack of professionalism. *Id.* LSU did offer Dr. Mbarika a one-year contract, which was terminable at will. *Id.* at 554.

¹¹⁸ *Id.* at 554.

publications were in lower-tiered journals and advised him to target more prestigious journals.¹¹⁹

Dr. Mbarika argued that despite this evidence, the reason of performance was pretextual. He claimed that he had articles in the “revise and resubmit” stage at top journals, which were ignored during his performance reviews, and he argued that the quantity of articles that he published was greater than that of a white candidate who was offered tenure.¹²⁰

LSU countered these claims. A department chair’s deposition explained that articles in a “revise and resubmit” stage have not yet been accepted so are not given significant consideration. The chairperson further explained that LSU was primarily concerned with the quality, not quantity, of publications, and that the white candidate had published in top journals.¹²¹ Based on this evidence, the court concluded that Dr. Mbarika had not met his burden of showing that LSU’s neutral reason of performance was pretext for racial discrimination.¹²²

2. Peremptory Challenges: *State v. Jacobs*

An analogous use of the *McDonnell Douglas* framework is found in the Louisiana Supreme Court’s analysis of peremptory challenges in *State v. Jacobs*.¹²³ Like in *Mbarika*, the *Jacobs* court reviewed a trial court’s ruling that a party did not engage in racial discrimination and focused its inquiry on whether the reasons given by the alleged discriminator were pretextual.¹²⁴

The court first considered the challenge of veniremember Eric Hughes. The prosecution argued that it struck Mr. Hughes not

¹¹⁹ *Id.* at 555-57 (discussing Dr. Mbarika’s performance reviews).

¹²⁰ *Id.* at 558.

¹²¹ *Id.* at 558-60.

¹²² The appellate court affirmed the trial court’s summary judgment finding for LSU. *Id.* at 562-63. The Louisiana Supreme Court subsequently denied certiorari. *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 1019 (La. 2008).

¹²³ *State v. Jacobs*, 32 So. 3d 227 (La. 2010).

¹²⁴ In *Jacobs*, there was an intermediate appellate court ruling that the prosecution had engaged in racial discrimination. *State v. Jacobs*, 13 So. 3d 677 (La. Ct. App. 2009). After the supreme court ruling discussed in this subsection, the supreme court granted rehearing to clarify that it was remanding the case to the appellate court for issues raised by the defendant that were pretermitted by the appellate court’s earlier ruling. *State v. Jacobs*, 37 So. 3d 994 (La. 2010). On remand the appellate court upheld the conviction. *State v. Jacobs*, 67 So. 3d 535 (La Ct. App. 2011).

because he was Latino, but because he had a medical condition and asked to be excused; the prosecutor theorized that jurors who do not want to serve are likely to be hostile to the state.¹²⁵ The defendant argued that there was no evidence on the record of Mr. Hughes' medical condition,¹²⁶ but the court found that because of an out-of-court discussion that Mr. Hughes had with a bailiff, "[t]he condition was plausible."¹²⁷ The defense also tried to show that the reason was pretextual by pointing to a white veniremember who also disclosed a medical condition, but who the prosecution did not strike. The court, however, found the comparison inapposite. The white veniremember had diabetes, which the court explained can be managed with food and breaks so that a juror can comfortably serve; Mr. Hughes had a muscular condition, which the court surmised could prevent him from sitting for long durations.¹²⁸

The court also addressed the challenge of Leola Florence, an African American, in detail. The prosecution presented a variety of reasons for the challenge, including Ms. Florence's previous service on a hung jury.¹²⁹ The defendant countered that a white prospective juror had also served on a hung jury, but was not challenged. The court, however, noted that unlike the white juror, Ms. Florence indicated that the hung jury did not know what to do. Also, unlike the white juror, the prosecutor observed Ms. Florence sleeping during voir dire, and Ms. Florence had revealed that she was a possible victim in an unrelated case.¹³⁰

For three other peremptory challenges, the prosecution also proffered multiple reasons. Melanie Auzenne avoided eye contact, formerly worked in the district attorney's office, and spontaneously said she had never been accused of anything; Ivory Jordan wore shorts, worked at a casino, gave a disgusted look, and spoke with hesitation; Virginia Stevenson was asleep during voir dire, taught Sunday school, had relatives in jail, and had found for the plaintiff in a civil case. The court held that the defendant was

¹²⁵ *Jacobs*, 32 So. 3d at 230.

¹²⁶ *Jacobs*, 13 So. 3d at 690.

¹²⁷ *Jacobs*, 32 So. 3d at 229-30.

¹²⁸ *Id.*

¹²⁹ *Id.* at 231.

¹³⁰ *Id.*

not able to show that these reasons were pretextual and therefore had not proven discrimination.¹³¹

*B. Differences Between Employment Decisions and Jury-
Selection Decisions*

While the courts in *Mbarika* and *Jacobs* both focused on proof of pretext, their analyses of pretext are different. This difference is caused by divergent judicial expectations about employment decisions and jury-selection choices. Employers make decisions for business reasons, whereas prosecutors make decisions for strategic reasons; and employers make decisions based on information, whereas prosecutors make decisions based on hunch.

1. Business Reasons vs. Strategic Reasons

Outside of discriminatory conduct, employers theoretically have unlimited discretion over whether to hire, promote, discipline, or fire employees.¹³² Accordingly, at the second step of the *McDonnell Douglas* framework, employers can offer any reason for their actions,¹³³ even those that seem like bad reasons for an employment decision,¹³⁴ such as personal animus or gut feelings.¹³⁵

Employers, however, know that they will face liability if, at the third step, employees can show that their proffered reasons are pretextual and are therefore motivated to offer reasons that courts will find persuasive. Unsurprisingly, given that employers

¹³¹ *Id.* at 234-35.

¹³² *See supra* note 48 and accompanying text (discussing employment at will). Beyond discrimination law, there are other constraints on employers' freedom to terminate. *See, e.g.*, David J. Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (1996) (discussing the proliferation of state wrongful discharge doctrines).

¹³³ *See supra* notes 101-102 and accompanying text (discussing the low burden at the second step).

¹³⁴ *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 5 (1992) ("Any person may refuse to contract for no reason at all, or even for bad reasons that lie outside the reach of the discrimination principle.").

¹³⁵ The Court has even found that employers can articulate non-discriminatory reasons that violate other laws. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (finding that an employer does not violate ADEA by firing an employee in violation of ERISA).

are attempting to justify personnel decisions, the Supreme Court has suggested that the most persuasive reasons are those that relate to the business needs of the employer. “[I]n a business setting,” the Court has articulated, “more often than not people do not act . . . without any underlying reasons.”¹³⁶ The Court found that by enacting antidiscrimination legislation, Congress expected employers to “focus on the qualifications of the applicant or employee.”¹³⁷ As explained by Professor Richard Epstein, “[i]n some cases it might be possible [for an employer] to show that there was a bad [but nondiscriminatory] . . . reason [for its employment decision]. But in the typical case the best line of defense is to show that a refusal to hire or a decision to fire was made for a good cause, that is, for legitimate business reasons unrelated to race or sex.”¹³⁸

LSU, for instance, justified its rehiring decision based on Dr. Mbarika’s publication record,¹³⁹ and recent employment cases heard by the Supreme Court¹⁴⁰ reveal employer reasons of efficiency,¹⁴¹ corporate reorganization,¹⁴² matching positions with employee skills,¹⁴³ performance evaluations,¹⁴⁴ seniority,¹⁴⁵

¹³⁶ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

¹³⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989).

¹³⁸ EPSTEIN, *supra* note 134, at 148; *see also* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 137 (1991) (“If the defendant generates an unseemly or arbitrary reason for its employment action that has no relation to any legitimate business objective, it should be easier . . . to prove that it is pretextual.”). Employers do not always give business-related reasons. Courts accept the reason of personal animosity, a trend critiqued in the employment literature. *See generally* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality Excuse,”* 18 BERKELEY J. EMP. & LAB. L. 183 (1997); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003).

¹³⁹ *See Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 555 (La. Ct. App. 2008) (presenting LSU’s argument that Dr. Mbarika had not published in top-tier journals).

¹⁴⁰ This paragraph references all employment discrimination cases published by the Supreme Court since 2000, not just those that concern proof of discrimination under *McDonnell Douglas*.

¹⁴¹ Brief for Respondent at 3-4, *Gross v. FBL Fin. Grp., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441).

¹⁴² *Id.* at 5-6.

¹⁴³ *Id.* at 7-8.

¹⁴⁴ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 622 (2007).

insubordination,¹⁴⁶ employee qualifications,¹⁴⁷ and employee misconduct.¹⁴⁸ Treatises providing an overview of employers' nondiscriminatory reasons similarly conclude that employers proffer reasons generally related to employee performance or conduct or to economic conditions.¹⁴⁹

In peremptory challenges, prosecutors, just like employers, offer nondiscriminatory reasons that they hope courts will find persuasive. Rather than personnel decisions, prosecutors are attempting to justify strategic decisions. Therefore, while employers hope to persuade courts with reasons relating to their business, prosecutors hope to persuade courts with reasons relating to jurors' likelihood of voting for the prosecution or defense.

Unlike employment cases, however, where courts expect business-related reasons, courts do not have clear expectations for what sort of reasons are strategic. In *Batson*, the Supreme Court suggested that it would find a variety of categories of reason persuasive, asserting that whether a juror has "an open mind about the case" may depend on "age, education, employment, and economic status."¹⁵⁰ Initially the Court limited the reasons that prosecutors could assert within these categories to reasons "related to the particular case to be tried."¹⁵¹ In the cases following *Batson*, the Court has removed this limit, and suggested

¹⁴⁵ *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 58 (2006).

¹⁴⁶ *Id.*

¹⁴⁷ *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-57 (2006).

¹⁴⁸ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 46-47 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 144 (2000).

¹⁴⁹ C. GEOFFREY WEIRICH ET AL., 2002 CUMULATIVE SUPPLEMENT TO BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 22-25 (3d ed. 1996) (categorizing employer reasons according to "misconduct, the need to eliminate jobs, other economic factors, poor work performance, personality factors, being overqualified for the job, attendance, inadequate or lesser qualifications, lesser work performance, or a combination of such factors").

¹⁵⁰ *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986) ("Prior to *voir dire* examination . . . lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case.").

¹⁵¹ *Id.* at 98.

that there are no limits, stating that any facially nondiscriminatory reason will suffice.¹⁵²

2. Information vs. Hunch

When making personnel decisions, employers generally have a wealth of information about the performance and compliance of employees and the financial situation of the company. When offering nondiscriminatory reasons, courts require employers to produce some of this information to justify their reasons. While in *McDonnell Douglas*, the Court stated that at the second step, employers must “articulate” a nondiscriminatory reason,¹⁵³ the Court has since clarified that employers have a burden of production,¹⁵⁴ which they must meet “through the introduction of admissible evidence.”¹⁵⁵ LSU, for instance, offered evidence through documentation of its tenure policy and Dr. Mbarika’s performance reviews and through depositions of the faculty who made the tenure decision.¹⁵⁶

The evidence offered by LSU was more than was necessary to meet a burden of production. LSU, like other employers, was incentivized to present additional evidence so as to persuade the court that its actions were not motivated by discrimination¹⁵⁷ and that it was therefore entitled to summary judgment.¹⁵⁸

¹⁵² See *supra* notes 101–102 (summarizing the low burden at the second step of the *McDonnell Douglas* framework).

¹⁵³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁵⁴ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

¹⁵⁵ *Id.*

¹⁵⁶ See *supra* Part II.A.1. (summarizing *Mbarika*).

¹⁵⁷ See *Burdine*, 450 U.S. at 258 (“[A]lthough the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful.”); see also Kenneth Bello, Jon W. Green & Bruce S. Harrison, *Summary Judgment*, in *EMPLOYMENT LITIGATION HANDBOOK* 111, 120 (Jon W. Green & John W. Robinson eds., 1998) (advising employers to introduce evidence in summary judgment motions to show courts that there is no genuine issue of fact concerning discriminatory intent).

¹⁵⁸ See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”); *id.* at 56(c)(1)(A) (listing the evidence a movant may cite to meet the burden for summary judgment); see also Malamud, *supra* note 61, at 2276 (finding courts increasingly use the *McDonnell Douglas* framework for summary judgment analysis).

In the peremptory challenge context, the *McDonnell Douglas* framework is used during voir dire and not during motion practice, so the prosecution does not formally offer evidence. Instead, prosecutors' burden at the second step has remained one of articulation: prosecutors need only "offer" a nondiscriminatory reason for their challenge.¹⁵⁹

Prosecutors generally have little evidence available to justify these reasons. Unlike cases about employee promotion or termination—hiring cases may bear a closer resemblance to peremptory challenges¹⁶⁰—where employees have track records of performance, substantiated by personnel files and witness testimony, prospective jurors have contact with attorneys only

¹⁵⁹ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

¹⁶⁰ Employers often make hiring decisions based only on brief interviews or applications. Given this limited information and the subjectivity of the decisions, the employment literature has noted applicants' difficulty in proving pretext. See Michael Fix, George C. Galster & Raymond J. Struyk, *An Overview of Auditing for Discrimination*, in CLEAR AND CONVINCING EVIDENCE 1, 14 (Michael Fix & Raymond J. Struyk eds., 1993) ("Contact between the applicant and the employer during the hiring process is typically fleeting, the eventual outcome is unknown to the candidate, and the process itself rarely signals exclusionary intent."); Naomi Schoenbaum, *It's Time that You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an "Information-Shifting" Model*, 30 HARV. J.L. & GENDER 99, 100 (2007) ("[B]ecause hiring decisions are often quite subjective, hiring discrimination claims can be some of the most difficult cases to prove."); see also John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) ("Hiring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1.").

during voir dire.¹⁶¹ Often attorneys cannot even speak with the veniremembers because the voir dire is conducted by the judge.¹⁶²

Any statements given by veniremembers are also likely brief¹⁶³ and may even be nonverbal. Often a juror may indicate a belief merely by raising (or not raising) a hand in response to a yes-or-no question posed to the entire panel.¹⁶⁴ Because of this paucity of information, prosecutors must predict juror voting tendencies based on limited characteristics, such as age, education, occupation, appearance, demeanor, marital status, and prior contact with the criminal justice system.¹⁶⁵

¹⁶¹ Previous literature has also noted that in contrast with employees, defendants have little evidence available to prove discrimination. 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, 797 (2006) ("*Batson* claims can only be proven with transcripts of questions, the racial composition of the petit jury and the prosecutor's feeble excuses for striking a juror. Employment discrimination claims involve witness testimony, examination of the employer's prior employment decisions, the plaintiff's testimony, [and] the plaintiff's personnel file"); David A. Sutphen, Note, *True Lies: The Role of Pretext Evidence under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks*, 94 MICH. L. REV. 488, 507 (1995) ("The issues raised in *Batson* hearings do not require the parties to conduct depositions and interrogatories, read lengthy evidentiary records or hear from a multitude of witnesses."); Malamud, *supra* note 61, at 2302-03 n.239 (distinguishing *Batson* challenges from employment suits with pleadings, discovery, and pretrial memoranda).

¹⁶² See Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545 (1999) (concluding that the *Batson* doctrine developed at the same time as the trend of judges limiting lawyer questioning or conducting voir dire entirely by themselves); see also GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, *THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT* 79 (2007) (providing, based on state-by-state survey, a measure of the extent to which voir dire is controlled by the presiding judge).

¹⁶³ See Cavise, *supra* note 162, at 546 ("In the interest of time, most judges will ask as few questions as possible, and ask them in a "closed" manner that encourages a one-word response."). The length of voir dire varies considerably by state, but a recent survey indicates that for felony trials, the total time used for voir dire in most states is between one and two hours. See MIZE ET AL., *supra* note 162, at 77 (charting voir dire times by state).

¹⁶⁴ See MIZE ET AL., *supra* note 162, at 28 tbl.21 (finding the vast majority of judges and lawyers surveyed reported that some voir dire questions were posed to the full panel with veniremembers indicating responses through a show of hands).

¹⁶⁵ The jury selection literature theorizes about how these characteristics correspond to juror proclivities. See, e.g., Baldus et al., *supra* note 64, at 14-15 (listing commonly-held stereotypes about juror voting proclivities); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and*

Prosecutors may not even have clear information on these limited characteristics because any observations they make are subject to multiple interpretations. For instance, in *Jacobs*, the prosecution claimed veniremember Auzenne avoided eye contact and used a peremptory challenge on her,¹⁶⁶ likely assuming that lack of eye contact meant hostility. But lack of eye contact could also signify deference or introversion, or could just be a product of happenstance.¹⁶⁷

Based on their brief responses during voir dire, prospective jurors that exhibit clear bias will be excused for cause.¹⁶⁸ Accordingly, prosecutors must determine which facially impartial veniremembers might cast an unfavorable vote.¹⁶⁹ Because of this paucity of information, peremptory challenges, as noted in Supreme Court opinions, are often made based on “hunch”¹⁷⁰ or “instinct.”¹⁷¹

Scientific Jury Selection: What Works?, 17 OHIO N.U. L. REV. 229, 230-37 (1990) (summarizing recommendations in jury-selection guides).

¹⁶⁶ See *supra* note 131 and accompanying text.

¹⁶⁷ See generally Page, *supra* note 65, at 176 n.94 (“[T]he limited information will be processed subjectively. It is legitimate to strike a venire person who is actually hostile towards the striking attorney. It may be difficult, however, to judge what set of behaviors constitute hostility . . .”).

¹⁶⁸ See *supra* note 24 (providing an overview of challenges for cause).

¹⁶⁹ The limited information available to prosecutors may also mean that they are more likely to discriminate; they will challenge veniremembers based on race or sex because they have little other information about which to base challenges. Scholars have used a similar rationale to argue that employers are more likely to discriminate in hiring decisions than in promotion or termination decisions. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1647 (1991) (“[S]tatistical discrimination [—discrimination based on a hypothesized correlation between minority status and employee performance—] is most likely to occur in hiring because information about employees is ordinarily much easier to acquire than information about applicants, and it is a lack of information that makes statistical discrimination rational.”); Scott A. Moss & Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 202 (1998) (“Employers often can discern a worker’s productivity only to a very limited extent before the worker begins the job But where an observable, immutable trait like race or disability correlates to a less observable negative trait, rational actors use the observable trait as a proxy for the negative trait.”).

¹⁷⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 148 (1994) (“[A] trial lawyer’s judgments about a juror’s sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror’s responses at voir dire or a juror’s ‘bare looks and gestures.’”) (O’Connor, J., concurring) (quoting *Swain v. Alabama*, 380 U.S. 202, 220

C. Differences Prevent Defendants From Proving Pretext

Judicial conceptions of prosecutors' decisions as strategic choices based on hunches effectively prevent defendants from proving pretext in the ways that employees do. Employees attempt to demonstrate pretext by arguing that an employer's proffered nondiscriminatory reason does not accurately describe their characteristics or conduct, is not a plausible explanation for the adverse employment action, or has been applied differently to minority and nonminority employees.¹⁷² The Supreme Court used these factors, among others, to find that the prosecution had discriminated in *Miller-El* and *Snyder*.¹⁷³ An examination of *Jacobs*, and the peremptory challenge case law more generally, however, reveals that these methods are not well suited for defendants trying to show that prosecutors' reasons are pretextual.

1. Defendants Generally Cannot Prove Reasons are Inaccurate

Employees can argue that an employer's reason is pretextual by showing that the evidence proffered by the employer is

(1965)); *Batson v. Kentucky*, 476 U.S. 79, 123 (1986) (“[I]n making peremptory challenges, both the prosecutor and defense attorney necessarily act on only limited information or hunch.”) (Burger, C.J., dissenting).

¹⁷¹ *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) (citing *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

¹⁷² See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 144-45 (2000) (finding that the employee made a substantial showing that the employer's explanation was false by presenting evidence contradicting the employer's claim that the employee had falsified company records); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (“Especially relevant . . . would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.”); see Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1159 (1991) (“Typically, though not exclusively, pretext is shown by proving that the supposed reasons . . . were not true when applied to [the plaintiff], or that such reasons existed for [employees of other groups who did not suffer similar adverse actions].”); Krieger, *supra* note 65, at 1180 (finding employees prove disparate treatment by presenting evidence that an employer's reason was not factually accurate or had been differentially applied); *infra* notes 188-95 for a discussion of plausibility analysis in employment cases.

¹⁷³ See *supra* notes 90-95 (discussing the factors used by the Supreme Court in *Miller-El* and *Snyder*).

inaccurate. Dr. Mbarika, for instance, in rebutting LSU's contention that his scholarship did not meet its standards, argued that the performance evaluations introduced by LSU did not recognize his articles in the publication process of top journals.¹⁷⁴ Dr. Mbarika also suggested that LSU had erred in its characterization of some of the journals in which he published.¹⁷⁵

Analogous arguments, however, are generally unavailable to defendants in peremptory challenges. When prosecutors challenge prospective jurors, the only information they often have is statements and observations of veniremembers during voir dire.¹⁷⁶ If prosecutors explain their challenges based on a veniremember's statements, the accuracy of these explanations is likely irrefutable.¹⁷⁷ As the court asserted in *Jacobs*, once the prosecutor challenged veniremember Jordan because of his employment at a casino, "[n]o amount of questioning would have elicited the response that Mr. Jordan did not work at a casino."¹⁷⁸

¹⁷⁴ See *supra* text accompanying note 121.

¹⁷⁵ See *Mbarika v. Bd. of Supervisors of La. State Univ.*, 992 So. 2d 551, 560 (La. Ct. App. 2008) (analyzing Dr. Mbarika's argument that LSU ranked journals so as to keep his publications from appearing in top tiers).

¹⁷⁶ See *supra* Part II.B.2. (describing the limited information available to prosecutors).

¹⁷⁷ In *Miller-El v. Dretke*, the defendant could refute the accuracy of the prosecution's reason because a prosecutor mischaracterized a statement that a veniremember made on the record. 545 U.S. 231, 242-44 (2005) (finding that the prosecutor asserted that a veniremember would only vote for the death penalty if rehabilitation was impossible even though the veniremember stated that he could impose the death penalty even if rehabilitation was possible).

¹⁷⁸ *State v. Jacobs*, 32 So. 3d 227, 235 (La. 2010). Employers can also assert reasons that cannot be proven inaccurate. See Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 178 (2007) ("McDonnell Douglas only works where the defendant's proffered reason is false (and thus susceptible to inferences of lying, cover-up, and discrimination). It will not work where the defendant's proffered reason is true—even where that reason did not in fact motivate the defendant."); see also *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987) ("[I]t is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative."). In asserting cover-ups, however, employers are limited by the judicial emphasis on business related reasons, see *supra* Part II.B.1. and by their burden of production, see *supra* notes 154-56, which requires that they provide evidence for any proffered reason. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513-14 (1993) (emphasizing that the employer, because it had terminated the manager who had terminated the plaintiff, would have to "confirm [its nondiscriminatory explanation] out of the mouth of its now antagonistic former employee"); Cox, *supra* note 161, at 793 ("[I]t is easier to present a subjective reason for a peremptory challenge . . . than it would be to include false reports in a personnel file and persuade

Defendants can theoretically refute the accuracy of reasons based on prosecutors' observations. Unlike employers, however, who must offer evidence to demonstrate their reasons—which employees can attempt to show is inaccurate—prosecutors need only state their reasons.¹⁷⁹ When prosecutors offer recollections to support challenges, defendants have no way to show that the recollections are false. For instance, when the prosecutor in *Jacobs* asserted that he struck veniremember Auzenne, in part, for lack of eye contact,¹⁸⁰ the defendant could not show that Ms. Auzenne *had* made eye contact: There is not likely to be objective evidence of jurors' demeanors.

Judges presiding over voir dire might be able to corroborate or contradict prosecutorial assertions about demeanor. But it seems unlikely that judges will have clear memories about such things as eye contact. Furthermore, because at the third step of the *McDonnell Douglas* analysis, the judge must determine the prosecutor's intent, the ultimate question is not the accuracy of a given explanation, but its genuineness, whether a prosecutor *believes* that a juror was struck for the proffered nondiscriminatory reason.¹⁸¹

Given judicial recognition that when making challenges, prosecutors act on speculation,¹⁸² defendants are unlikely to be able to refute prosecutors' beliefs in their recollections. In *Jacobs*, even though the judge did not recall that Mr. Jordan was wearing shorts¹⁸³ and did not interpret Mr. Jordan's speech pattern as an impediment,¹⁸⁴ the defense could not disprove that the prosecutor believed he had observed these things. Other courts have upheld

other employees to perjure themselves to make an employment decision appear legitimate.”).

¹⁷⁹ See *supra* Part III.B.2.

¹⁸⁰ See *supra* note 131 and accompanying text.

¹⁸¹ See *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (overturning an appellate finding of discrimination because the court of appeals focused on the “reasonableness,” rather than the “genuineness” of the proffered reason).

¹⁸² See *supra* notes 170-71 and accompanying text.

¹⁸³ *State v. Jacobs*, 13 So. 3d 677, 694 (La. Ct. App. 2009), *rev'd*, 32 So. 3d 227, 235 (La. 2010).

¹⁸⁴ See Brief for Defendant at 16, *State v. Jacobs*, 13 So. 3d 677 (2009) (No. 07-KA-887) (quoting the judge who in denying the *Batson* challenge remarked that he thought Mr. Jordan's hesitation indicated shyness, but that it could have been caused by a speech impediment).

strikes based on prosecutors' conjectures: crediting, for example, prosecutors' assertions about veniremembers' language difficulty based on country of origin or accent;¹⁸⁵ speculation about familial relationships based on last name;¹⁸⁶ and recollections about jurors' statements, despite no on-the-record support.¹⁸⁷

2. Defendants Generally Cannot Prove Reasons are Implausible

Employees can also prove pretext by showing that employers' proffered reasons are implausible.¹⁸⁸ Employees argue that a reason, while business-related, does not justify the adverse action. Courts do not use their own business judgment to second guess the sensibility of employers' decisions,¹⁸⁹ but the Supreme Court

¹⁸⁵ See *United States v. McKoy*, 129 Fed. App'x 815, 821-22 (4th Cir. 2005) (upholding a challenge in part because of a conjecture that a veniremember with a Jamaican accent could have difficulty understanding witnesses with Spanish accents); *United States v. Canoy*, 38 F.3d 893, 898 (7th Cir. 1994) (upholding a challenge based on the prosecutor's inference that because a veniremember was educated outside of the U.S., he would have difficulty understanding English even though the veniremember did not demonstrate any such difficulty during voir dire); *People v. Jurado*, 131 P.3d 400, 423 (Cal. 2006) (finding that a difficulty understanding English can be inferred from a veniremember's birth in the Philippines). Failure to question a veniremember about English-language ability has also, however, been found to be evidence of pretext. See *Diomampo v. State*, 185 P.3d 1031, 1038 (Nev. 2008); see also *United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) ("So long as the prosecutor . . . can convince the district court that the potential juror who is being struck *in fact* has difficulty with English, the justification is race-neutral."). Courts have also found English language deficiency to be a pretextual reason when voir dire reveals a veniremember's ability to speak and understand the language. See, e.g., *State v. Sherman*, No. C1-94-1247, 1995 WL 118917, at *2 (Minn. Ct. App. Mar. 21, 1995); *Diomampo*, 185 P.3d at 1037-38.

¹⁸⁶ *Jackson v. State*, 5 So. 3d 1144, 1150 (Miss. Ct. App. 2008) (King, C.J., specially concurring) (criticizing the prosecution for striking a prospective juror based on sharing a last name with someone who had been arrested without asking the juror if he was related to such person).

¹⁸⁷ *Scott v. State*, No. 04-06-00028-CR, 2007 WL 1059039, at *2 (Tex. Ct. App. Apr. 11, 2007) (finding that although the record did not contain a given statement, the prosecution's notes indicated that the given veniremember had spoken and that a challenge based on a good-faith, but mistaken belief, is not discriminatory).

¹⁸⁸ See, e.g., *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) ("[T]he non-moving plaintiff [to survive summary judgment] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence' . . .") (citation omitted).

¹⁸⁹ See, e.g., *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997) ("Plaintiffs lose if the company honestly believed in the nondiscriminatory reasons it offered, even

has noted that “[i]dentifiable qualifications for a single job provide a common standard by which to assess each employee.”¹⁹⁰ Accordingly, when an employee brings a discrimination claim, courts can analyze employers’ job descriptions and personnel criteria to see if they are consistent with the action taken against the plaintiff employee.

Dr. Mbarika, for instance, suggested that lack of top-tier publications could not explain LSU’s failure to grant him tenure, given the quantity of articles that he published.¹⁹¹ Dr. Mbarika’s argument was unsuccessful because LSU’s tenure criteria showed the plausibility of its reason; at hiring, Dr. Mbarika was provided with the tenure policy, dictating that decisions would be made, in part, based on publication in leading journals.¹⁹² When employers’ internal criteria do not explain their decisions, employees can prove pretext, showing, for instance, that an employer did not follow its hiring policies,¹⁹³ could not justify its employee ratings,¹⁹⁴ or terminated an employee for a mistake that, at the time, a company executive had characterized as “a minor matter.”¹⁹⁵

In the peremptory challenge context, defendants also try to prove the implausibility of the prosecution’s proffered reasons. The Supreme Court has found that “implausible or fantastic” explanations for challenges will likely be found to be pretexts,¹⁹⁶

if the reasons are foolish or trivial or even baseless.”); *Fuentes*, 32 F.3d at 765 (“[T]he factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.”).

¹⁹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 295 n.14 (1987).

¹⁹¹ *See supra* note 120 (summarizing Mbarika’s arguments that he had published more articles than had a white candidate who was reappointed).

¹⁹² *See supra* note 118.

¹⁹³ *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (reversing summary judgment by finding that an employee could show pretext, in part, by demonstrating that the hiring chairperson, contrary to employer policy, did not take into account the screening committee’s recommendations).

¹⁹⁴ *Tomasso v. Boeing Co.*, 445 F.3d 702, 709-10 (3d Cir. 2006) (reversing summary judgment, in part, by finding that the employer had not explained the reason for some of the employee’s low ratings).

¹⁹⁵ *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 56 (1st Cir. 2000) (reversing summary judgment, in part, because a factfinder could conclude that the employer’s reason was implausible given a comment by the vice president at the time the employee supposedly made the error).

¹⁹⁶ *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see also Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (“Credibility [of a prosecutor] can be measured by . . . how reasonable,

and in *Snyder*, the Court questioned the plausibility of the prosecution's conjecture that a student-teacher would find the defendant guilty of a lesser-included offense so as to speed deliberations and return to the classroom.¹⁹⁷ But whereas, in employment cases, courts can examine employer policies and practices to determine plausibility, courts, as noted by Justice Marshall, do not have clear standards by which to assess prosecutor explanations.¹⁹⁸ District attorneys' offices do not share jury-picking standards with courts, and courts, recognizing that prosecutors must make guesses based on limited information,¹⁹⁹ do not impose standards on prosecutors' strategies.

Courts do not require that prosecutors demonstrate that the characteristics that they offer as nondiscriminatory reasons actually relate to a veniremember's voting proclivity. The Supreme Court, in *Miller-El*, found that the prosecution's failure to question a veniremember about a proffered reason casts doubt on the reason,²⁰⁰ but, as this was just one factor among many in the Court's decision,²⁰¹ lowers courts do not generally find that failure to question demonstrates that a reason is pretextual. In *Jacobs*, the prosecutor asserted that he struck veniremember Jordan in part for working at a casino, arguing that law-abiding citizens should not take part in some activities that occur at casinos.²⁰² But the prosecutor did not question Mr. Jordan about his morals²⁰³ and presented no evidence showing that casino workers are less likely to be law abiding or more likely to side with defendants. In striking veniremember Stevenson, the

or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.”).

¹⁹⁷ See *supra* note 91.

¹⁹⁸ See *Wilkerson v. Texas*, 493 U.S. 924, 927 (1989) (denying certiorari) (Marshall, J., dissenting) (“[A] factfinder can assess the employer’s faithfulness to its own nonracial criteria by examining whether the particular white candidate’s qualifications, as defined by the criteria, were superior to those of the Afro-American candidate. In the *Batson* context, though, the criteria underlying a prosecutor’s peremptory challenges are private . . .”).

¹⁹⁹ See *supra* Part II.B.2.

²⁰⁰ See *supra* note 90 and accompanying text.

²⁰¹ See *supra* notes 90-95 and accompanying text (discussing factors considered by the Court in *Miller-El* and *Snyder*).

²⁰² *State v. Jacobs*, 32 So. 3d 227, 234 (La. 2010).

²⁰³ *State v. Jacobs*, 13 So. 3d 677, 694 (La. Ct. App. 2009), *rev’d*, 32 So. 3d 227 (La. 2010).

prosecutor never questioned her to see if her Sunday school teaching or relatives in jail revealed an anti-state bias²⁰⁴ and never presented any evidence that people with these characteristics have such biases. Similarly, when giving reasons, such as age,²⁰⁵ vocation,²⁰⁶ or dress,²⁰⁷ prosecutors generally do not need to present evidence that the given juror is biased or that jurors with those characteristics generally have biases.

Courts also do not require prosecutors to show that their reasons are related to the case being tried.²⁰⁸ The prosecutor in *Jacobs* implied that Mr. Jordan's employment in a casino could be connected to unsavory activities—perhaps gambling or organized crime. But the trial involved a sixteen-year old alleged to have shot a man and the man's mother;²⁰⁹ it is unclear how Mr. Jordan's employment suggested an affinity for such a defendant.

²⁰⁴ Brief for Defendant, *supra* note 184, at 17.

²⁰⁵ See, e.g., *People v. Lomax*, 234 P.3d 377, 413 (Cal. 2010) (finding it was not unreasonable for the prosecution to believe that a young person would impose a more lenient sentence); *State v. Martin*, 683 N.W.2d 399, 403-05 (S.D. 2004) (upholding the trial court's determination that a strike of a veniremember, in part, for being seventy-one years old was not "without a logical perception on the part of the state").

²⁰⁶ See, e.g., *State v. Martinez*, No. 1 CA-CR 08-0144, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009) (upholding the challenge of an engineer based on the prosecutor's supposition, for which he offered no support, that "engineers are of a special breed"); *People v. Reynoso*, 74 P.3d 852, 865-66 (Cal. 2003) (upholding a challenge even though the record did not show the customer service representative's hypothesized lack of education and the prosecutor did not show that the representative was likely to favor the defense); *Jackson v. State*, 5 So. 3d 1144, 1148-49 (Miss. Ct. App. 2008) (finding that the prosecutor was not required to explain why a parochial school teacher would favor defendant).

²⁰⁷ In *Jacobs*, the prosecutor did not question veniremember Jordan about his shorts or explain why his shorts would impact his decision making. *Jacobs*, 13 So. 3d at 694. Similarly, in *Jackson v. State*, the court upheld the prosecution's strike of a veniremember with dyed-red hair because this, in the judge's opinion, could indicate the veniremember was "out of synch with society or something" even though the veniremember was an engineer, Brief of the Appellant at 16, *Jackson v. State*, 5 So. 3d 1144 (Miss. Ct. App. 2008) (No. 2007-KA-01782-COA), and the prosecutor presented no evidence of such a connection. *Jackson*, 5 So. 3d at 1149.

²⁰⁸ Some courts consider whether there is a relationship between the reason and the case, although they do not require that the prosecution actually demonstrate a relationship. See, e.g., *Ex Parte Branch*, 526 So. 2d 609, 624 (Ala. 1987); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000); *State v. Parker*, 836 S.W.2d 930, 940 (Mo. 1992); *People v. Richie*, 217 A.D.2d 84, 89 (N.Y. App. Div. 1995); *Brumfield v. Exxon Corp.*, 63 S.W.3d 912, 917 (Tex. Ct. App. 2002).

²⁰⁹ *Jacobs*, 13 So. 3d at 682.

It is also unclear how veniremember Stevenson's prior service on a jury that found for a plaintiff²¹⁰ would have any connection to the facts of *Jacobs*. Similarly, in cases where prosecutors strike jurors based on insufficient education, they are not required to show that the facts presented at trial will be complex.²¹¹

Courts also do not limit where within a given category jurors' characteristics must fall. In employment cases, by contrast, courts expect employers to take action only if employees exhibit a behavior in a certain direction. For instance, no matter what type of job an employee has or what type of business an employer engages in, if performance is offered as an explanation, an employee must have performed *poorly*. Ruling on *Batson* challenges, however, courts have accepted that prospective jurors were struck for being too old²¹² or too young;²¹³ too vocal²¹⁴ or too passive;²¹⁵ too educated²¹⁶ or too uneducated;²¹⁷ for being single²¹⁸

²¹⁰ See *supra* note 131 and accompanying text.

²¹¹ See, e.g., *Jackson*, 5 So. 3d at 1145-47 (upholding the peremptory challenge of a veniremember with a twelfth-grade education, in a trial for a restaurant hold-up, based on the prosecutor's reason of selecting a highly educated jury).

²¹² See, e.g., *People v. Jurado*, 131 P.3d 400, 423 (Cal. 2006); *State v. Myers*, 603 N.W.2d 378, 386 (Neb. 1999); *State v. Martin*, 683 N.W.2d 399, 403-05 (S.D. 2004).

²¹³ See, e.g., *People v. Lomax*, 234 P.3d 377, 413 (Cal. 2010); *Walker v. State*, 640 S.E.2d 274, 277 (Ga. 2007); *Myers*, 603 N.W.2d at 386.

²¹⁴ See, e.g., *United States v. Jynes*, 197 F. App'x 351, 353-55 (5th Cir. 2006); *State v. Givens*, 888 So. 2d 329, 340 (La. Ct. App. 2004); *Carroll v. State*, No. 10-08-00413, 2010 WL 5142386, at *7-9 (Tex. Ct. App. Dec. 15, 2010).

²¹⁵ See, e.g., *Stokes v. State*, 194 S.W.3d 762, 764-65 (Ark. 2004); *People v. Ledesma*, 140 P.3d 657, 687-88 (Cal. 2006); *Morales v. State*, No. 54180, 2010 WL 3503519, at *1 (Nev. July 15, 2010).

²¹⁶ See, e.g., *People v. Gaston*, 628 N.E.2d 699, 701 (Ill. App. Ct. 1993); *State v. Williams*, 922 S.W.2d 845, 850 (Mo. Ct. App. 1996); see also *People v. Reynoso*, 74 P.3d 852, 925 n.6 (Ca. 2003) ("[A]n attorney could peremptorily excuse a potential juror because he or she feels the potential juror's occupation reflects *too much education . . .*").

²¹⁷ See, e.g., *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005); *People v. Hecker*, 942 N.E.2d 248, 272-74 (N.Y. 2010); *State v. Mulligan*, 736 N.W.2d 808, 820-21 (S.D. 2007).

²¹⁸ See, e.g., *People v. Hamilton*, 200 P.3d 898, 933 (Cal. 2009); *Roberts v. State*, 651 S.E.2d 689, 693-94 (Ga. 2007); *Pitchford v. State*, 45 So. 3d 216, 226 (Miss. 2010).

or because of a marital relationship;²¹⁹ and for having been accused of a crime²²⁰ or having been a victim of a crime.²²¹

Prosecutors also strike prospective jurors for having no job²²² or for the jobs at which they are employed. In *Jacobs*, the prosecution struck veniremembers, in part, for working in a casino and having worked in the district attorney's office.²²³ Other courts have upheld challenges based in part on employment as a teacher,²²⁴ postal worker,²²⁵ customer service representative,²²⁶ and engineer.²²⁷ Similarly, courts uphold challenges based on all sorts of appearances. The court in *Jacobs* upheld the prosecutor's challenge of veniremember Jordan in part for his shorts;²²⁸ other courts have upheld challenges based in part on dyed-red hair,²²⁹ earrings,²³⁰ a large hat and sunglasses,²³¹ a T-shirt,²³² and an unbuttoned flannel shirt.²³³ The legal literature is full of many more examples of the varied reasons accepted by courts.²³⁴

²¹⁹ Courts allow peremptory challenges based on the occupation of a spouse. *See, e.g.*, *People v. Allen*, No. A118253, 2008 WL 2673363, at *7 n.8 (Cal. Ct. App. July 9, 2008); *People v. Davis*, 677 N.E.2d 1340, 1345 (Ill. App. Ct. 1997); *State v. Terry*, 928 S.W.2d 879, 884-85 (Mo. Ct. App. 1996).

²²⁰ *See, e.g.*, *People v. Cowan*, 236 P.3d 1074, 1114 (Cal. 2010); *Sykes v. State*, 953 A.2d 261, 270-71 (Del. 2008); *Munoz v. State*, No. 49227, 2008 WL 6062132, at *3-4 (Nev. Aug. 14, 2008).

²²¹ *See, e.g.*, *State v. Holloway*, 977 A.2d 750, 758-59 (Conn. App. Ct. 2009); *State v. Jacobs*, 32 So. 3d 227, 231-32 (La. 2010); *Horne v. State*, 825 So. 2d 627, 636 (Miss. 2002).

²²² *See, e.g.*, *Woolfolk v. State*, 644 S.E.2d 828, 832 (Ga. 2007); *State v. Johnson*, 207 S.W.3d 24, 36-37 (Mo. 2006); *Commonwealth v. Cook*, 952 A.2d 594, 609-10 (Pa. 2008).

²²³ *See supra* note 131 and accompanying text.

²²⁴ *Jackson v. State*, 5 So. 3d 1144, 1148-49 (Miss. Ct. App. 2008).

²²⁵ *Carter v. Duncan*, No. C 02-0586SBA(PR), 2005 WL 2373572, at *10-13 (N.D. Cal. Sept. 27, 2005).

²²⁶ *People v. Reynoso*, 74 P.3d 852, 923-26 (Cal. 2003).

²²⁷ *State v. Martinez*, No. 1 CA-CR 08-0144, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009).

²²⁸ *See supra* note 131 and accompanying text.

²²⁹ *Jackson*, 5 So. 3d at 1149-50.

²³⁰ *United States v. Claytor*, No. 7:05 CR 0007, 2005 WL 1745642, at *3 (W.D. Va. July 26, 2005).

²³¹ *State v. Tyler*, No. M2005-00500-CCA-R3-CD, 2006 WL 264631, at *8 (Tenn. Crim. App. Feb. 1, 2006).

²³² *Cook v. LaMarque*, 593 F.3d 810, 819-20 (9th Cir. 2010).

²³³ *People v. Cruz*, 187 P.3d 970, 988-91 (Cal. 2008).

²³⁴ *See, e.g.*, Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1090-99 (2011); Jeffrey S. Brand, *The Supreme Court, Equal*

Defendants may argue that a reason is implausible because, if anything, it seems to suggest that a veniremember would be sympathetic to the prosecution.²³⁵ But unlike employment cases, where certain characteristics, such as high performance, are clearly ideal for employers, there is no standard for what makes a juror ideal. In *Jacobs*, the prosecutor argued, and the court did not dispute that, rather than making them desirable, Ms. Auzenne's past employment with the district attorney's office and Ms. Florence's status as a victim in another case, prejudiced them against the prosecution.²³⁶

Even if a court recognizes that some characteristics suggest that a veniremember would favor the state, the prosecution can still base a challenge on other characteristics.²³⁷ For example, besides pointing to Ms. Auzenne's former employment, the *Jacobs* prosecution asserted two other reasons for her challenge. Finding that the defendant did not prove that these reasons were pretextual, the court upheld the challenge.²³⁸ Other courts similarly uphold challenges of seemingly ideal minority veniremembers by finding that prosecutors articulated nondiscriminatory reasons that the defense did not disprove.²³⁹

Protection and Jury Selection: Denying that Race Still Matters, 1994 WIS. L. REV. 511, 591-94 (1994); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 533-35 (1999); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 237-66 (1993).

²³⁵ The Supreme Court has indicated that the fact that a struck juror would seem ideal for the prosecution suggests discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

²³⁶ See *supra* notes 130-31 and accompanying text. The prosecution offered a similar counterintuitive argument in *State v. Pona*, 926 A.2d 592, 600 (R.I. 2007), arguing that a veniremember with brothers in the police department was likely to side with the defense in order to contradict the assumption that she would be pro-state. The court upheld the challenge. See *infra* note 239 (noting that the challenge was upheld based on a different reason given by the prosecution).

²³⁷ Prosecutors would be wise to assert all the reasons for their challenges together. In *Miller-El*, after the defense contested one reason, the prosecution asserted an additional reason. The Court found this "reek[ed] of afterthought." 545 U.S. at 246.

²³⁸ *State v. Jacobs*, 32 So. 3d 227, 234 (La. 2010).

²³⁹ See, e.g., *People v. Washington*, No. A109989, 2006 WL 3720341, at *9 & n.7 (Cal. Ct. App. Dec. 19, 2006) (finding that a veniremember who was studying criminal justice and considering becoming a police officer was not ideal for the prosecution because although the veniremember had past positive experiences with the police, the veniremember also had past negative experiences with the police); *State v. Hoffman*,

As asserted by Justice Marshall, “[a]ny prosecutor can easily assert facially neutral reasons for striking a juror.”²⁴⁰ Since many of these facially neutral reasons are assertions about veniremembers’ statements or appearances, defendants are not often able to show that they are inaccurate,²⁴¹ and because courts have broad conceptions of acceptable jury-picking strategies, defendants generally are not able to show that the reasons are implausible.

3. Defendants Generally Cannot Prove Reasons also Apply to Unchallenged Jurors

The multitude of reasons available to prosecutors also can prevent defendants from proving pretext by showing that a given reason has been differentially applied. While the Supreme Court, in *Miller-El* and *Snyder*, compared minority veniremembers who the prosecution challenged with white veniremembers who the prosecution accepted in order to show discrimination,²⁴² the prosecution can avoid these comparisons by offering reasons that are unlikely to apply to other veniremembers. Highlighting this difficulty, in upholding the prosecution’s challenge of Mr. Jordan based on his employment at a casino, the *Jacobs* court emphasized that there were no jurors with similar jobs.²⁴³

Prosecutors also can prevent defendants from finding a comparable white veniremember by explaining challenges with multiple nondiscriminatory reasons. Courts have generally held that “where a party gives multiple reasons for striking a juror, it is not enough for the other side to assert that the empanelled juror

768 So. 2d 542, 557-59 (La. 2000) (finding that a veniremember with relatives in law enforcement and who had previously served on a jury that returned a guilty verdict was not ideal for the prosecution given the prosecution’s interpretation of the veniremember’s answers during voir dire); *State v. Pona*, 926 A.2d 592, 608-09 (R.I. 2007) (upholding a strike of a veniremember with police officer brothers based on the prosecution’s observation of the veniremember’s demeanor); *Scott v. State*, No. 1059039 2007 WL 1059039, at *2 (Tex. Ct. App. Apr. 11, 2007) (rejecting the defendant’s contention that a veniremember employed by the state was ideal for the prosecution because of a statement the prosecution alleged the veniremember to have made but which was not confirmed in the record).

²⁴⁰ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

²⁴¹ *See supra* Part II.C.1.

²⁴² *See supra* note 90 and accompanying text.

²⁴³ *Jacobs*, 32 So. 3d at 235.

shares one attribute with the struck juror.”²⁴⁴ In *Miller-El*, however, the Supreme Court made clear that even if unchallenged white veniremembers do not have the precise mix of characteristics as the challenged minority veniremembers, comparisons can still undercut the legitimacy of proffered reasons.²⁴⁵

Nonetheless, while one reason that a prosecutor proffered for striking a minority veniremember may also apply to a white veniremember, this similarity is often insufficient to persuade courts that another reason proffered for the strike of the minority veniremember is pretextual.²⁴⁶ As one judge asserted after *Miller-El*:

While evidence that “a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-

²⁴⁴ *Wilson v. Cockrell*, 70 Fed. App’x 219, 224 (5th Cir. 2003) (citing *Alverio v. Sam’s Warehouse Club, Inc.*, 253 F.3d 933, 941 (7th Cir. 2001)); *see, e.g., United States v. Davenport*, No. 93-1216, 1994 WL 523653, at *6 (5th Cir. 1994) (finding a comparison of prospective jurors unpersuasive because the defendant did not show that any other juror “had the same combination of factors” that the prosecution had used to justify the strike); *Taylor v. State*, 620 S.E.2d 363, 366 (Ga. 2005) (“If multiple racially-neutral reasons are given for the peremptory strike of [African American] potential jurors, a *Batson* violation does not exist simply because one or more of those racially-neutral reasons was not used by the prosecutor to strike white potential jurors.” (citations omitted) (brackets in original)); *Berry v. State*, 802 So. 2d 1033, 1040 (Miss. 2001) (“[T]he fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.”); *Cantu v. State*, 842 S.W.2d 667, 689 (Tex. Crim. App. 1992) (“Where . . . the State has offered numerous race neutral reasons for its challenge, we cannot say that the fact that there were other acceptable jurors possessing one or more of these objectionable attributes, is sufficient to establish disparate treatment.”). Employers can also proffer multiple reasons for their decision, but are generally limited to presenting business-related reasons, whereas prosecutors can assert almost any reason. *See supra* Part II.B.1.

²⁴⁵ *See Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) (“None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one.”).

²⁴⁶ *See, e.g., People v. Huggins*, 131 P.3d 995 (Cal. 2006) (finding that while many of the prosecution’s explanations for challenging minority veniremembers could also apply to white veniremembers who were not challenged, the prosecutor presented additional evidence that the minority veniremembers would not support the death penalty); *Densey v. State*, 191 S.W.3d 296, 322-25 (Tex. Ct. App. 2006) (finding that although the challenged minority veniremember’s answers to questions concerning rehabilitation were the same as the answers of unchallenged white veniremembers, the prosecution had other reasons for challenging the minorities).

similar nonblack who is permitted to serve” tends to prove purposeful discrimination, the prosecution can rebut that evidence by showing that the prosecutor had other non-discriminatory reasons for striking the juror which did not also apply to the empaneled juror.²⁴⁷

In *Jacobs*, the prosecution struck Ms. Florence in part for having served on a hung jury, but did not strike a white veniremember who had also served on a hung jury. In upholding the challenge, the court found that the comparison did not show the reason to be pretextual because unlike the white veniremember, Ms. Florence had been the victim of a crime and was observed sleeping during voir dire.²⁴⁸ Similarly, prosecutors can strike an engineer while seating other jurors with technical backgrounds²⁴⁹ and strike a veniremember on the basis of inadequate education while striking other veniremembers with advanced educations.²⁵⁰

In addition to the multitude of reasons available to prosecutors, the ability of defendants to prove pretext by comparing veniremembers is limited by judicial perception of the flexibility of prosecutors’ strategies. The Supreme Court has noted that while employers may look at many variables in assessing employees, “these variables are to a great extent uniform for all employees because they must all have a reasonable relationship to the employee’s qualifications to perform the particular job at issue.”²⁵¹

In contrast, prosecutors’ preferences may change over the course of voir dire. The Supreme Court has noted that prosecutors may be more willing to use peremptory challenges earlier in voir

²⁴⁷ *Rose v. Spitzer*, No 99-CV-6053 (SLT), 2006 WL 1720445, at *9 (E.D.N.Y. June 22, 2006) (citing *Miller-El*, 545 U.S. at 241).

²⁴⁸ See *supra* note 130 and accompanying text.

²⁴⁹ *State v. Martinez*, No. 1 CA-CR 08-014, 2009 WL 3165489, at *2-3 (Ariz. Ct. App. Oct. 1, 2009).

²⁵⁰ *Jackson v. State*, 5 So. 3d 1144, 1150 (Miss. Ct. App. 2008) (King, C.J., concurring) (“Among the reasons for striking four of the black prospective were that . . . the prosecution wanted a well-educated jury. While desiring a well-educated jury, the prosecution struck (1) a well-educated engineer . . . and (2) a well-educated school teacher . . .”).

²⁵¹ *McCleskey v. Kemp*, 481 U.S. 279, 295 n.14 (1987).

dire when they have more challenges remaining.²⁵² Also, prosecutors may not have uniform preferences for each juror: A prosecutor may, for instance, want some jurors who are leaders and some who are followers. Some courts therefore assert that prosecutors' disparate use of challenges on jurors with the same characteristics does not imply discrimination.²⁵³

4. Courts Generally Find Other Factors Cannot Prove Pretext

In addition to the inaccuracy, implausibility, or differential application of a prosecutor's proffered reason, the Supreme Court, in *Miller-El* and *Snyder*, identified other indicators of pretext, such as the pattern of challenges, the questions asked during voir dire,²⁵⁴ and the demeanor of the prosecutors while justifying the challenges.²⁵⁵ Lower courts consider these factors in making determinations, but generally find that statistics, disparate questioning, and demeanor do not prove that a proffered reason is false.²⁵⁶

In *Jacobs*, the Louisiana Supreme Court analyzed the prosecution's frequency of challenges against minority and non-minority veniremembers. Finding that the prosecution used eighty-seven percent of its challenges on racial minorities, even though the venire was more than eighty-one percent white, the court asserted that from "a purely statistical standpoint," the disparity could not be explained by chance.²⁵⁷ But the court found that it did not have to rely on statistics because it had already

²⁵² *Gray v. Mississippi*, 481 U.S. 648, 665 (1987).

²⁵³ *See Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997) (quoting *Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994)) ("[C]ounsel is entitled to . . . reevaluate the mix of jurors and the weight he gives to various characteristics as he begins to exhaust his peremptory challenges"); *People v. Johnson*, 767 P.2d 1047, 1056-57 (Cal. 1989) ("It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. . . . These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors.").

²⁵⁴ *See supra* notes 93-94 and accompanying text.

²⁵⁵ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003).

²⁵⁶ Professor Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment*, 61 LA. L. REV. 577 (2001), has made a related critique for employment cases, arguing that courts discount the probative value of individual pieces of evidence favorable to employees when awarding employers summary judgment and judgment as a matter of law.

²⁵⁷ *State v. Jacobs*, 32 So. 3d 227, 236 (La. 2010).

assessed the reasons proffered by the prosecution for the challenges and found them to be nondiscriminatory.²⁵⁸

The court's logic is revealed in the organization of its opinion. The initial sections are labeled by the names of veniremembers. In each of these sections, the court addressed the reasons proffered for the strikes of the given veniremember and found them not to be pretextual.²⁵⁹ The opinion's final section is devoted to the "statistical argument."²⁶⁰ Other courts employ similar logic, separately addressing the reasons proffered by the prosecution and the statistics of the prosecution's challenges, then concluding that mere statistics do not prove pretext.²⁶¹

The *Jacobs* court's analysis of the prosecution's patterns of questioning similarly reflects courts' failure to find this factor convincing. Like statistics, the court addressed disparate questioning in a separate section after it had concluded that pretext had not been demonstrated for any particular juror.²⁶² The defense argued that the prosecution asked venire panels with minority jurors if they knew anyone in jail, but did not pose this question to a panel that was composed exclusively of white veniremembers.²⁶³ Knowing that Louisiana courts have accepted a

²⁵⁸ *Id.* at 236-37.

²⁵⁹ *Id.* at 229-33 (labeling sections "Eric Hughes," "Leola Florence," and "Other prospective jurors").

²⁶⁰ *Id.* at 236.

²⁶¹ *See, e.g.*, *State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) (rejecting the defendant's statistical argument because "[d]efendant cites no case . . . in which a *Batson* challenge was granted based on statistics alone" and then separately addressing whether the defendant proved that the prosecution's proffered reasons were pretextual); *State v. Hugueley*, 185 S.W.3d 356, 374-75 (Tenn. 2006) (concluding that even though all eight of the prosecution's challenges were used against African Americans, "[t]hese bare statistics do not, in and of themselves, convince us that the State's proffered race-neutral reasons for excusing the five named persons were merely pretextual"); *Jackson v. State*, No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) ("Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of veniremember 3 demonstrates that the State's reason for striking her was not pretextual, and our analysis of the State's remaining strikes on African-American veniremembers does not demonstrate discriminatory intent.").

²⁶² *Jacobs*, 32 So. 3d at 236; *see also* *Clay v. State*, No. 05-94-01770-CR, 1996 WL 167930, at *5 (Tex. Ct. App. April 9, 1996) (dismissing allegations of disparate questioning after having concluded in prior sections of the opinion that the prosecution's proffered reasons were not pretextual).

²⁶³ *Jacobs*, 32 So. 3d at 236.

veniremember's relationship with someone in jail as a nondiscriminatory reason for challenge,²⁶⁴ the prosecutor may have asked this question to minority veniremembers in the hope that some would respond affirmatively, providing "ammunition" for challenge.²⁶⁵

The court, however, explained away the disparate questioning. The all-white panel was the final panel, and only a few additional jurors needed to be selected; the court therefore concluded that the failure to fully question them could be motivated by expediency rather than discrimination.²⁶⁶ Other courts similarly provide explanations for disparate questioning, attributing the differences to, for example, answers given by jurors,²⁶⁷ previous questions asked by the court,²⁶⁸ or inadvertent prosecutor error.²⁶⁹ These explanations, while not necessarily inaccurate, reflect the ease with which disparate questioning can be attributed to non-discriminatory factors. Even when courts acknowledge that disparate questioning may evince a

²⁶⁴ See *id.* at 235 (noting that Louisiana courts have found that having a relative in prison is a nondiscriminatory reason for a challenge).

²⁶⁵ Such a strategy is revealed in excerpts of a training tape for jury selection made by a former Philadelphia assistant district attorney. See Jack McMahon, *Fear of a Black Jury*, HARPER'S MAG., July 2000, at 29 ("You want to ask more questions of [African Americans] so that you have more ammunition to make an articulable reason as to why you are not striking them for race.").

²⁶⁶ *Jacobs*, 32 So. 3d at 236.

²⁶⁷ See *State v. Gay*, 150 P.3d 787, 794-95 (Ariz. 2008) (finding that the prosecutor questioned an African American veniremember more extensively than a white veniremembers because the veniremember's initial answer more likely suggested a negative attitude towards law enforcement); *Bailey v. Commonwealth*, No. 2002-SC-1090-MR, 2005 WL 119619, at *4 (Ky. Jan. 20, 2005) ("The number and intrusiveness of those follow-up questions depended on the initial response from the juror, i.e., jurors who volunteered less information were asked more questions, not the race of the juror.").

²⁶⁸ *People v. Emory*, No. A122557, 2009 WL 4680009, at *6 (Cal. Ct. App. Dec. 9, 2009) ("If the prosecutor questioned J.P. more closely than others about his work history, the questions are readily explained by the fact that the court itself asked J.P. few questions on that topic . . .").

²⁶⁹ See *Brown v. State*, No. CR-07-1332, 2010 WL 3612138, at *33 (Ala. Crim. App. June 25, 2010) (finding that when the prosecutor stopped a white veniremember from answering a question, claiming—incorrectly—that the veniremember had previously answered it, "it appears that the prosecutor was simply mistaken about the veniremembers' previous responses").

discriminatory intent, they often find that factor, alone, does not prove that the state's nondiscriminatory reasons are pretextual.²⁷⁰

The Supreme Court has emphasized that the "best evidence" to determine whether a proffered reason is pretextual is often the demeanor of the prosecutor.²⁷¹ But given that prosecutors become increasingly expert at conducting voir dire in each case that they try, and that they may receive specialized voir dire training,²⁷² it is questionable whether any intent to discriminate or deceive would be revealed by their demeanor. If proffering pretextual reasons does affect demeanor, it seems unlikely that judges will be able to reliably identify these effects.²⁷³

Even if judges identify aspects of a prosecutor's demeanor that may imply deception, they may be reluctant to find that prosecutors have acted pretextually. Prosecutors are often repeat-players who have developed trusting relationships with judges.²⁷⁴

²⁷⁰ See, e.g., *Watkins v. State*, 245 S.W.3d 444, 453 (Tex. Crim. App. 2008) ("[W]hile one of the prosecutor's main lines of questioning seemed suspiciously directed toward African-Americans, the two others manifestly were not. . . . [W]e [cannot] say that this evidence, at least by itself, compels a conclusion that the trial court clearly erred [in not finding pretext]."); *State v. Lamon*, 664 N.W.2d 607, 627 (Wis. 2003) ("[R]efusal to conduct individualized voir dire of [the veniremember] may be an isolated factor arguably evidencing discriminatory intent. . . . [T]he numerous race-neutral reasons proffered by the State outweigh any alleged discriminatory intent resulting from the failure to question [the veniremember] further."). *Lamon* seems to be an especially egregious case. The day before jury selection, the state requested the address of the only African American veniremember, allegedly because his surname, Bell, was a "well known criminal name" in the area. See *Lamon*, 664 N.W.2d at 638 (Abrahamson, C.J., dissenting).

²⁷¹ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion)).

²⁷² See William H. Farmer, *Presumed Prejudiced, But Fair?*, 63 VAND. L. REV. EN BANC 5, 7 (2010) ("Practitioners throughout the country are trained to learn the preferences and taboos of their local trial courts, state or federal, before conducting voir dire."). But see John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life Disqualification" through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1245-46 (2001) (asserting that lawyers have little training in voir dire).

²⁷³ Legal literature has used empirical evidence to critique the assumption that factfinders can determine credibility based on demeanor. See generally, e.g., Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157 (1993); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 174-80 (2011).

²⁷⁴ See *Ex Parte Branch*, 526 So. 2d 609, 616 (Ala. 1987) (quoting a trial judge reminding the defense attorney of the experience of the prosecutors and that he "trust[s] these men when they tell [him] something as court officers"); *People v.*

Judges may therefore hesitate to find that they are lying based on ambiguous demeanor-based cues.²⁷⁵ Perhaps, most importantly, judges' decisions generally turn on defendants' ability to disprove prosecutors' proffered reasons;²⁷⁶ it is unlikely that judges will hold that a prosecutor's demeanor proves that a proffered reason is false.

This inability to find pretext based on demeanor is magnified at the appellate level. The Supreme Court has recognized that appellate courts have only transcripts and, as a result, are not "well positioned" to assess prosecutors' credibility.²⁷⁷ Trial judges' findings are therefore accorded "great deference."²⁷⁸ The *Jacobs* court accordingly supposed that the trial judge's upholding of a peremptory challenge "could have been validly based on the

Coulter, 799 N.E.2d 708, 723 (Ill. App. Ct., 2003) (Campbell, J., dissenting) (quoting a trial judge who in upholding peremptory challenges remarked, "I will never, ever have the pleasure of knowing a more honest person, a person with more integrity [as one of the prosecutors and that the other prosecutor] had the same sort of reputation."); see also Jose Felipe Anderson, *Catch Me If You Can! Resolving the Ethical Tragedy in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 377 (1998) ("For the lawyer who does not regularly practice before a given court, the risk of making a *Batson* challenge may be to anger the judge by challenging the integrity of a local lawyer with whom the judge has become familiar and who he may believe to be honest.").

²⁷⁵ See Deana Kim El-Mallawany, Comment, *Johnson v. California and the Initial Assessment of Batson Claims*, 74 FORDHAM L. REV. 3333, 3355 (2006) ("[T]he trial judge is often in the awkward position of questioning whether a prosecutor, who comes before the judge on a regular basis, is lying to the court"); Charlow, *supra* note 66, at 11 (reporting that after finding an explanation was pretextual, a judge "had the uncomfortable feeling that she had just rendered an official ruling that the attorney was lying to the court"). This situation is less likely to occur in employment cases. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 520-21 (1993) ("[T]he defendant is ordinarily *not* an individual but a company, which must rely upon the statement of an employee To say that the company which in good faith introduces such testimony . . . becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.").

²⁷⁶ See *supra* Part II.A. (discussing judicial focus on proof of pretext).

²⁷⁷ *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); see also *United States v. Armstrong*, 517 U.S. 456, 468 (1996) ("Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (citation omitted)). The trial judge is also able to assess veniremembers' demeanors firsthand, and therefore is better able to assess the credibility of challenges based on veniremembers' demeanor. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

²⁷⁸ *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986); see also *infra* notes 302-04 (discussing standards of review).

judge's personal observation of the prosecutor's demeanor."²⁷⁹ In upholding peremptory challenges, other courts similarly assert that they defer to a trial judge's assessment of pretext, despite evidence to the contrary, because of the judge's ability to assess a prosecutor's demeanor firsthand.²⁸⁰

III. FOCUS ON PROVING DISCRIMINATION

As demonstrated in Part II, defendants generally cannot prove pretext, even when courts use the factors articulated by the Supreme Court in *Miller-El* and *Snyder*. The Court, however, has provided guidance beyond just the articulation of factors. As discussed in Section A, in employment cases, the Court has prescribed that at the third step of the *McDonnell Douglas* framework, courts should focus on discrimination rather than on pretext. The Court has not made this shift explicit for peremptory challenge cases. However, *Miller-El* and *Snyder* model such an approach, which, as argued in Section B, lower courts should implement to better detect discrimination.

A. Supreme Court Shifts Focus From Pretext to Discrimination in the Employment Context

Courts analyzing peremptory challenges have generally followed the structure of the *McDonnell Douglas* framework to focus on defendants' ability to prove pretext. However, in employment cases after *McDonnell Douglas* and *Burdine*, the Court has clarified that at the third step of the analysis, courts

²⁷⁹ *State v. Jacobs*, 32 So. 3d 227, 233 (La. 2010).

²⁸⁰ *See, e.g., State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *5 (Ariz. Ct. App. Jan. 10, 2008) ("As pretextual as the prosecutor's reasons for striking Juror Thirteen may seem based on the written record alone, the trial court is in a much better position to determine the prosecutor's credibility than we are."); *People v. Johnson*, 767 P.2d 1047, 1056 n.6 (Cal. 1989) (rejecting a strong dissent and noting "[t]he trial judge . . . had almost 10 years of judicial experience Moreover, trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of reasons given for peremptory challenges."); *People v. Dimas*, No. B223795, 2011 WL 1227395, at *3-4 (Cal. Ct. App. Apr. 4, 2011) (giving considerable deference to the trial judge because of his "knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience" and rejecting the defendant's *Batson* claim because the judge "made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor.").

must determine whether an employer discriminated, not whether an employer's reason was pretextual.²⁸¹ In *St. Mary's Honor Center v. Hicks*, the Court held that proof that an employer's proffered reason is pretextual does not necessitate a judgment for the plaintiff.²⁸² Instead, as clarified by the Court in *Reeves v. Sanderson Plumbing Products*, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination."²⁸³

The Court has not directly stated whether its holdings from *Hicks* and *Reeves* apply in the *Batson* context. In *Miller-El* and *Snyder*, the Court suggested that, in contrast with employment cases, proof of pretext is generally sufficient to prove discrimination.²⁸⁴ Scholars have also argued for such a view. Employers' evidence of nondiscriminatory reasons must necessarily come through the testimony of or the documents produced by individual employees, who may not have full knowledge of the motivations of other agents and may act for self-serving reasons. Disproof of their proffered reasons may therefore not persuade courts that the real reason was discriminatory.²⁸⁵

²⁸¹ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518-19 (1993) ("Once the defendant responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide *not* . . . whether that evidence is credible, but "whether the rejection was discriminatory . . .") (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983)).

²⁸² *Id.* at 511.

²⁸³ 530 U.S. 133, 147 (2000).

²⁸⁴ In *Miller-El*, the Court suggested that in peremptory challenge cases, proof of pretext tends to prove purposeful discrimination, which contrasts with employment cases where proof of pretext is "simply one form of circumstantial evidence." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The Court made the same contrast in *Snyder* and also cited the plurality statement from *Hernandez v. New York* that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)).

²⁸⁵ See David A. Sutphen, Note, *True Lies: The Role of Pretext Evidence under Batson v. Kentucky in the Wake of St. Mary's Honor Center v. Hicks*, 94 MICH. L. REV. 488, 505 (1995) ("[A] company . . . is forced to rely on the testimony and recollection of various employees regarding their state of mind or the actions and motivations of other employees, all of which makes it extremely difficult specifically to identify the 'real' motivation for the adverse employment action."); see also *Hicks*, 509 U.S. at 520 ("[A] company . . . must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact To say that the company which in good faith

But for peremptory challenges, prosecutors give their reasons without intermediary, so if the court does not believe the reasons, discrimination seems a highly likely alternative.²⁸⁶

B. Courts Should Shift Focus From Pretext to Discrimination in the Batson Context

While the Court in *Miller-El* and *Snyder* declined to adopt the holding from *Hicks* and *Reeves* that a finding of pretext does not necessitate a finding of discrimination, the peremptory challenge cases do reflect the employment cases' holding that pretext is just one way in which discrimination may be proven. The Court, particularly in *Miller-El*, did not find whether the defendant had disproven the prosecution's proffered reason for any given juror to be dispositive. Instead, it determined whether the sum of the prosecution's actions during voir dire was more likely explained by the proffered reasons or by discrimination. By framing their analysis with statistics, inquiring into the most likely explanation for prosecutorial actions, and focusing on discrimination rather than individual challenges, lower courts should use this Supreme Court model to guide their assessment of peremptory challenges.

1. Frame Analysis with Statistics

In *Miller-El*, the Court framed its inquiry with the statistics of the prosecution's challenges. After setting out the facts and procedural posture, the Court began its analysis by asserting, "[t]he numbers describing the prosecution's use of peremptories are remarkable."²⁸⁷ The Court noted that of the eleven black veniremembers who were not excused for cause or by agreement of the parties, ten were peremptorily challenged by the prosecution.²⁸⁸ In *Jacobs*, the Louisiana Supreme Court also mentioned a statistical disparity—the prosecution used eighty-seven percent of its peremptory challenges on veniremembers of

introduces such testimony . . . becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.”).

²⁸⁶ Cavise, *supra* note 162, at 539-40; Sutphen, *supra* note 285, at 505-08.

²⁸⁷ *Miller-El*, 545 U.S. at 240.

²⁸⁸ *Id.* at 240-41.

racial minorities, even though such veniremembers made up less than nineteen percent of the venire—but did so at the end of its analysis, when it had already found that the prosecution’s reasons were not pretextual.²⁸⁹

Statistical disparities may not be dispositive. The Supreme Court has indicated that the Equal Protection Clause only prohibits intentional discrimination,²⁹⁰ which cannot generally be proven with statistics alone.²⁹¹ Nonetheless, a marked difference in the percentages of white and minority veniremembers challenged casts doubt on the prosecution’s intent. Whereas the *Jacobs* court dismissed the statistics at the end of its analysis,²⁹² the Supreme Court in *Miller-El* framed its analysis around the statistics, asserting that they were unlikely to have occurred by “[h]appenstance.”²⁹³

2. Inquire into Most Likely Explanation for Prosecutorial Action

In *Miller-El*, the Supreme Court carried its initial question, whether the statistics were more likely explained by discrimination or coincidence, throughout its analysis. When a prosecutor, while explaining the reasons for a challenge, mischaracterized a veniremember’s answer to a voir dire question, the Court inquired whether the prosecutor’s actions were more

²⁸⁹ See *supra* notes 257-59 (discussing use of statistics in *Jacobs*).

²⁹⁰ *Supra* note 66.

²⁹¹ See *McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987) (holding that a statistical difference in the imposition of the death penalty between black and white defendants did not prove that the state had intentionally discriminated in a specific case); *Washington v. Davis*, 426 U.S. 229 246-48 (1976) (finding that a racially disproportionate impact of an employment test does not prove that the test was purposely discriminatory); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972) (finding that a statistical difference in state funding of welfare programs used by minority and nonminority residents does not prove intentional discrimination). The Court has found that statistics may be dispositive when they reveal a near-complete exclusion of minorities. In *McCleskey*, 481 U.S. at 294 n.12, the Court distinguished the purported disparate impact of the death penalty from *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), in which a state legislature redefined a city’s boundaries to exclude 395 of 400 black voters but not a single white voter, and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in which a city provided laundry permits to all but one white applicant but no Chinese applicants.

²⁹² See *supra* notes 259-60 and accompanying text.

²⁹³ *Miller-El*, 545 U.S. at 241 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

likely caused by misunderstanding or were evidence of discrimination.²⁹⁴ When the prosecution chose to rearrange the venire when African Americans were at the front, thereby minimizing the probability of African Americans serving,²⁹⁵ the court theorized that while legitimate reasons could explain the shuffling, none had been offered, so discrimination seemed to be a likely explanation.²⁹⁶

Language about which explanation was more likely—that tendered by the prosecution or discrimination—permeates the opinion. Looking at the prosecution’s disparate questioning, the Court found that discrimination provides “a much tighter fit of fact and explanation”; that “[a]s between the State’s ambivalence explanation and Miller-El’s racial one, race is much the better”;²⁹⁷ and that the prosecution’s proffered explanations “fit the evidence less well than the racially discriminatory hypothesis.”²⁹⁸ Looking at the overall pattern of prosecutorial challenges, the Court found that “[t]he strikes correlate with no fact as well as they correlate with race.”²⁹⁹ This inquiry makes salient that to show the prosecution has acted discriminatorily, the defendant need only persuade the court by a preponderance of the evidence.

Accordingly in *Jacobs*, the Louisiana Supreme Court, rather than inquiring whether given nondiscriminatory reasons were “plausible”³⁰⁰ or “masked a racially-discriminatory intent,”³⁰¹ should have analyzed whether the reasons were the most likely explanations for the prosecutor’s challenges. Was veniremember Jordan more likely challenged because of his shorts or his race?

²⁹⁴ *Id.* at 244.

²⁹⁵ Texas criminal law allows parties to shuffle the order of the venire. *Id.* at 253 n.12 (citing TEX. CODE CRIM. PROC. ANN. art. 35.11 (West 2006)). The Court noted that the prosecution requested shuffles on two occasions when African American veniremembers were in the front of the panel. *Id.* at 253. In Texas, veniremembers are seated on the petit jury one-by-one, TEX. CODE CRIM. PROC. ANN. art. 35.20 (West 2006), so if the prosecution (or defense) wants to avoid seating veniremembers at the front of the panel without having to use peremptory challenges, it can request a shuffle, thereby moving them to the back.

²⁹⁶ *Miller-El*, 545 U.S. at 254–55.

²⁹⁷ *Id.* at 260.

²⁹⁸ *Id.* at 266.

²⁹⁹ *Id.*

³⁰⁰ *State v. Jacobs*, 32 So. 3d 227, 230 (La. 2010).

³⁰¹ *Id.* at 235.

Was it more likely that the prosecution engaged in disparate questioning because of expedience or because of race? While the defendant has the burden of proof in these questions, courts must keep in mind the overall statistics of the challenges, which may impugn any explanations proffered by the prosecution.

While a trial court can simply look at which explanation is more likely, the inquiry is more nuanced for appellate courts. The Supreme Court has held that trial court findings are given “great deference.”³⁰² While standards may differ by state, on direct review of *Batson* challenges, federal courts use the clearly erroneous standard.³⁰³ On habeas review, the standard is even higher: The Antiterrorism and Effective Death Penalty Act of 1996 requires the defendant to show the state conclusion to be “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”³⁰⁴

Even the demanding habeas standard, however, should not change the structure of courts’ analyses. *Miller-El* was a habeas case and the Supreme Court still structured its analysis around whether discrimination was a more convincing explanation than those offered by the prosecution. After asking this question repeatedly throughout its decision—and finding that discrimination was often the more persuasive answer—the Court found that the state court’s decision was “unreasonable as well as erroneous” and “shown up as wrong to a clear and convincing degree.”³⁰⁵

3. Focus on Discrimination

The Supreme Court reached this conclusion in *Miller-El* because it did not focus on each challenge made by the prosecution in isolation, but on the accumulation of evidence of discrimination. The Court noted that while individual pieces of evidence are “open

³⁰² See *supra* notes 277-80 and accompanying text (discussing deference given to trial court findings that prosecutors have not discriminated).

³⁰³ *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). But see Bryan Adamson, *Critical Errors: Courts’ Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL’Y REV. 1 (2009) (arguing that, as constitutional facts, findings of intentional discrimination should be subjected to less-deferential review).

³⁰⁴ *Miller-El*, 545 U.S. at 240 (quoting 28 U.S.C. § 2254(d)(2) (2006)).

³⁰⁵ *Id.* at 266.

to judgment calls,” the evidence “viewed cumulatively . . . is too powerful to conclude anything but discrimination.”³⁰⁶ The Court found similarly in *Snyder v. Louisiana*, citing *Miller-El* for the proposition that “all of the circumstances that bear upon the issue of racial animosity must be consulted.”³⁰⁷

In *Miller-El*, the Court engaged in the paradigmatic pretext analyses, examining whether the reasons were applicable to the challenged veniremembers, whether the reasons were plausible, and whether they could also be applied to unchallenged white veniremembers.³⁰⁸ But the Supreme Court did not rest its holding on a finding that the prosecution’s explanations for any given juror were pretextual. Instead, it asserted that “[t]he whole of the *voir dire* testimony . . . casts the prosecutor’s reasons . . . in an implausible light.”³⁰⁹

Similarly, in *Snyder*, the Court asserted that the prosecution’s discriminatory intent should not be analyzed separately for each juror, but that discrimination should be inferred from the prosecution’s cumulative use of challenges. The Court found that the prosecution’s nondiscriminatory reason for one veniremember was so unconvincing as to necessitate reversal, but emphasized that “if there were persisting doubts as to the outcome, a court would be required to consider the strike of [one veniremember] for the bearing it might have upon the strike of [another veniremember].”³¹⁰

The Court’s focus on the cumulative evidence of intentional discrimination is highlighted by Justice Thomas’s dissent. Arguing, “the majority finds that a succession of unpersuasive arguments amounts to a compelling case,”³¹¹ Justice Thomas discounted each piece of evidence relied on by the majority. Given the limited information available to the prosecution, it was reasonable to interpret a veniremember’s answer as favoring the

³⁰⁶ *Id.* at 265.

³⁰⁷ *Snyder*, 552 U.S. at 478.

³⁰⁸ *Miller-El*, 545 U.S. at 242-52.

³⁰⁹ *Id.* at 252.

³¹⁰ *Snyder*, 552 U.S. at 478.

³¹¹ *Miller-El*, 545 U.S. at 286 (Thomas, J., dissenting). Justice Thomas also argued that the majority improperly considered evidence that was not presented to the state courts. *Id.* at 279-85.

defendant;³¹² the white veniremembers who may have similarly favored the defendant were questioned later in voir dire when the prosecution had fewer challenges remaining;³¹³ the white veniremembers who were not challenged could be distinguished from the challenged black veniremembers;³¹⁴ many reasons could explain the shuffling of the venire;³¹⁵ the disparate questioning could be attributed to differing answers given by veniremembers;³¹⁶ and there was no evidence that any of the prosecutors who tried Miller-El had ever read the discriminatory jury-selection manual used in the district attorney's office.³¹⁷ Accordingly, Justice Thomas individually dismissed each piece of evidence as insufficient to prove pretext. But rather than ask whether each factor alone was sufficient, the majority focused on the broader question of whether, based on all of the available evidence, the prosecution had discriminated. Although, as demonstrated in Part II, many courts continue to focus on pretext, some courts have cited *Miller-El* for the proposition that the prosecution's actions must be evaluated as a whole to see if discrimination in the most likely explanation.³¹⁸

In *Jacobs*, the Louisiana Supreme Court took an approach similar to that of Justice Thomas, addressing each nondiscriminatory reason individually, finding that the defendant had not proven them pretextual,³¹⁹ and dismissing other factors as insufficient to prove pretext.³²⁰ The court should have followed the majority by evaluating the totality of the prosecution's actions.

³¹² *Id.* at 292.

³¹³ *Id.* at 290.

³¹⁴ *Id.*

³¹⁵ *Id.* at 305.

³¹⁶ *Id.* at 296-302.

³¹⁷ *Id.* at 305.

³¹⁸ See, e.g., *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) ("While each individual strike may have justifiably appeared to the trial court to be sufficiently race neutral, the trial court also has a duty to look at the State's use of peremptory challenges *in toto*." (citing *Miller-El*, 545 U.S. at 252); *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 526 (Tex. 2008) ("After examining the totality of the circumstances, we conclude that race explains Fisk's strikes of Daigle and Pickett better than any other reason . . .") (citing *Miller-El*, 545 U.S. at 266).

³¹⁹ See *supra* Part II.A.2. (discussing the court's analysis of the prosecution's nondiscriminatory reasons).

³²⁰ See *supra* Part II.C.4. (discussing the court's analysis of statistics, disparate questioning and demeanor).

In addition to the statistical framing³²¹ and the evidence that bore directly on pretext—explanations that seemed implausible,³²² lacked connection to the facts of the case,³²³ were not developed during voir dire,³²⁴ and applied to unchallenged white veniremembers³²⁵—the prosecution also engaged in disparate questioning,³²⁶ and there was outside evidence of discrimination by the district attorney’s office. Upon reversing an initial trial of Jacobs for unrelated reasons, the Louisiana Supreme Court warned the trial court that the prosecution’s use of peremptory challenges raised questions of discrimination.³²⁷ Most shockingly, before the second trial, the prosecutors came to court dressed in ties decorated with nooses.³²⁸ These factors are not directly related to a prosecutor’s proffered explanations and, perhaps, individually, can be explained away. Consequently, a court focusing on pretext risks overlooking intentional discrimination.

CONCLUSION

This Article’s proposed shift in focus is not a cure-all. For those courts that continue to defer to prosecutors’ explanations despite evidence to the contrary, a mandate to use a different focus will not be effective. And for courts that thoroughly scrutinize prosecutors’ motives, the difficulty of determining whether a prosecutor has challenged a juror based on a good-faith guess or discrimination remains. Detecting discrimination will be especially difficult when its effects are more subtle, and, for

³²¹ See *supra* notes 257-60 (discussing use of statistics in *Jacobs*).

³²² See *supra* notes 202-04 and accompanying text. On remand, the appellate court analyzed two other jurors who were challenged for seemingly improbable reasons. See *supra* note 124 (discussing progression of *Jacobs* through the Louisiana courts). The prosecution struck one veniremember ostensibly because she wanted the defendant to testify and another veniremember because when asked during voir dire what she would worry about if her child ran away—the defendant had run away from home—the veniremember responded that she would worry about her child being hurt. The court upheld both challenges. *State v. Jacobs*, 67 So. 3d 535, 556-58 (La. Ct. App. 2011).

³²³ See *supra* notes 209-10 and accompanying text.

³²⁴ See *supra* notes 202-04 and accompanying text.

³²⁵ See *supra* note 248 and accompanying text.

³²⁶ See *supra* notes 262-65 and accompanying text.

³²⁷ *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001).

³²⁸ Brief for Defendant, *supra* note 184, at 4.

example, the statistics are not overly skewed and the questioning does not appear disparate.

Nonetheless, this Article contends that a movement away from the current focus on pretext will improve courts' identification of discrimination. Mathematically, pretext and discrimination may be equivalent: If a prosecutor discriminates, the proffered nondiscriminatory reason is pretextual, and if the prosecutor's nondiscriminatory reason is pretextual, the prosecutor is discriminating.³²⁹ This equivalency does not, however, imply that courts are equally likely to find pretext as they are to find discrimination. This Article has argued that because prosecutors have so much flexibility in the nondiscriminatory reasons that they can proffer, it is extremely difficult for defendants to show any given reason is pretextual, even when courts employ factor tests to evaluate pretext.

The *McDonnell Douglas* framework is still helpful for its requirement that prosecutors provide nondiscriminatory reasons. But, as dictated by the Court in its post-*McDonnell Douglas* employment decisions, disproof of nondiscriminatory reasons is only one means of proving discrimination. Courts analyzing peremptory challenges are more likely to identify discrimination if, rather than focusing on pretext, they follow the Supreme Court in *Miller-El* and *Snyder* to ask whether, taking all of the prosecution's actions into account, discrimination is the most likely explanation for the prosecution's actions.

³²⁹ This leaves aside the question of unconscious discrimination, in which prosecutors offer reasons that they believe are legitimate, but are actually discriminatory. See *supra* note 65 (discussing unconscious discrimination). It also assumes that prosecutors do not proffer nondiscriminatory reasons to conceal other nondiscriminatory reasons. See *supra* Part III.A. (discussing the distinction between pretext and discrimination).