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True Lies: The Role of Pretext Evidence Under *Batson v. Kentucky* in the Wake of *St. Mary's Honor Center v. Hicks*

David A. Sutphen

INTRODUCTION

During the course of voir dire in *State v. McRae*,¹ a prosecutor questioned the only African-American veniremember regarding her views on the fairness of the justice system:

[Prosecutor:] Did you also understand that there may be certain jurors who have certain feelings or attitudes about whatever . . . that[ ]

they couldn't for example, find somebody guilty because they just don't think the system is fair . . . [Veniremember:] I understand that.

[Prosecutor:] Okay. Knowing what you know about, you know, your belief that the system maybe isn't perfect, should I be concerned? Is it something where you don't think you could convict him if he's proven—[Veniremember:] No, no, no. [Prosecutor:] Okay.

[Veniremember:] I would base my judgment on the evidence.²

After responding to this line of inquiry, which was not posed to any of the white veniremembers, the prospective juror was peremptorily challenged by the State.³ Concerned that the prosecutor's strike was racially motivated, defense counsel raised an objection under *Batson v. Kentucky*.⁴

After determining that the defendant had established a prima facie case of discrimination,⁵ the trial judge afforded the prosecutor an opportunity to proffer a legitimate nondiscriminatory reason for the peremptory challenge. In his defense the prosecutor offered two justifications. First, that the stricken veniremember "had an attitude that where she thought that basically, the system is unfair to minorities, and the defendant's being black is — and her being black would over compensate by basically letting this guy off."⁶

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1. 494 N.W.2d 252 (Minn. 1992).

2. 494 N.W.2d at 254-55.

3. See 494 N.W.2d at 253.

4. 476 U.S. 79 (1986). In general, *Batson* prohibited state actors from exercising racially motivated peremptory challenges on the grounds that they violate the Equal Protection Clause of the Fourteenth Amendment.

5. At a minimum, this initial burden of production requires that the moving party demonstrate that he is a member of a protected class and that the state has exercised one or more of its peremptory challenges against a member of this protected class. For a more detailed discussion of the production requirements for *Batson* objections, see *infra* text accompanying notes 51-64.

6. 494 N.W.2d at 256.

Second, that she “thinks the whole jury process is [a] fraud.”⁷ Notwithstanding the defendant’s claim that these explanations were pretextual, the trial judge concluded that there “was an articulable basis for the prosecutor’s challenge in this case.”⁸ Thus, the case proceeded to trial, and the defendant was eventually convicted of second-degree criminal sexual conduct.⁹ On appeal to the Minnesota Supreme Court, however, the trial judge’s ruling was reversed on the ground that the prosecutor’s explanation for the challenged strike was unworthy of credence because it was unsupported by the voir dire transcript.¹⁰

The facts of *State v. McRae* are representative of a large number of *Batson* cases in which the validity of a prosecutor’s explanation for a peremptory challenge is the main point of inquiry both during the trial and on appeal.¹¹ This emphasis is largely a function of the fact that, under *Batson*, proof of pretext is the legal equivalent of proof of intentional discrimination.¹² In other words, if a defendant

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7. 494 N.W.2d at 256.

8. 494 N.W.2d at 256.

9. See 494 N.W.2d at 253.

10. In particular, the state supreme court noted that “the record of the prosecutor’s examination of the juror in question fails to support the explanation given by the prosecutor for striking the juror.” 494 N.W.2d at 257. Accordingly, “[t]o allow the striking of this juror . . . in effect would allow a prosecutor to strike any fair-minded, reasonable black person from the jury panel who expressed any doubt th[at] ‘the system’ is perfect.” 494 N.W.2d at 257.

The justices’ words reflect a keen awareness of one of the Supreme Court’s underlying concerns in *Batson*, namely that the purposeful exclusion of African-Americans from jury service undermines “public confidence in the fairness of our system of justice.” *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). The irony, however, is that race-based strikes, like the one exercised in this case, contribute to the perception among blacks that the justice system is unfair.

Batson also proscribed race-based prosecutorial challenges “on the assumption — or . . . intuitive judgment — that they [blacks] would be partial to the defendant because of their shared race.” 476 U.S. at 97. Notwithstanding this unequivocal language, the trial court in *McRae* accepted, as legitimate, the prosecutor’s contention that because the defendant and excluded juror were both black, the veniremember “would over compensate by basically letting this guy off.” *McRae*, 494 N.W.2d at 256.

11. Although *Batson* itself only dealt with the constitutionality of race-based peremptory challenges by the State in criminal cases where the defendant and struck juror shared the same race, the Supreme Court has since greatly expanded its scope. Consequently, as the law currently stands, *Batson* applies in all cases — criminal and civil — to race or gender-based peremptory challenges exercised by either party, regardless of whether that party shares the same race or gender as the excluded juror. See *J.E.B. v. Alabama ex rel.*, 114 S. Ct. 1419 (1994) (extending *Batson* to gender); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to peremptory challenges exercised by criminal defendants); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson* to civil trials); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that *Batson* applied regardless of whether the criminal defendant and excluded juror were of the same race). Notwithstanding this wide scope of *Batson*, this Note relies exclusively on the original *Batson* circumstances both for convenience and because it is representative of the largest number of cases alleging the discriminatory use of peremptory challenges.

12. See, e.g., *Johnson v. Vasquez*, 3 F.3d 1327, 1330 (9th Cir. 1993) (holding that “Johnson carried his burden of proving intentional discrimination by establishing that the prosecutor’s four race-neutral explanations were a pretext”); *Jones v. Ryan*, 987 F.2d 960, 962 (3rd Cir.

challenging a peremptory strike can convince a trial judge during the final stage of the *Batson* hearing that the explanation offered by a prosecutor in support of a peremptory strike is pretextual,¹³ then she will prevail as a matter of law.¹⁴

In the process of determining whether a peremptory strike is valid, lower courts rely on the Title VII burden-shifting framework originally laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.¹⁵ As a result, the order and presentation of proof in *Batson* cases deliberately parallels the order and presentation of proof in Title VII intentional discrimination suits. In light of this similarity, the Supreme Court's recent Title VII ruling in *St. Mary's Honor Center v. Hicks*¹⁶ — that proof of pretext under the *McDonnell Douglas* framework is *not* the legal equivalent to proof of intentional discrimination — raises questions regarding the role of pretext evidence in the operation of the present *Batson* proof structure.

This Note argues that notwithstanding *Batson*'s reliance on the *McDonnell Douglas* burden-shifting framework, the current standard of proof under *Batson* should not be altered along the lines suggested by *Hicks*. Part I contends that *Batson* and its progeny are an affirmative effort by the Court to eliminate racism in jury selection. Part II analyzes the Court's ruling in *Hicks* and specifically focuses on the Court's reasons for rejecting proof of pretext as the legal equivalent of proof of intentional discrimination in Title VII cases. Finally, Part III argues that there are fundamental differences between the Title VII employment discrimination context and *Batson* cases, and as such, the logic underlying *Hicks* breaks

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1993); *United States v. Wilson*, 884 F.2d 1121, 1121 (8th Cir. 1989); *Bush v. State*, 615 So. 2d 137 (Ala. Crim. App. 1992); *People v. Kindelan*, 572 N.E.2d 1138, 1139 (Ill. App. Ct. 1991); *Foster v. Spartanburg Hosp. Sys.*, 442 S.E.2d 624, 626 (S.C. Ct. App. 1994); *Miller-El v. State*, 790 S.W.2d 351, 354 (Tex. Ct. App. 1990).

Throughout this Note I use the terms *pretext*, *pretext evidence* and *proof of pretext* interchangeably. In all cases, they are intended to refer to the circumstance in which a defendant raising a *Batson* objection offers evidence to prove or actually establishes that a prosecutor's explanation for a peremptory challenge, for whatever reason, is unworthy of credence.

13. In a recent per curiam opinion, *Purkett v. Elem*, 115 S. Ct. 1769 (1995), the Supreme Court clarified the stage at which it is appropriate for a trial judge to rule on the legitimacy of a prosecutor's explanation for a peremptory challenge. In particular, the Court held that so long as the prosecutor's reason(s) is facially valid then the trial court must withhold judgment until the final stage of the *Batson* hearing in which the defendant is provided an opportunity to establish that the prosecutor's explanation is pretextual. 115 S. Ct. at 1770-71.

14. See, e.g., *Trahan v. City of Oakland*, 15 F.3d 1090 (9th Cir. 1993), available in LEXIS, 1993 U.S. App. LEXIS 37498; *Roman v. Abrams*, 822 F.2d 214, 229 (2nd Cir. 1987); *Tursio v. United States*, 634 A.2d 1205, 1213 (D.C. 1993); *Oliver v. State*, 826 S.W.2d 787, 790 (Tex. Ct. App. 1992).

15. 411 U.S. 792 (1973); *Batson v. Kentucky*, 476 U.S. 79, 94 n.18 (1986) (citing *McDonnell Douglas* for the rules of the prima facie burden of proof); see also *infra* notes 47-52 and accompanying text (discussing the operation of the *McDonnell-Douglas* framework).

16. 113 S. Ct. 2742 (1993).

down when applied in cases alleging the discriminatory use of peremptory challenges.

I. *BATSON*: ITS PURPOSE AND APPLICATION

This Part examines the Court's landmark ruling in *Batson* and describes how lower courts have applied it. Section I.A argues that *Batson* was a reaction to *Swain v. Alabama*, and was intended to ease the burden of proof on criminal defendants challenging the States' use of peremptories. Section I.B explores the operation of *Batson*'s three-part proof structure. Section I.C argues that establishing pretext is presently the critical question in *Batson* cases.

A. *An Interpretation of Batson*

To understand *Batson* it is important to recognize that *Batson* was a direct response to an earlier, much maligned, peremptory challenge case: *Swain v. Alabama*.¹⁷ The decision in *Batson* was a clear rejection of the notion embraced by the Court in *Swain* that it was reasonable to assume that a prosecutor's strikes were based on legitimate considerations. Section I.A.1 argues that *Batson* eased *Swain*'s excessive burden of proof and reversed *Swain*'s presumption regarding the discriminatory potential of peremptory challenges. Section I.A.2 contends that in addition to relieving *Swain*'s excessive burden of proof, *Batson* sought to alleviate two other harms caused by discriminatory peremptories: harm to the excluded juror, and harm to the integrity of the justice system.

1. *Batson as a Reaction to Swain*

For over a century the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment forbids race-based exclusion of blacks from service on grand and petit juries.¹⁸ It was not until 1965, however, that the Court first addressed the specific question of whether race-based peremptory challenges violate the Fourteenth Amendment. In *Swain v. Alabama*,¹⁹ the Court

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17. 380 U.S. 202 (1965). For criticism of *Swain*, see, e.g., *Commonwealth v. Soares*, 387 N.E.2d 499, 510 n.12 (Mass.) ("In light of the extensive criticism of *Swain*, and in recognition of the negligible protection that decision offers to a defendant asserting the right to trial by jury of peers, we take this opportunity to depart from applying its rule perfunctorily . . ."), *cert. denied*, 444 U.S. 881 (1979); *State v. Crespino*, 612 P.2d 716, 717 (N.M. Ct. App. 1980) ("[T]he challenge allowed in *Swain* may be too limited. . . . [T]he California experience with the *Swain* rule has resulted in numerous attempts to meet the *Swain* burden with no success . . . ." (citations omitted)); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 164 (1989) ("Under *Swain*, the Constitution guaranteed minorities only an opportunity to reach the finals before a government officer discriminated against them.").

18. See, e.g., *Peters v. Kiff*, 407 U.S. 493 (1972); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Avery v. Georgia*, 345 U.S. 559 (1953); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

19. 380 U.S. 202 (1965).

recognized that, in principle, proof of the systematic exclusion of blacks through the State's use of peremptory challenges was sufficient to establish a violation of the Constitution.²⁰

Nevertheless, in practice, the burden of proof required to prevail under *Swain* was nearly insurmountable. In order to show a constitutional violation, a defendant had to demonstrate that the prosecutor challenged blacks "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be."²¹ As a result, *Swain* did little, on a case-by-case basis, to deter prosecutors from challenging veniremembers solely on the basis of race.²²

By the mid-1980s, faced with compelling evidence of the continued use of racially motivated peremptory challenges,²³ the Supreme Court decided to reconsider its primary holding in *Swain*. In *Bat-*

20. Although the Court embraced the principle that "[j]urymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race," 380 U.S. at 204 (quoting *Cassell v. Texas*, 339 U.S. 282, 286 (1950)), it appeared reluctant to lessen the evidentiary burden placed on defendants challenging peremptory strikes.

If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof *might* support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.

380 U.S. at 224 (emphasis added).

21. 380 U.S. at 223. One of the most disturbing aspects of the Court's ruling in *Swain* was that although "there never ha[d] been a Negro on a petit jury in either a civil or criminal case in Talladega County," the majority nonetheless ruled against *Swain* on the grounds that he lacked sufficient evidence to establish that discrimination occurred at his trial. 380 U.S. 223-24. In fact, Justice Goldberg noted in his dissent that "[s]ince it is undisputed that no Negro has ever served on a jury in the history of the county, and a great number of cases have involved Negroes, the only logical conclusion . . . is that in a good many cases Negroes have been excluded by the state prosecutor." 380 U.S. at 235 (Goldberg, J., dissenting).

22. At least one commentator noted that "[a]lthough courts are inclined to say that the defendant's burden of showing . . . systematic exclusion by the prosecutor 'is not insurmountable,' experience has clearly indicated the 'virtual impossibility' of doing so." 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 21.3(d), at 739 (1984) (footnote omitted). In fact, during the two decades before the Court decided *Batson*, there were only two reported cases in which a plaintiff prevailed under the *Swain* evidentiary standard. See ACLU Amici Curiae Brief for Petitioner at 45, *Batson* (No. 84-6263) (citing *State v. Brown*, 371 So. 2d 751 (La. 1979)), *microformed* on U.S. Supreme Court Records and Briefs (Congressional Info. Serv.); and see *State v. Washington*, 375 So. 2d 1162 (La. 1979).

23. One clear illustration can be found in the Dallas County, Texas, District Attorney's Office's instruction manual provided to new prosecutors. In particular, the instructions regarding jury selection read:

III. What to look for in a juror

A. Attitudes

1. You are not looking for a fair juror but rather a strong, biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree.
2. You are not looking for any member of a minority group which may subject him to oppression — they almost always empathize with the accused.
3. You are not looking for free-thinkers and flower children . . .

Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192, 224 (1978) (emphasis added).

son v. Kentucky,²⁴ the Court held that race-based peremptory challenges in a criminal case where the defendant and struck juror are both black violate the Equal Protection Clause of the Fourteenth Amendment.

James K. Batson, a black man, was arrested and charged by the State of Kentucky with second-degree burglary and receipt of stolen goods.²⁵ During the course of jury selection, the State used four of its six peremptory challenges to excuse all four black veniremembers.²⁶ In response, Batson moved to discharge the jury on the ground that the State's challenges violated his constitutional rights under the Fourteenth Amendment.²⁷ The trial judge, however, rejected Batson's argument noting that the parties could "strike 'anybody they want to.'"²⁸ The Supreme Court ultimately granted certiorari and ruled that race-based peremptory challenges were unconstitutional and that, in order to prevail, a criminal defendant need not prove that the individual prosecutor had a history of exercising discriminatory strikes.²⁹

The Court in *Batson* clearly rejected the notion underlying *Swain*, that it was reasonable — even if the State had peremptorily challenged all black veniremembers — to assume that a prosecu-

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Another previously circulated jury selection guide instructed Dallas County prosecutors not to "take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury no matter how rich or well educated." *Batson v. Kentucky*, 476 U.S. 79, 103, n.3 (1986) (Marshall, J., concurring) (quoting the DALLAS MORNING NEWS, Mar. 9, 1986, at 29). Other examples include checklists advising attorneys to establish "prototypes" and initially decide whether to exclude individuals on the basis of their race. See Kelner, *Jury Selection: The Prejudice Syndrome*, N.Y. STATE B.J., Feb. 1984, at 35-38.

These practices led Justice White to comment that "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." 476 U.S. at 101 (White, J., concurring).

24. 476 U.S. 79 (1986).

25. See 476 U.S. at 82.

26. See 476 U.S. at 83.

27. See 476 U.S. at 83. The case was ultimately decided solely on the basis of Batson's Fourteenth Amendment claim. In the eyes of the Court:

Petitioner has framed his argument in . . . an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. . . . [R]esolution of petitioner's claim properly turns on application of equal protection principles and [we] express no view on the merits of any of petitioner's Sixth Amendment arguments.

476 U.S. at 84 n.4.

28. 476 U.S. at 83.

29. See 476 U.S. at 96; see Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 MINN. L. REV. 689, 697 n.55 (1993).

As Justice Marshall commented, "[f]or evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." 476 U.S. at 95-96 (quoting *McCray v. New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from denial of certiorari)).

tor's strikes were based on legitimate considerations.³⁰ In fact, *Batson* explicitly recognized that peremptory challenges allow "those to discriminate who are of a mind to discriminate"³¹ and that *Swain*'s "crippling burden of proof" essentially had immunized such challenges from constitutional review.³²

Batson recognized that the burden in *Swain* had been insurmountable and established a new three-stage analysis, based on Title VII, which was clearly aimed at making objections to discriminatory peremptory challenges more viable.³³ Furthermore, the Court stated that in meeting *Batson*'s lower burden of proof, the objecting party could rely on the fact that the peremptories offer the opportunity to discriminate.³⁴ The *Batson* Court's decision to lessen the standard of proof required to show a constitutional violation makes it substantially easier for a defendant to prevent a prosecutor from exercising racially motivated peremptory challenges.

2. *Batson's Three Harms*

Although *Batson* primarily focused on the constitutional harm suffered by the criminal defendant as a result of race-based peremptory challenges,³⁵ the Court also identified two additional harms arising from discriminatory peremptory challenges: the harm to the excluded juror, and the harm to the integrity of the justice system as a whole.³⁶ In the cases that expanded *Batson*—*Powers v. Ohio*,³⁷ *Edmonson v. Leesville Concrete Co.*,³⁸ *Georgia v.*

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30. According to the *Swain* Court, "it [was] permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged." *Swain v. Alabama*, 380 U.S. 202, 223 (1965).

31. *Batson*, 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

32. See 476 U.S. at 92-93 (noting that "[s]ince . . . *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny").

33. See 476 U.S. at 92-93 (rejecting *Swain*'s "crippling burden of proof" in favor of Title VII's three-part test). For a discussion of *Batson*'s three-part test see *infra* section I.B.

34. See 476 U.S. at 96 ("[T]he defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (quoting *Avery*, 345 U.S. at 562)).

35. See 476 U.S. at 86 (holding that "[p]urposeful racial discrimination in the selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure").

36. See 476 U.S. at 87-88; see also *J.E.B. v. Alabama ex rel.*, 114 S. Ct. 1419, 1427 (1994) (reasoning that "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders").

37. 499 U.S. 400 (1991) (holding that *Batson* applies regardless of whether the criminal defendant and excluded juror are of the same race).

38. 500 U.S. 614 (1991) (ruling that *Batson* applies in the context of civil as well as criminal trials).

McCullum,³⁹ and *J.E.B. v. Alabama ex rel.*⁴⁰—the Court specifically focused upon the impact of these two harms. Essentially, what emerges from these four subsequent cases is the fundamental principle that the legitimacy of our system of justice is severely undermined by the continued existence of racial discrimination in the jury selection process. More specifically, the Court reasoned that:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law — that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.⁴¹

The Court's unwavering adherence to this important principle illustrates the significance it places on the struggle to eradicate racial discrimination from the process by which we select juries.⁴²

B. Batson's Three-Stage Analysis

In order to lessen *Swain's* burden of proof and to facilitate the consideration of indirect and circumstantial evidence in cases alleging the discriminatory use of peremptory challenges, *Batson* adopted the three-stage Title VII disparate treatment burden-shifting proof structure established by the Court in *McDonnell Douglas Corp. v. Green*.⁴³ The Court's choice of this framework reflected its recognition of two important principles. First, that the ultimate burden of proving intentional discrimination under the Fourteenth Amendment remains with the criminal defendant.⁴⁴

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39. 505 U.S. 42 (1992) (holding that *Batson* applies to race-based peremptory challenges exercised by defendants).

40. 114 S. Ct. 1419 (1994) (holding that the principles underlying *Batson* also apply to gender-based peremptory challenges).

41. 114 S. Ct. at 1430.

42. In light of the Supreme Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987) (upholding the constitutionality of the death penalty notwithstanding undisputed evidence of its disparate impact on blacks), it would be disingenuous to argue that the Court's grave concern over eradicating racial discrimination in the jury-selection process extends equally to all phases of our justice system.

43. 411 U.S. 792 (1973); see also *Batson v. Kentucky*, 476 U.S. 79, 94 n.18 (1986) ("[O]ur decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of the prima facie burden of proof rules." (citing *McDonnell Douglas*)). The plaintiff in *McDonnell Douglas* was a black civil rights activist who had been refused reemployment as a mechanic on the grounds that he had participated in a series of illegal protests.

44. See 476 U.S. at 93 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

Those bringing a challenge under the equal protection clause of the Fourteenth Amendment must establish discriminatory intent in order to prevail. See *Washington v. Davis*, 426 U.S. 229 (1976). In other words, the "invidious quality" of governmental action [i.e. peremptory challenges] claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'" *Batson*, 476 U.S. at 93 (quoting *Washington*, 426 U.S. at

Second, that it is inherently difficult to prove intentional discrimination without reference to circumstantial evidence.⁴⁵ As a result, the Court noted that in weighing whether a defendant has carried his burden of persuasion, courts should make a careful and searching inquiry into any evidence that may be relevant to establishing discriminatory intent.⁴⁶ To facilitate this inquiry, the Court borrowed the Title VII proof structure.

This section examines the workings of this burden-shifting scheme. It explores first how the scheme operates in its original Title VII context and then how it works under *Batson*.

1. *The Roots of Batson's Proof Structure*

In *McDonnell Douglas*, the Supreme Court established a burden-shifting proof structure for resolving Title VII intentional discrimination cases.⁴⁷ Under this framework, a plaintiff initially

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240); see also Benjamin Hoorn Barton, Note, *Religion-Based Peremptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 194-95 n.18 (arguing that peremptory challenges are examples of disparate impact and that *Batson* was an effort to make findings of intentional discrimination possible).

Note also that a "finding of intentional discrimination is a finding of fact" entitled to appropriate deference by a reviewing court." 476 U.S. at 98 n.21 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). Moreover, because "the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." 476 U.S. at 98 n.21 (quoting *Anderson*, 470 U.S. at 575-76).

45. See 476 U.S. at 93-96. Courts consistently have held that due to the inherent difficulty in proving intentional discrimination, "[i]nsistence upon direct . . . evidence would create insurmountable problems of proof for plaintiffs." *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

46. In particular, the Court noted that "a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

47. See *McDonnell Douglas*, 411 U.S. at 792. The allocation of shifting burdens in disparate treatment cases was designed to allow plaintiffs lacking a "smoking gun" to prevail under Title VII. Courts recognized that an "[i]nsistence upon direct . . . evidence would create insurmountable problems of proof for plaintiffs in discrimination cases." *King*, 778 F.2d at 881.

must prove a *prima facie* case⁴⁸ of intentional discrimination in order to state a valid Title VII claim.⁴⁹

If the plaintiff is successful at this first stage, the burden of production shifts to the employer at the second stage to come forward with a "legitimate non-discriminatory reason" for its adverse employment action.⁵⁰ For example, at this second stage an employer might contend that the plaintiff was fired because of poor performance evaluations or frequent tardiness. It does not matter, for purposes of stage two analysis, if the proffered reason is credible, or if it was the real reason for the employer's action. All that matters is that the reason asserted be facially nondiscriminatory.

Once the employer offers a facially valid justification, stage three of the *McDonnell Douglas* framework affords the plaintiff an opportunity to demonstrate that the reason proffered is pretextual and that race was the real reason for the adverse employment action.⁵¹ During this final "pretext" stage of proof, plaintiffs can pre-

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48. The term *prima facie* case in the Title VII context "denote[s] the establishment of a legally mandatory, rebuttable presumption," rather than "the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981). According to the Court:

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. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (citation omitted).

49. In particular, the plaintiff must prove the following four elements: (1) he "belongs to a racial minority"; (2) "he applied and was qualified for a job for which the employer was seeking applicants"; (3) "despite his qualifications, he was rejected"; and (4) "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

50. In *Burdine*, 450 U.S. at 248, (1981), the Supreme Court clarified the exact nature of this second-stage burden. Specifically at issue in *Burdine* was whether the employer's second-stage burden is one of production or persuasion. In other words, the Court was asked to decide whether the *McDonnell Douglas* standard required that a Title VII defendant persuade the court that it was "actually motivated" by the reason(s) proffered; or, whether it was sufficient for an employer simply to introduce evidence that "raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55.

The distinction between these two production requirements is significant. Under the former, an employer would be required not only to come forward with a legitimate nondiscriminatory reason for its action but also to convince the factfinder by a preponderance of the evidence that it actually was motivated by the proffered reason. By contrast, under the latter production requirement, an employer would satisfy its burden simply by articulating a legitimate nondiscriminatory reason, regardless of whether it proved to be the "true" motivation behind the adverse employment action. See *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2748 (1993) (holding that "[b]y producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners [defendants] sustained their burden of production").

51. See *McDonnell Douglas*, 411 U.S. at 804. This final stage does not occur, however, if the defendant is unable to articulate a "legitimate nondiscriminatory" reason for the adverse employment action, namely one that on its face does not violate Title VII. In such circumstances, the plaintiff is entitled to judgment as a matter of law in her favor because the de-

vail either directly, by showing that a discriminatory purpose more likely than not motivated the employer, or indirectly, by proving that the employer's explanation lacks credibility.⁵² For instance, under the first option, a plaintiff might offer evidence establishing that his employer had a history of using racial epithets to refer to him and other black employees. By contrast, under the second option a plaintiff could establish that his firing was racially motivated because white employees with equally poor or worse performance evaluations or similar tardiness problems did not lose their jobs.

2. *How Batson's Proof Structure Operates*

Under *Batson's* first stage, a criminal defendant, like a Title VII plaintiff, must establish a prima facie case of discrimination. In particular, the *Batson* Court stated that:

[T]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove veniremembers of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremembers from the petit jury on account of their race.⁵³

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defendant has failed to rebut the presumption of discrimination previously established by the prima facie case. See *Hicks*, 113 S. Ct. at 2748.

52. See *Burdine*, 450 U.S. at 256. Marina C. Stzteinbok provides a helpful explanation of these two avenues of proof. She notes the following:

[U]nder *McDonnell Douglas*, both the type of evidence the plaintiff introduces and the method of proof itself are indirect. The distinction *Burdine* established between "direct" and "indirect" modes of proving pretext must be understood in this context. The plaintiff uses circumstantial evidence whether pretext is proved directly or indirectly. By invoking the "more likely" strand of *Burdine*, the plaintiff proves discrimination affirmatively (i.e. "directly") through the introduction of circumstantial evidence. By invoking the "unworthy of credence" strand, however, the plaintiff proves discrimination "indirectly," without needing to build an affirmative case that the defendant more likely than not discriminated.

Marina C. Stzteinbok, Note, *Indirect Proof of Discriminatory Motive in Disparate Treatment Claims After Aikens*, 88 COLUM. L. REV. 1114, 1118 n.34 (1988).

53. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (citations omitted).

If successful,⁵⁴ at the second stage of proof the burden of production then shifts to the State to offer a facially valid race-neutral explanation for the strike.⁵⁵

Recently, in *Purkett v. Elem*,⁵⁶ the Supreme Court clarified the exact nature of this second stage burden under *Batson*. The Court specifically addressed the question of whether a criminal defendant, at the second stage of the *Batson* framework, is entitled to judgment in his favor if a prosecutor's explanation for a peremptory challenge appears implausible on its face.⁵⁷ In reversing the Eighth Circuit, which had ruled in favor of the defendant, the Court held that the Court of Appeals erred "by . . . requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive."⁵⁸ Essentially, therefore, *Elem* represents the *Burdine* of the *Batson* line of cases, insofar as it stands for the proposition that at the second stage of proof the challenged party bears a burden of production, not persuasion.⁵⁹

Notwithstanding *Elem*, a prosecutor will not succeed in rebutting the prima facie case at the second *Batson* stage merely by asserting that he sensed that a black juror would be partial to the defendant because they were both black.⁶⁰ *Batson* cautioned that prosecutors may not overcome the inference of discrimination simply by stating that their strike was in good faith and not motivated

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54. Among the considerations the Court mentioned as relevant to the determination whether a prima facie case has been established were "a 'pattern' of strikes against black jurors included in the particular venire" and the "prosecutor's questions and statements during voir dire examination and in exercising his challenges." 476 U.S. at 97.

The Court also noted that, in weighing the evidence in support of a prima facie case, "the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." 476 U.S. at 95 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972)).

55. 476 U.S. at 97. Although the state is required to come forward with some nondiscriminatory reason for its action, the "explanation need not rise to the level justifying exercise of a challenge for cause." 476 U.S. at 97.

56. 115 S. Ct. 1769 (1995).

57. In *Elem*, the prosecutor had justified his strike on the ground that the veniremember "had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair." 115 S. Ct. at 1770.

In reaction to the majority's ruling, the dissenters noted that:

The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.

115 S. Ct. at 1775-76 (Stevens, J., dissenting).

58. 115 S. Ct. at 1771.

59. See *supra* note 50 (discussing the Court's ruling in *Burdine*).

60. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986); see *supra* notes 1-10 and accompanying text.

by a discriminatory animus.⁶¹ Instead, the prosecutor must offer a race-neutral explanation that is relevant to the case at hand.⁶²

Ultimately, if a trial or reviewing court determines at the third stage that the reasons asserted by the prosecutor at stage two are insufficient to overcome the inference of discrimination, the criminal defendant is entitled to the appropriate relief.⁶³ For example, a prosecutor might claim that her peremptory challenge was based on her belief that a black veniremember's prior criminal record would make him a bad juror for the State's case. Although this explanation is legitimate on its face, and therefore satisfies the State's second-stage burden under *Elem*, a defendant could still prevail at the third stage if he could establish that the prosecutor's explanation was pretextual. In other words, if the defendant could prove that the black veniremember who was struck did not actually have a criminal record, or that white veniremembers with similar records had not been struck, then the defendant would be entitled to relief under *Batson*.

In many cases, the presence of one or more of the following five factors will support a defendant's conclusion that the prosecutor's explanation is pretextual:

1. The reason given for the peremptory challenge is not related to the facts of the case;
2. There was a lack of questioning to the challenged juror or a lack of meaningful questions;
3. Disparate treatment — persons with the same or similar characteristics as the challenged juror were not struck;
4. Disparate examination of members of the venire, i.e., questioning a challenged juror so as to evoke a certain response without asking the same question of other panel members; and
5. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.⁶⁴

Consequently, under the *Batson* proof structure, if the defendant is successful in proving pretext by establishing one of these factors, he is entitled to judgment as a matter of law.

C. *Pretext Evidence in the Batson Proof Structure*

In accordance with the explicit mandate of *Batson*, lower courts have employed the *McDonnell Douglas* framework in cases alleging the discriminatory use of peremptory challenges. Increasingly, the

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61. See 476 U.S. at 98 (quoting in part *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

62. See 476 U.S. at 98.

63. See 476 U.S. at 100; see also *State v. Singfield*, No. 16253, 1994 WL 30482, at *3 (Ohio Ct. App. Jan. 26, 1994) ("The third step of the *Batson* analysis requires the court to reach the ultimate issue of whether the prosecutor's race-neutral explanation was merely a pretext . . .").

64. *Edwards v. State*, Nos. 05-91-00651-CR & 05-91-00652-CR, 1992 WL 276483, at *3-4 (Tex. Ct. App. Oct. 6, 1992) (citing *Keeton v. State*, 749 S.W.2d 861, 866 (Tex. Crim. App. 1988)).

focus of inquiry in such cases has shifted away from the prima facie case toward an assessment of the adequacy of the prosecutor's proffered reasons for the challenged strike.⁶⁵

One explanation for this high degree of scrutiny at the pretext stage is the standard of proof that is required to prevail under *Batson*. Because proof of pretext under *Batson* is the legal equivalent to proof of intentional discrimination, many state and federal judges, in order to expedite *Batson* hearings, ask prosecutors to offer a race-neutral explanation for their challenges even before a prima facie case is established.⁶⁶ The enormous significance that trial judges place on pretext evidence means that an increasing number of *Batson* motions are decided solely on the basis of whether the trial judge is convinced that the prosecutor's proffered reasons are pretextual.⁶⁷

In light of the wide range of explanations considered race-neutral under *Batson*,⁶⁸ however, prosecutors readily can succeed in exercising discriminatory peremptory challenges.⁶⁹ For example, a prosecutor legitimately can justify a strike based on the fact that the excluded juror has a relative who has been prosecuted for a crime,⁷⁰ lives in the same county as the defendant,⁷¹ wears dark glasses,⁷² wears a hat,⁷³ or is young or unmarried,⁷⁴ all of which make it extremely difficult for defendants to prevail on *Batson* motions at trial. Moreover, due to the factual nature of a trial judge's ruling

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65. See Jeffery S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 Wis. L. REV. 511, 583 n.380 (arguing that this shift in focus "reflects the desire for quick determination of Batson objections").

66. See *id.* (listing examples of circuit court opinions that have benefited from this practice).

67. A failure on the part of the defendant to "respond or offer any rebuttal to the prosecutor's reasons precludes appellate consideration of the issue of pretext." *Id.* at 590.

68. For a detailed discussion of the wide range of reasons considered legitimate under *Batson*, see Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993) (arguing in particular that prosecutors' strikes can be classified into 12 basic categories — Age, Occupation, Unemployment, Religion, Demeanor, Relationship with a Trial Participant, Lack of "Intelligence," Socioeconomic Status, Residence, Marital Status, Previous Involvement with the Criminal Justice System, and Jury Experience — many of which serve as pretexts for racial discrimination).

69. See generally *id.* In particular, Raphael & Ungvarsky argue that

[I]n almost any situation a prosecutor can readily craft an acceptable neutral explanation to justify striking black jurors because of their race. This is especially true when only a single or a few jurors are struck because it is less obvious that a pattern of striking blacks is involved.

Id. at 236.

70. See *People v. Chambie*, 234 Cal. Rptr. 308, 312 (Ct. App. 1987).

71. See *Johnson v. State*, 529 So. 2d 577, 583 (Miss. 1988).

72. See *State v. Williams*, 545 So. 2d 651, 654-55 (La. Ct. App. 1989).

73. See *Lockett v. State*, 517 So. 2d 1346, 1351 (Miss. 1987).

74. See *People v. Taylor*, 524 N.E.2d 1216, 1221 (Ill. App. Ct. 1988).

regarding whether a proffered reason is pretextual, reviewing courts are required to grant enormous deference to these findings.⁷⁵ Although the exact standard varies from state to state, generally a reviewing court cannot reverse a ruling below unless, after assessing the entire voir dire transcript, it "is left with the definite and firm conviction that a mistake has been committed."⁷⁶

Notwithstanding this extremely deferential standard of review, 20% of state⁷⁷ and 10% of federal⁷⁸ *Batson* cases in which the legitimacy of the prosecutor's explanation was an issue on appeal, were reversed on the ground that the trial judge committed clear error in accepting — as nondiscriminatory — the proffered explanation for the peremptory challenge.⁷⁹ In other words, in all of these cases, the reviewing court was convinced after assessing the voir dire transcript that the prosecutor's reasons for the strike were pretextual, which under *Batson* is the legal equivalent to proof of intentional discrimination.

II. *HICKS*: ALTERING THE *MCDONNELL DOUGLAS* FRAMEWORK

Prior to the Supreme Court's decision last term in *St. Mary's Honor Center v. Hicks*,⁸⁰ the federal circuits were sharply divided

75. See *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986) ("[A] finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (citation omitted)).

In particular, the Supreme Court has held that a trial court's factual findings — of which a finding of pretext is one — may not be reversed on appeal even if the reviewing court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

76. *Bose Corp. v. Consumer Union*, 466 U.S. 485, 499 (1984) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

77. As of May 1, 1994, there were 378 state and 79 federal *Batson* cases in which the appellant alleged that the trial judge committed clear error in accepting the prosecutor's ostensibly race-neutral explanation for the challenged peremptory strike. Of the *Batson* cases in state courts where pretext was an issue on appeal, 74 out of 378 were reversed because the reviewing court concluded that the prosecutor's explanation for the challenged peremptory strike was pretextual. This search was accomplished by first searching the Allstates-Allfeds directories on Westlaw for all cases which included the words *Batson* and *pretext*. From this list of cases, the author counted those cases which were reversed for pretext.

78. As of May 1, 1994, 8 out of 79 *Batson* cases in federal court where pretext was an issue on appeal were reversed because the reviewing court concluded that the prosecutor's explanation for the challenged peremptory strike was pretextual.

79. One possible conclusion that can be drawn from these reversal rates is that federal and state trial judges are not adequately upholding the mandate of *Batson*. In fact, some judges have expressed open hostility toward *Batson*. See, e.g., *United States v. Johnson*, 721 F. Supp. 1077, 1079-82 (E.D. Mo. 1989); *People v. Banks*, 609 N.E.2d 864, 871-72 (Ill. App. Ct. 1993).

80. 113 S. Ct. 2742 (1993).

on the question whether proof of pretext in a Title VII disparate treatment case was equivalent, as a matter of law, to proof of intentional discrimination.⁸¹ In general, the appellate courts that addressed the issue adopted one of two distinct standards. Some circuits embraced a "pretext-only" approach,⁸² treating proof of pretext by the plaintiff as the legal equivalent to proof of intentional discrimination. In practice, this approach is the functional equivalent to the current standard of proof in *Batson* cases. Other circuits, however, advocated a pretext-plus approach⁸³ that only en-

81. Compare *EEOC v. Flasher Co.*, 986 F.2d 1312, 1321 (10th Cir. 1992) (holding that establishing pretext does not mandate a finding of illegal discrimination); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282-83 (6th Cir. 1991) (same), *cert. denied*, 503 U.S. 945 (1992); *Samuels v. Raytheon Corp.*, 934 F.2d 388, 392 (1st Cir. 1991) (same); *Holder v. City of Raleigh*, 867 F.2d 823, 827-28 (4th Cir. 1989) (same); *Benzies v. Illinois Dept. of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.) (same), *cert. denied*, 483 U.S. 1006 (1987); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983) (same), *with Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492-93 (8th Cir. 1992) (ruling that a finding pretext mandates finding intentional discrimination), *rev'd*, 113 S. Ct. 2742 (1993); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2nd Cir.) (same), *cert. denied*, 502 U.S. 880 (1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1554 (11th Cir. 1990) (same); *Tye v. Board of Educ.*, 811 F.2d 315, 320 (6th Cir. 1986) (same), *cert. denied*, 484 U.S. 924 (1987); *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985) (same); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 639-40, 646-47 (5th Cir. 1985) (same); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-96 (3rd Cir. 1983) (same), *cert. denied*, 469 U.S. 1087 (1984). Also, for a general discussion of the law prior to *Hicks*, see Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

82. See, e.g., *Dister v. Continental Group*, 859 F.2d 1108, 1113 (2d Cir. 1988) (ruling that "a plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence"); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1059 (8th Cir. 1988) (finding that "[a]s a matter of both common sense and federal law, an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred"); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir.) (holding that "[i]f the plaintiff [shows] that it is more likely than not that the employer did not act for its proffered reason, then the employer's decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent"), *cert. dismissed*, 483 U.S. 1052 (1987); *Thornbrough*, 760 F.2d at 647 (arguing that the plaintiff "is not required to prove that the [defendant] was motivated by bad reasons; he need only persuade the factfinder that the [defendant's] purported good reasons were untrue"); see also Lancot, *supra* note 81, at 71-81 (discussing in greater depth the arguments in favor of a "pretext-only" approach).

83. See, e.g., *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990) (holding that "[i]f the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion"); *Hawkins v. Ceco Corp.*, 883 F.2d 977, 981 n.3 (11th Cir. 1989) (finding that "merely establishing pretext, without more, is insufficient to support a finding of racial discrimination"); *Keyes v. Secretary of Navy*, 853 F.2d 1016, 1026 (1st Cir. 1988) (ruling that "it was plaintiff's burden not only to show that the defendant's proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts aimed at masking sex or race discrimination"); *Benzies*, 810 F.2d at 148 (ruling that plaintiffs have "the ultimate burden of persuading the court that the reasons advanced . . . are a pretext and that the substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed"); see also Lancot, *supra* note 81, at 81-91 (addressing the arguments in favor of a "pretext-plus" standard).

abled the factfinder to draw a permissible, rather than mandatory, inference of discrimination from a finding of pretext. In practice, pretext-plus courts often required the plaintiff not only to prove that the employer's reason was pretextual, but also to offer additional evidence that discrimination was the real motivation behind the adverse employment action.⁸⁴ In contrast, pretext-only courts presumed that discrimination was the real reason as soon as the plaintiff proved that the employer's explanation was unworthy of credence. In *Hicks*, the Supreme Court resolved this conflict in favor of the pretext-plus courts, holding that proof of pretext alone does not mandate a finding of intentional discrimination.

This Part analyzes the Court's decision in *Hicks* with particular attention paid to its reasons for rejecting the principle that proof of pretext under the *McDonnell Douglas* framework is legally equivalent to proof of intentional discrimination. This Part concludes that the Court was concerned that a "pretext-only" standard subjected employers to an unreasonable risk of unwarranted liability.

Prior to an administrative shake-up at St. Mary's Honor Center, Melvin Hicks, a black shift commander, consistently received satisfactory job performance evaluations. Following a series of supervisory changes, however, he was subjected to "repeated, and increasingly severe, disciplinary actions" which ultimately resulted in his dismissal from the job.⁸⁵ In response to his termination, Hicks filed a race discrimination suit against St. Mary's. At the trial, the court concluded that the justifications St. Mary's offered for firing Hicks — the severity and accumulation of rules violations — were merely pretextual because similarly situated white coworkers were not subjected to comparable disciplinary actions.⁸⁶ Notwithstanding this evidence of disparate treatment, the trial judge ruled in favor of St. Mary's on the ground that Hicks had not proven that the crusade to terminate him "was racially rather than personally motivated."⁸⁷ The Eighth Circuit reversed the lower court ruling, concluding that by offering a pretextual reason for its actions, St. Mary's had failed to rebut the *prima facie* case of discrimination.⁸⁸

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84. See *Hicks*, 113 S. Ct. at 2752.

85. 113 S. Ct. at 2746.

86. See 113 S. Ct. at 2748.

87. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991), *revd.*, 970 F.2d 487 (8th Cir. 1992), *revd.*, 113 S. Ct. 2742 (1993).

88. Relying on existing precedent, Hicks argued on appeal that because he had successfully discredited St. Mary's proffered explanations for his termination, he was entitled to judgment as a matter of law.

In agreeing with Hicks, the Eighth Circuit reasoned that because "all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions." *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir. 1992),

The specific question presented to the Court in *Hicks*⁸⁹ was whether the trier of fact in a Title VII disparate treatment case was compelled to find for the plaintiff if it disbelieved the employer's proffered reasons for taking an adverse employment action.⁹⁰ A sharply divided Court ruled that proof of pretext within the *McDonnell-Douglas* framework did not, as a matter of law, mandate a judgment for the plaintiff.⁹¹ Rather, according to the majority, discrediting the defendant's proffered reasons for its action only permits the trier of fact to draw a *permissible* inference that the defendant intentionally discriminated against the plaintiff.⁹²

The Court's ruling in *Hicks* established the principle that an employer's unpersuasive or contrived justifications for an adverse employment action are not the equivalent to proof of intentional discrimination.⁹³ Implicit in the Court's holding was the view, previously expressed by various lower courts, that a wide variety of reasons might exist for terminating an employee, none of which rise to the level of violating Title VII.⁹⁴ For example, an employer might feel compelled to offer an explanation that it knows to be false rather than admit in pleadings or open court that its actions were actually the result of personal favoritism, dislike, politics, an arbitrary decision, or clerical or administrative mistakes.⁹⁵ Moreover, it is often the case that the defendant is a company that 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,⁹⁶ all of which makes it extremely difficult specifically to identify the "real" motivation for the adverse employment action. Referring to this problem, the *Hicks* Court noted:

[T]he employer's 'proffered explanation,' his 'stated reasons,' his 'articulated reasons,' [do not] somehow exist *apart from the record* — in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder. ("Your honor,

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revd., 113 S. Ct. 2742 (1993). Consequently, they "were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated . . . on the basis of . . . race." 970 F.2d at 492.

89. See 113 S. Ct. at 2742.

90. See 113 S. Ct. at 2746.

91. See 113 S. Ct. at 2748.

92. See 113 S. Ct. at 2749.

93. See 113 S. Ct. at 2756.

94. See *Benzies v. Illinois Dept. of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

95. See 810 F.2d at 148; *see also* *EEOC v. Flasher Co.*, 986 F.2d 1312, 1319 (10th Cir. 1992) (arguing that "[h]uman relationships are inherently complex [and] . . . employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods, and an incredible array of facts that will inevitably differ even among seemingly similar situations").

96. See *Hicks*, 113 S. Ct. at 2754.

pursuant to *McDonnell Douglas* the defendant hereby formally asserts, as its reason for the dismissal at issue here, incompetence of the employee.") Of course it does not work like that.⁹⁷

Relying on this reasoning, the Court concluded that a proof standard that regards pretext evidence as the legal equivalent to proof of intentional discrimination risks unnecessarily subjecting faultless employers to liability under Title VII.⁹⁸

III. THE ARGUMENT AGAINST APPLYING *HICKS* TO *BATSON*

Part III addresses the question of whether the *Hicks* standard of proof should be applied in the *Batson* context. Section III.A argues that because of the practical differences between Title VII and *Batson* cases, the reasoning in *Hicks* is inapplicable when applied to cases alleging the discriminatory use of peremptory challenges. Section III.B argues that the principles that motivated the Court's ruling in *Batson* also would be undermined if its current proof structure were altered along the lines suggested by *Hicks*.

A. *An Argument Against Applying Hicks to Batson*

As argued in Part II, two primary concerns motivated the Court's decision in *Hicks*. First, in light of the wide variety of reasons for why an employer might fire an employee — many of which may be considered illegitimate but nevertheless do not rise to the level of violating Title VII — proving pretext should not carry enormous evidentiary weight.⁹⁹ In other words, even though an employer may have offered an "incredible" reason for an adverse employment action, it is too great a leap of logic to assume that therefore the real motivation was racial animus.¹⁰⁰ Second, because proof of pretext is not necessarily affirmative proof of an intent to discriminate, it is wrong to hold employers liable under Title VII simply based on such a showing, because to do so would unfairly result in liability for employers that may have acted arbitrarily but not in violation of Title VII.¹⁰¹

The problem with applying the logic of *Hicks* to *Batson* cases simply because they both operate under the same *McDonnell Douglas* burden-shifting proof structure is that Title VII and *Batson* cases are contextually distinct.

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97. 113 S. Ct. at 2755.

98. See 113 S. Ct. at 2756 (noting that "Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason . . . of race").

99. See *supra* notes 91-93 and accompanying text.

100. See *supra* notes 93-96 and accompanying text.

101. See *supra* notes 94-95 and accompanying text.

First, unlike a Title VII disparate treatment case, *Batson* objections do not require factfinders to analyze employment relationships, which by their nature often include individual personal relationships that could factor — positively or negatively — into employment decisions. Prosecutorial peremptory strikes are rarely based on a personal relationship with the juror,¹⁰² virtually eliminating personal animosity as a factor.

Furthermore, the scope of evidence available on which to determine intentional discrimination differs greatly from the employment context to *Batson*.¹⁰³ 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. Rather, they only require the prosecutor to offer an explanation for his or her own strikes based on the transcribed voir dire testimony of potential jurors, which itself has been taken in the presence of all of the relevant parties. Equally important, however, is the fact that in *Batson* cases the individuals that are called upon to proffer an explanation for their actions are actually those responsible for exercising the peremptory challenge. Thus, *Batson* stands in stark contrast to Title VII cases where employers are often required to rely on the testimony of individuals who were not actually responsible for the adverse employment action.¹⁰⁴ In other words, there is no concern in *Batson*, as there is in the Title VII context, of a prosecutor being bound by the statements or actions of others. In *Hicks*, the majority emphasized the fact that Title VII employers are not required to stand before the court and claim “[y]our honor, pursuant to *McDonnell Douglas* the defendant hereby formally asserts, as its reason for the dismissal at issue here, incompetence of the employee.”¹⁰⁵ But this is exactly what occurs in *Batson* hearings: under *Batson*, there is a concrete, contemporaneous justification given directly to the court by the individual responsible for the strike.

Finally, it is clear that applying a *Hicks* standard in the context of *Batson* has the potential to allow prosecutors successfully to mis-

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102. See Raphael & Ungvarsky, *supra* note 68, at 252. Moreover, the existence of such a personal relationship would more than likely give rise to a challenge for cause.

103. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2303 n.239 (1995):

In assessing whether criticisms of *McDonnell Douglas-Burdine* in employment discrimination cases are relevant to *Batson* cases, it is important to note the very significant differences between the two types of cases. *Batson* cases have no pretrial phase: no pleading, no discovery, no pretrial memoranda. They therefore present none of the usual methods for “smoking out” evidence and narrowing disputed issues. For that reason alone, it is dangerous to simply transfer doctrine from one setting to the other.

104. See *supra* note 96 and accompanying text.

105. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2754 (1993); see also *supra* notes 96-97 and accompanying text.

lead, and even blatantly to lie, to a trial judge regarding their reasons for exercising a peremptory challenge. As the Supreme Court has noted, however,

It is difficult to imagine that . . . intentional violations of defendants' constitutional rights by Government prosecutors who are officers of the court charged with upholding the law would not have a considerable detrimental effect on the integrity of the process and call for judicial action designed to restore order and integrity to the process.¹⁰⁶

With this principle in mind, it is difficult to imagine — in light of the long history of prosecutorial abuse of the peremptory challenge — that altering the *Batson* proof structure along the lines suggested by *Hicks* would have anything but a "detrimental effect on the integrity of the process" of selecting juries.

B. *The Implications of Applying Hicks to Batson*

Part I of this Note focused on the *Batson* Court's purpose in lowering the standard of proof required for a criminal defendant to establish that the State has exercised a racially motivated peremptory challenge. It noted that the Court's ruling was influenced, at least in part, by a concern over the widespread use of race-based peremptory challenges, a practice that the Court clearly intended *Batson* to counteract.¹⁰⁷ The Court's decision to apply the *McDonnell Douglas* proof structure in *Batson* cases, therefore, can and should be understood as a means of facilitating this goal.¹⁰⁸ But altering the *Batson* framework in accordance with *Hicks* would, like *Swain*, have the practical effect of placing a higher burden of proof on criminal defendants, thus making it more difficult to prove that the State has exercised a racially motivated peremptory challenge.

Furthermore, application of *Hicks* to the peremptory challenge framework appears to conflict with *Batson*'s premise that the peremptory challenge is "a practice 'providing the opportunity for discrimination.'"¹⁰⁹ Unlike in the employment discrimination context, where any number of legitimate reasons might explain an employer's pretextual justification for dismissing an employee, *Batson* recognizes that pretextual justifications for peremptory strikes almost certainly reveal discriminatory animus.¹¹⁰

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106. *United States v. Hastings*, 461 U.S. 499, 522 (1983).

107. *See supra* notes 36, 41-42 and accompanying text.

108. *See supra* notes 44-47 (discussing why this proof structure is beneficial to parties trying to establish intentional discrimination without direct proof).

109. *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (quoting *Whitus v. Georgia*, 385 U.S. 545, 552 (1967)).

110. *See* 476 U.S. at 96.

If *Hicks* were applied to *Batson*, it would essentially reintroduce a *Swain*-like presumption to peremptory challenge cases.¹¹¹ By requiring more than a showing of pretext in the Title VII context, *Hicks* creates a presumption, akin to that in *Swain*, that employment decisions, even those that are justified by pretextual reasons, are presumptively nondiscriminatory unless intentional discrimination is affirmatively proven. The *Batson* presumption is the exact opposite: the peremptory "permits 'those to discriminate who are of a mind to discriminate.'"¹¹²

Application of *Hicks* to the peremptory challenge setting, for example, would create uncertainty about the proper outcome in a case like *State v. Reliford*¹¹³ where the government's explanation for a strike proved to be pretextual. In *Reliford*, a state prosecutor claimed that he removed a black juror because the juror knew the defendant from church. The Missouri Court of Appeals found that this explanation was pretextual because the prosecutor had not struck a white juror who knew the defendant from work.¹¹⁴ Under the current *Batson* standard, *Reliford* is entitled to a new trial because it is presumed that the prosecutor's pretextual justification for the peremptory challenge concealed a discriminatory intent. But if *Batson* were altered along the lines suggested by *Hicks*, the outcome in cases like *Reliford*, where the reason given is facially neutral but pretextual, would be less than certain. What more would the defendant need to show?

For a more extreme illustration, consider *United States v. Guevera*.¹¹⁵ In *Guevera*, a federal prosecutor claimed that he used a peremptory challenge to excuse a black woman from the jury panel because she was an unemployed, single mother.¹¹⁶ On appeal the Ninth Circuit reversed and remanded the case for a new trial on the ground that the prosecutor's reason was pretextual because the struck juror was "married, childless, and employed at the same casino as other [white] jurors who were not challenged."¹¹⁷ Under a *Hicks* framework, the trial judge or reviewing court could have found that the prosecutor's explanation was wholly unsupported by the record, yet still rule in favor of the prosecutor on the ground that the defendant had only proven pretext and not racial discrimination.

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111. See *supra* note 30.

112. 476 U.S. at 96 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

113. 753 S.W.2d 9, 11 (Mo. Ct. App. 1988).

114. See 753 S.W.2d at 11.

115. No. 92-10005, 1993 WL 68944 (9th Cir. Mar. 11, 1993).

116. See 1993 WL 68944, at *1.

117. 1993 WL 68944, at *1.

In practice, therefore, a prosecutor could offer a patently false justification for a strike and then argue, notwithstanding the lack of a credible explanation for his actions, that the defendant is not entitled to judgment because he has failed to offer sufficient evidence to support a finding that the strike was race-based. Such a standard clearly has the potential to enable prosecutors to mask racial discrimination in the jury selection process by relying on a tool — a peremptory challenge — that is by its nature susceptible to misuse.¹¹⁸

Finally, it is important to note that in the vast majority of cases, the most that the defense can prove is pretext. *Hicks* calls for a direct showing of intentional discrimination,¹¹⁹ which would be impossible in the *Batson* context because aside from pretext there is little evidence available to the defendant. Barring a prosecutor's use of a racial slur during voir-dire, or some similarly improbable misstep, it is hard to imagine what evidence of discrimination could exist aside from proof of pretext.

CONCLUSION

Batson v. Kentucky and its progeny are a powerful statement by the Court regarding the importance of eradicating racial discrimination from the jury selection process. In overruling *Swain*, a twenty-one year old unanimous precedent,¹²⁰ the *Batson* Court decried *Swain*'s "crippling burden of proof"¹²¹ and adopted a new standard of proof specifically aimed at easing the burden on criminal defendants.

Although *Batson* itself has not succeeded fully, in practice it has proven far more effective than *Swain* in the struggle to combat the use of discriminatory peremptory challenges.¹²² As a result, it is particularly important that the decision in *Hicks* not be extended to the *Batson* context. Applying *Hicks* to *Batson*, in effect, would reestablish a *Swain*-like presumption in cases alleging the discriminatory use of peremptory challenges. Prosecutors' peremptory strikes would once again become "largely immune from constitu-

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118. See *supra* notes 109, 112 and accompanying text. Although some may take offense to the implication that prosecutors would intentionally exercise racially motivated peremptory challenges, one need only look to the plethora of cases in recent years in which race has been an underlying or explicit element in the case to realize the influence that a consideration such as race must play in the selection of juries.

119. See *supra* Part II.

120. The parties were so confident that the Court would not overrule *Swain* that the equal protection issues were not even briefed. See *Batson v. Kentucky*, 476 U.S. 79, 112-16 (1986) (Burger, C.J., dissenting).

121. 476 U.S. at 92.

122. See Raphael & Ungvarsky, *supra* note 68; Barton, *supra* note 44, at 214 (describing *Batson* as a "virtual sieve").

tinal scrutiny.”¹²³ As a result, both the jury selection process and our system of justice would suffer from the debilitating effects of regularly exercised discriminatory peremptory challenges, and the project begun in *Batson* — the elimination of discrimination from the selection of juries — would be endangered.

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123. 476 U.S. at 92.