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EXCUSES, EXCUSES: NEUTRAL EXPLANATIONS UNDER *BATSON V. KENTUCKY*

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The legal struggle for racial justice in the United States has always been in part a struggle to determine how best to achieve racial equality. In 1986, in *Batson v. Kentucky*,[1] the United States Supreme Court attempted to curb racial discrimination in the use of peremptory challenges to strike potential members of a jury. The Court mandated procedures for determining whether a prosecutor had struck members of the venire because of their race.[2] The procedures furnished in *Batson* are quite general, however, and lower courts have used a variety of standards in implementing them. This Article examines how lower courts have handled one important *Batson* procedure—the "neutral explanation"[3] that prosecutors must offer to explain their strikes[4]—and suggests how the treatment of neutral explanations can be improved.

In Part I of this Article, we provide some background information necessary to explain our research and analysis. We briefly explain the role of peremptory challenges in the venire process, the precursors to *Batson*, and the *Batson* decision itself. In Part II, we explain our methodology for analyzing the lower court cases. In Part III, we discuss and analyze our research concerning how courts have applied the neutral explanation requirement of the *Batson* decision, and we present the

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1. 476 U.S. 79 (1986).

2. Recently, the Supreme Court extended *Batson* to peremptory challenges based on a venireperson's gender. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, (1994). We anticipate that courts will apply current *Batson* procedures for race-based strikes to those allegedly based upon gender; thus, we believe our discussion herein also will apply to procedures implementing *J.E.B.*

3. The term is discussed and explained *infra* Part I.B.

4. *See Batson*, 476 U.S. at 97–98.

results of our research by dividing the explanations into various categories. Finally, in Parts IV and V, we provide a new approach for improving the treatment of neutral explanations, which attempts to remedy the problems we find with the current approach.

I. BACKGROUND

The process of jury selection is governed by statute in each American jurisdiction. Though there are many differences in the particulars, each jurisdiction follows the same general process. First, a list of eligible jurors is compiled, usually from voter registration lists. Next, a group of those persons is randomly selected from the list and given notice that they are to appear for jury duty at a particular time. This group of jurors is known as the venire.[5] Before a trial, in a process called "voir dire," attorneys for each party may question the venirepersons.[6] A juror[7] may be removed "for cause" if she demonstrates by her answers an inability to pass impartial judgment in the case or that she is otherwise unfit or incompetent to serve.[8] For instance, a juror who says she could not apply the law at issue because she disagrees with it, or a juror who says she is prejudiced against a criminal defendant, easily could be dismissed for cause. All jurisdictions also allow attorneys peremptory challenges for use against jurors whom they wish to dismiss, but who have not displayed characteristics that support a for-cause challenge.[9] Either method of dismissal is normally characterized as "striking the juror." Traditionally, attorneys do not have to offer a reason for exercising a

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5. Each jurisdiction allows certain people to be excused before sitting on the venire, due, for example, to their profession or because sitting on a jury would cause them undue hardship. For an explanation of how racial bias can enter the system before the venire is seated, see *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1562–64 (1988).

6. In some jurisdictions, the judge participates in the voir dire questioning.

7. This Article defines "juror" to include empaneled jurors and venirepersons, and those terms are used interchangeably.

8. *See* 50 C.J.S. *Juries* § 269 (1947) (grounds for challenges for cause).

9. *See, e.g.*, 28 U.S.C. § 1870 (1988) (providing for peremptory challenges in federal civil actions); FED. R. CRIM. P. 24 (providing for peremptory challenges in federal criminal actions); CAL. CIV. PROC. CODE § 231 (West 1994) (providing for peremptory challenges in civil and criminal cases); MICH. COMP. LAWS §§ 768.12–768.13 (West 1982) (providing for peremptory challenges in criminal cases).

peremptory challenge. While the number of challenges for cause is unlimited, the number of peremptories each party may exercise is limited by statute, usually depending upon the type of case.[10]

A. Batson's Precursors

Batson[11] was not the first case in which the Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment[12] to address the problem of racial discrimination against jurors. In *Strauder v. West Virginia*,[13] a post-Civil War case, the Court held that states could not expressly exclude black citizens from venire pools.[14] In *Strauder*, a West Virginia statute required that venire pools be composed solely of white male citizens.[15] Because members of trial juries are chosen from these pools, the statute's exclusion of blacks effectively meant that no blacks could serve on a jury. Subsequently, the plaintiff in *Strauder*, who was black, was convicted of murder by an all-white jury. The Supreme Court found that the statute offended equal protection by contravening the "very idea of a jury [as] a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, [and] persons having the same legal status in society as that which he holds."[16] Thus, *Strauder* held that the systematic exclusion of blacks from petit juries[17] was unconstitutional. After *Strauder*, several Supreme Court decisions further elucidated the constitutional bar against

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10. A list of the number of peremptory challenges allowed to each side in each state can be found in JON M. VAN DYKE, JURY SELECTION PROCEDURES 282–84 (1977). They range from as high as 20 or more per side in felony cases, especially those involving capital punishment, to as low as two or three in civil cases. *Id.*

11. 476 U.S. 79 (1986).

12. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

13. 100 U.S. 303 (1879).

14. *Id.* at 310.

15. W. Va. LAWS, ch. XCVII § 1 (1873).

16. 100 U.S. at 308.

17. Petit juries are trial juries, usually composed of 12 persons, as distinguished from grand juries, which are larger groups that decide whether to indict a criminal suspect. *See* BLACK' S LAW DICTIONARY, 856 (6th ed. 1990).

excluding minorities from the jury pool.[18]

The Supreme Court first applied the Equal Protection Clause to the exercise of peremptory challenges during the 1960s. In *Swain v. Alabama*,[19] Robert Swain, a black man who was convicted of rape by an all-white jury and sentenced to death, alleged that the prosecution willfully used its peremptory strikes to exclude all blacks from the jury.[20] The Supreme Court advanced racial equality in principle, holding that although "a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[21] In implementing this important principle, however, the Court came up shamefully short. For a defendant to prove state discrimination, the *Swain* Court required the defendant to show that peremptory strikes were used systematically by the prosecution to exclude blacks from all juries over a period of years.[22] Stating that peremptory challenges are presumed to have been exercised fairly,[23] the Court held that a defendant could present a prima facie case of discrimination only by showing that the "prosecutor . . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for" striking all potential black jurors.[24] Thus, the Court focused the judicial inquiry not upon the reasons proffered by the prosecutor for his strikes in the instant case but rather upon all the cases tried by the prosecutor.[25] To prove a

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18. *See, e.g.*, Neal v. Delaware, 103 U.S. 370, 397 (1881) (rejecting the argument that excluding blacks was justified because the entire population of blacks was unqualified for jury duty); Carter v. Texas, 177 U.S. 442, 447 (1900) (prohibiting the systematic exclusion of blacks from grand juries under the Equal Protection Clause); Patton v. Mississippi, 332 U.S. 463, 469 (1947) (holding that a jury selection plan that has completely excluded members of a racial group over a protracted period establishes a strong presumption that the instant jury was selected through impermissible racial exclusion); Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (prohibiting systematic exclusion or automatic exemption of women from criminal jury venires based solely on gender); Castaneda v. Partida, 430 U.S. 482, 495 (1977) ("Once the defendant has shown substantial underrepresentation of his group [in a grand jury], he has made out a prima facie case of discriminatory purpose . . . .").

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

20. *See id.* at 203.

21. *Id.* at 203–04.

22. *Id.* at 224.

23. *Id.* at 222.

24. *Id.* at 223.

25. *Id.* at 227–28.

Swain violation, then, a defendant had to gather evidence not only about his own case but also about the prosecutor's pattern of behavior in numerous other cases as well. Not surprisingly, given this difficult and expensive burden, Robert Swain could not prove a constitutional violation, despite the fact that no black had served on a petit jury in the county where his case was tried in at least fifteen years.[26] The test articulated in *Swain* proved unable to curb prosecutorial discrimination in the exercise of peremptory challenges, suggesting the need for a new approach.[27]

B. Batson's Framework

Batson attempted to better address unconstitutional prosecutorial discrimination by establishing a two-part procedure for determining whether a prosecutor had used peremptory challenges to exclude a juror on the basis of her race.[28] First, the criminal defendant must establish a prima facie case of purposeful discrimination in striking a member of the venire.[29] Second, if such a case is established, the prosecutor must rebut the inference of discrimination by proffering a "neutral explanation" for the strikes that is specific to the circumstances of the case at hand.[30]

In presenting a prima facie case, the defendant may establish an inference of discrimination "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial."[31] The defendant must satisfy a three-pronged test to establish the inference. First, the defendant "must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges

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26. *Id.* at 205.

27. The standard developed in *Swain* was characterized by the *Batson* Court as a "crippling burden of proof." Batson v. Kentucky, 476 U.S. 79, 92 (1986). For academic criticisms of *Swain*, see Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977); Foy R. Devine, Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

28. *See Batson*, 476 U.S. at 93–98.

29. *Id.* at 93–94.

30. *Id.* at 97–98.

31. *Id.* at 96.

to remove from the venire members of the defendant's race."[32] Second, the defendant may rely on the fact "that peremptory challenges . . . permit[] 'those to discriminate who are of a mind to discriminate.'"[33] Lastly, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[34]

Once a defendant successfully raises an inference of discrimination, the burden shifts to the prosecutor to offer a neutral explanation for the challenges. The *Batson* Court provided only minimal guidance regarding what constitutes an adequate neutral explanation. On the one hand, the prosecutor's explanation need not be so substantial as to "rise to the level justifying [the] exercise of a challenge for cause."[35] On the other hand, "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."[36] Furthermore, the prosecutor may not rebut the defendant's case simply by claiming that he had no discriminatory motive in exercising his challenges.[37] *Batson* gave no other express guidance regarding which explanations are acceptable and which are not.

II. METHODOLOGY OF PROJECT

We examined all published lower court cases that cited the 1986 *Batson* decision. Using the *Shepard's* citator system available on the LEXIS computer database service, we retrieved over 2000 such cases through January 1992. Of these, a total of 824 cases directly applied the *Batson* procedures, including 129 federal cases and 695 state cases. The 129 federal cases included 115 Court of Appeals and 14 District Court opinions. The 695 state cases also included primarily

32. *Id.* (citation omitted).
33. *Id.* (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
34. *Id.*
35. *Id.* at 97.
36. *Id.*
37. *Id.* at 98.

appellate decisions, as few state trial court opinions are published.

Thus, our sample consists of cases from the first five years after *Batson*. Because new lower court cases dealing with *Batson* are issued regularly, this collection of cases is not meant to be used as an up-to-date exposition of the law of any particular jurisdiction. Rather, we deliberately limited our sample so that we could analyze broadly how various courts employ the *Batson* procedures. We sought to determine whether *Batson* is achieving its goal of eliminating racial discrimination in jury selection. Our research focuses on determining how lower courts have evaluated neutral explanations in the absence of more extensive instructions from the Supreme Court.

To explain their strikes, prosecutors frequently offer more than one explanation. The cases rarely identify which reasons the prosecutors, defense attorneys, and trial and appellate judges thought were most important. Our research includes both cases involving just one clearly articulated, independent factor and cases in which more than one reason for excluding a juror was given. In the next Part, we provide and analyze our findings.

III. JUDICIAL TREATMENT OF NEUTRAL EXPLANATIONS

A. Overview of the Problem

A prosecutor who wishes to rebut the prima facie case does not face a significant challenge.[38] In our data, only a small percentage of the neutral explanations for peremptory strikes were rejected. Indeed, those explanations that were rejected often involved the clearest cases of *Batson* violations, such as

38. Throughout this paper, we have chosen to use as our paradigm the original *Batson* situation of a criminal case in which a black defendant challenges strikes of black jurors by a prosecutor. *See id.* at 82–83. In more recent cases, the Court has extended *Batson* both to the exercise of peremptory challenges by criminal defendants, Georgia v. McCollum, 112 S. Ct. 2348 (1992), to peremptory challenges in civil cases, Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), to white defendants' challenges to prosecutorial strikes of black jurors, Powers v. Ohio, 499 U.S. 400 (1991), and to strikes allegedly based upon gender, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994). We do not address the merits of so extending *Batson*, and we refer to the original *Batson* paradigm only for ease of discussion.

prosecutors who explained that they struck the juror based on race[39] or prosecutors who gave no reason for striking the juror.[40] Opponents of racial discrimination, however, cannot take much comfort from the treatment of even these clear cases of prosecutorial abuse because there are a number of cases in which courts accepted as a neutral explanation the prosecutor's statement that she struck a juror because, among other reasons, the juror was black,[41] or the prosecutor's offering no explanation at all.[42] These cases intimate that courts are often uncritical in evaluating neutral explanations. In fact, our research demonstrates that in 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.

The ease with which *Batson*'s neutral explanation test can be satisfied is illustrated further in the following hypothetical example. Suppose that a prosecutor has struck a juror named Pat because Pat is black. Imagine further that the defendant has established a prima facie case of racial discrimination

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39. *See, e.g.*, Goggins v. State, 529 So. 2d 649, 651–52 (Miss. 1988) (deeming invalid a strike based on the belief that blacks are more favorable to black defendants); State v. Blackmon, 744 S.W.2d 482, 486 (Mo. Ct. App. 1988) (same); *see also* Owens v. State, 531 So. 2d 22, 26 (Ala. Crim. App. 1987) (rejecting the trial court's conclusion that a prosecutor's consideration of a jurors' race among other factors is "race-neutral"); State v. Holman, 759 S.W.2d 902, 903 (Mo. Ct. App. 1988) (same).

40. *See, e.g.*, United States v. Battle, 836 F.2d 1084, 1085–86 (8th Cir. 1987) (holding that the trial court erred in construing *Batson* as not requiring the prosecutor to state a reason for the contested peremptory challenges); United States v. Cunningham, 713 F. Supp. 165, 170 (M.D.N.C. 1988); *Ex parte* Williams, 571 So. 2d 987, 990 (Ala. 1990); Williams v. State, 507 So. 2d 566, 568 (Ala. Crim. App. 1987). For cases in which the trial court failed to ask the prosecutor for an explanation, see People v. Snow, 746 P.2d 452, 457 (Cal. 1987); Reynolds v. State, 576 So. 2d 1300, 1301 (Fla. 1991); Thompson v. State, 548 So. 2d 198, 202 (Fla. 1989).

41. *See, e.g.*, Lee v. State, 747 S.W.2d 57, 59 (Tex. Ct. App. 1988) (accepting the prosecutor's explanation that he struck a juror because he was a black male within 10 years of the defendant's age); *see also* United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988) (accepting a prosecutor's explanation of similar appearance in a case involving a defense of mistaken identity), *cert. denied*, 490 U.S. 1114 (1989); Scales v. State, 539 So. 2d 1074, 1074 (Ala. 1988) (accepting an explanation of similar age, appearance, and background to the defendant); Branch v. State, 526 So. 2d 605, 606 (Ala. Crim. App. 1986) (accepting an explanation of similar age and appearance and possible former relationship with the defendant).

42. *See, e.g.*, State v. Wylie, 525 A.2d 528, 534–35 (Conn. App. Ct.) *cert. denied*, 528 A.2d 1154 (Conn. 1987); People v. Mack, 538 N.E.2d 1107, 1113 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990); State v. Butler, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990).

under *Batson*. At this point, the prosecutor has the opportunity to produce a neutral explanation as to why Pat was challenged. In virtually any situation, an intelligent prosecutor can produce a plausible neutral explanation for striking Pat despite the prosecutor's having acted on racial bias. The prosecutor can show either that Pat has served on a jury before, or that Pat has never served on a jury before.[43] The prosecutor can explain that Pat is young or that Pat is old.[44] He can say that he does not want a juror with Pat's occupation for this case,[45] or that Pat is unemployed.[46] If Pat or Pat's relatives have had any involvement with law enforcement in the past, the prosecutor can exclude Pat regardless of whether the involvement has some connection to Pat.[47] The prosecutor can declare that something in Pat's demeanor is bothersome.[48] The prosecutor can even focus on a random aspect of the juror's character or past dealings, even if it only remotely relates to some aspect of the case or to the legal process in general.[49] Moreover, the best strategy for the prosecutor is to offer a combination of the above rationales for striking Pat. Consequently, given the current case law, a prosecutor who wishes to offer a pretext for a race-based strike is unlikely to encounter difficulty in crafting a neutral explanation.

B. Analysis of Neutral Explanations

In this section, we set forth the results of our examination of lower court decisions. Finding that the same types of

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43. *See infra* Part III.B.12.
44. *See infra* Part III.B.1.
45. *See infra* Part III.B.2.
46. *See infra* Part III.B.3.
47. *See infra* Part III.B.11.
48. *See infra* Part III.B.5.
49. *See, e.g.*, State v. Wylie, 525 A.2d 528, 534 (Conn. App. Ct.) (accepting the prosecutor's explanation that the juror had stopped once or twice at the store where the crime occurred), *cert. denied*, 528 A.2d 1154 (Conn. 1987); People v. Mack, 538 N.E.2d 1107, 1112 (Ill. 1989) (accepting the prosecutor's explanation that the juror knew some lawyers and a judge in the same courthouse), *cert. denied*, 493 U.S. 1093 (1990); Chisolm v. State, 529 So. 2d 635, 638 (Miss. 1988) (accepting the prosecutor's explanation that the juror's husband worked at a radio station that once aired a documentary unfavorable to law enforcement).

One court maintains that *Batson* does not "preclude exercise of a peremptory challenge for a non-race based reason that objective and fair-minded persons might regard as absurd." *Chisolm*, 529 So. 2d at 639.

explanations occur repeatedly, we have organized them into twelve categories. Although they do not encompass all possible explanations, these categories account for a solid majority of the explanations we reviewed. In our study, courts accepted the vast majority of the explanations offered. Nonetheless, we spend a disproportionate amount of space discussing the rejected explanations because those cases typically emphasize the most important concerns in evaluating each category. By this discussion, we do not mean to give the impression that courts in our study often rejected explanations.

1. Age—Courts routinely accept explanations from prosecutors who say they struck a juror based upon the juror's age. Though explanations based upon youth are far more common than those based upon old age, many examples of both exist. The willingness of courts to accept age-based explanations is well-illustrated in *State v. Smith*,[50] where the prosecutor struck four blacks and explained that two were struck because they were the same age as the defendant, and that two were struck because they were old.[51] One of the older jurors was in her early fifties and the other was in her early sixties. Even though the prosecutor failed to strike a white venireperson who was over sixty years old, the court upheld the prosecutor's explanations of the other strikes.[52] *Currin v. State*[53] provides another example of a court upholding a prosecutor's strikes of black jurors both because some were young and because some were old.

In striking young blacks, prosecutors often maintain that young jurors are particularly sympathetic to the defendant, who often is young as well. For instance, in *Thompson v. State*,[54] the court accepted the prosecutor's explanation that he struck three jurors because they approximated the defendant's age.[55] At times, prosecutors also claim that a

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50. 791 S.W.2d 744 (Mo. Ct. App. 1990).
51. *Id.* at 750.
52. *Id.*
53. 535 So. 2d 221 (Ala. Crim. App. 1988).
54. 390 S.E.2d 253 (Ga. Ct. App. 1990).
55. *Id.* at 255. For additional examples of prosecutors striking young venire members because they would be sympathetic to a young defendant, see Stanley v. State, 582 A.2d 532, 535 (Md. Ct. Spec. App. 1990) (nineteen and twenty-year-olds); Grady v. State, 730 S.W.2d 191, 194 (Tex. Ct. App. 1987) (a thirty-two-year-old); *see also* Wagner v. State, 555 So. 2d 1141, 1143–44 (Ala. Crim. App. 1989) (four blacks of similar age to the defendant); Ricks v. State, 542 So. 2d 289, 290 (Ala. Crim. App.

venireperson's age makes her unable to judge the evidence competently.[56] Only rarely have prosecutors attempted to link juror age to a specific element of the case being tried, although some instances do exist. In one trial for drug possession, the prosecutor claimed to have struck two black jurors aged eighteen and twenty-one because young jurors are more likely to tolerate drug use.[57] In one child molestation case, the prosecutor claimed to have struck a childless forty-year-old woman because having no children at that age indicated that she probably could not relate to the case.[58]

A few courts have rejected explanations based upon age. In several of these cases, courts did so because the prosecutor did not strike white venire members who should have been dismissed on the same age-based rationale. For instance, in one rape case, the prosecutor claimed to have struck a thirty-four-year-old black male because his age indicated that he would be unable to appreciate the gravity of the offense.[59] The Illinois Supreme Court rejected this explanation, however, because the prosecutor had not challenged an eighteen-year-old white male.[60] In the same case, the prosecutor had struck two black men, aged sixty-three and sixty-nine, allegedly because their advanced age would have impeded their understanding of the

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1987) (two jurors of approximately the same age as the defendant); Orr v. State, 375 S.E.2d 669, 670 (Ga. Ct. App. 1988) (allowing the prosecutor to strike a black because of his similarity in age to the defendant); State v. Thompson, 516 So. 2d 349, 354 (La. 1987) (allowing the prosecutor to strike the mother of children the defendant's age), *cert. denied*, 488 U.S. 871 (1988); Taitano v. Commonwealth, 358 S.E.2d 590, 591 (Va. Ct. App. 1987) (allowing the prosecutor to strike three males of the same approximate age as defendant who also lived near the defendant).

56. *See* People v. Kindelan, 572 N.E.2d 1138, 1143 (Ill. App. Ct. 1991) (allowing a prosecutor's explanation that a twenty-four-year-old black woman would be unable to sit in judgment and express opinions because of her youth); Williams-Bey v. State, 765 S.W.2d 41, 42 (Mo. Ct. App. 1988) (allowing the prosecutor's explanation that an elderly woman would have been unable to understand the evidence despite no questioning as to whether the woman actually could understand the required concepts).

57. Chambliss v. Commonwealth, 386 S.E.2d 478, 478 (Va. Ct. App. 1989).

58. Bess v. State, 369 S.E.2d 784, 786 (Ga. Ct. App. 1988). In *Bass*, although the court noted that the voir dire only produced evidence that the woman was single and not that she was childless, it upheld the dismissal. *Id.*

59. People v. McDonald, 530 N.E.2d 1351, 1356 (Ill. 1988).

60. *Id.* at 1358. Interestingly, the prosecutor testified that young, single males are the worst jurors in a rape case, and testified further that he defined "young" to include only people in their early twenties or younger. *Id.* at 1356. By the prosecutor's own testimony, then, he should have struck the eighteen-year-old white male and had much less reason to challenge the thirty-four-year-old black male.

case.[61] Again the court rejected this explanation because the prosecutor had nevertheless permitted a sixty-seven-year-old white man to serve on the jury.[62]

Other cases have rejected the age-based explanation because the prosecutor made no attempt to explore the issue of age bias when questioning the venirepersons.[63] *United States v. Chinchilla*[64] implicitly placed upon the prosecutor the burden of demonstrating that an age-based strike is valid by presenting a record of the challenged juror's age.[65] In that case, the court refused to consider age-based explanations because the jurors had not stated their ages for the record and no other evidence of their ages was present.[66]

2. Occupation—Prosecutors commonly explain that they struck a juror because the juror's occupation may adversely affect the juror's evaluation of the facts presented in the case. The three occupations that most often provide a basis for neutral explanations are social worker,[67] teacher,[68] and govern-

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61. *Id.* at 1359.

62. *Id.* In several other cases, courts also rejected age-based explanations because the prosecutor had inconsistently applied an age rationale. *See* Powell v. State, 548 So. 2d 590, 593 (Ala. Crim. App. 1988), *aff'd*, 548 So. 2d 605 (Ala. 1989); Floyd v. State, 539 So. 2d 357, 363 (Ala. Crim. App. 1987); State v. Williams, 746 S.W.2d 148, 149 (Mo. Ct. App. 1988).

63. *See* Avery v. State, 545 So. 2d 123, 127 (Ala. Crim. App. 1988); Jackson v. Commonwealth, 380 S.E.2d 1, 6 (Va. Ct. App. 1989); *cf.* Williams v. State, 548 So. 2d 501, 506 (Ala. Crim. App. 1988) (rejecting the explanation of age bias because the state had failed to establish actual bias stemming from similarity in age to the defendants).

64. 874 F.2d 695 (9th Cir. 1989).

65. *Id.* at 698.

66. *Id.*

67. *See, e.g.*, United States v. Alvarado, 923 F.2d 253, 255 (2d Cir. 1991) (accepting the explanation that a social worker might sympathize with the defendant); United States v. Wilson, 867 F.2d 486, 487–88 (8th Cir.) (accepting the explanation that the juror was a juvenile court social worker who worked with police officers and defense attorneys), *cert. denied*, 493 U.S. 827 (1989); Smith v. State, 531 So. 2d 1245, 1248 (Ala. Crim. App. 1987) (accepting the explanation that the juror was a social worker who had voted to acquit a criminal defendant in a previous trial); Thompson v. State, 390 S.E.2d 253, 254 (Ga. Ct. App. 1990) (accepting the explanation that a social worker would tend to identify with persons of low socioeconomic status such as the defendant); Foster v. State, 374 S.E.2d 188, 192 (Ga. 1988) (accepting the explanation that social workers would sympathize with criminal defendants, especially in the sentencing phase of a capital punishment case), *cert. denied*, 490 U.S. 1085 (1989); People v. Buckley, 522 N.E.2d 86, 92 (Ill. App. Ct. 1988) (accepting the dismissal of a social worker supervisor despite the fact that the prosecutor had stated that he wanted jurors employed in positions of authority).

68. *See, e.g.*, People v. Harris, 544 N.E.2d 357, 381 (Ill. 1989) (accepting the explanation that a juror was excluded because he was a former teacher and was married to a teacher), *cert. denied*, 494 U.S. 1018 (1990); Rasco v. State, 739 S.W.2d 437, 439 (Tex. Ct. App. 1987) (accepting the explanation that a black teacher was

ment worker.[69] Prosecutors have explained successfully that they struck jurors for employment in virtually any line of work: comptrollers,[70] cooks,[71] librarians,[72] grocery clerks,[73] student counselors,[74] missionaries,[75] students,[76] scientists,[77] nurses,[78] ministers,[79] security guards,[80] pharmacists,[81] and

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struck because in her job she was used to hearing excuses). *But see* McGahee v. State, 554 So. 2d 454, 460–61 (Ala. Crim. App.) (finding the explanation that teachers were of special concern "due to their social approach to dealing with people" not neutral on its own), *aff'd on other grounds*, 554 So. 2d 473 (Ala. 1989).

69. *See, e.g.*, Barfield v. Orange County, 911 F.2d 644, 648 (11th Cir. 1990) (accepting the explanation that a school board employee would generally favor employees), *cert. denied*, 111 S. Ct. 2263 (1991); United States v. Johnson, 905 F.2d 222, 223 (8th Cir.) (accepting the strikes of black and white Division of Family Services employees on the belief that they would sympathize with the defendant who was involved in an escape from a halfway house), *cert. denied*, 498 U.S. 924 (1990); United States v. Biaggi, 705 F. Supp. 867, 869 (S.D.N.Y. 1988) (accepting the strike of a sanitation department police officer for fear of sympathy towards the defendant who was a former law enforcement officer); Simpkins v. State, 558 A.2d 816, 820 (Md. Ct. Spec. App. 1989) (accepting the dismissal of a Social Security claims examiner).

70. *See, e.g.*, People v. Peters, 494 N.E.2d 853, 861 (Ill. App. Ct. 1986) (accepting the prosecutor's explanation that comptrollers are prone to detail and order and that such people do not make good jurors in criminal cases).

71. *See, e.g.*, People v. Buckley, 522 N.E.2d 86, 92 (Ill. App. Ct. 1988) (accepting the prosecutor's dismissal of a cook because her job was not "a type of worldly occupation where someone would be exposed to a large variety of things").

72. *See, e.g.*, Levy v. State, 749 S.W.2d 176, 178 (Tex. Ct. App. 1988) (accepting the prosecutor's explanation that he wanted jurors with jobs that put them in contact with people).

73. *See, e.g.*, State v. Reyes, 788 P.2d 1239, 1242 (Ariz. Ct. App. 1989) (accepting the prosecutor's explanation that the juror would sympathize with a defendant involved "in a working-class barroom fight").

74. *See, e.g.*, State v. Jackson, 368 S.E.2d 838, 841 (N.C. 1988) (accepting the prosecutor's explanation that a juror who had worked as a student counselor at a university would be sympathetic to the defendant), *cert. denied*, 490 U.S. 1110 (1989).

75. *See, e.g.*, United States v. Biaggi, 705 F. Supp. 867, 869–70 (S.D.N.Y. 1988) (accepting the prosecutor's explanation that the juror would be too sympathetic to the testimony concerning the defendant's contributions to religious charities in a case involving tax evasion).

76. *See, e.g.*, State v. Richburg, 403 S.E.2d 315, 317 (S.C. 1991) (accepting the explanation that college students are "more tolerant towards drugs" in a drug possession case).

77. *See, e.g.*, Branch v. State, 526 So. 2d 605, 606–07 (Ala. Crim. App. 1986) (allowing dismissal based upon the concern that a scientist would demand a scientific presentation of the evidence).

78. *See, e.g.*, Pritchett v. State, 548 So. 2d 509, 510 (Ala. Crim. App. 1988) (allowing the strike without requiring an explanation).

79. *See, e.g.*, Lockett v. State, 517 So. 2d 1346, 1350–51 (Miss. 1987) (accepting the explanation that preachers are too forgiving).

80. *See, e.g.*, State v. Hood, 745 S.W.2d 785, 787 (Mo. Ct. App. 1988) (accepting the explanation that security guards commonly question police procedures).

81. *See, e.g.*, United States v. Rodrequez, 859 F.2d 1321, 1325 (8th Cir. 1988) (accepting the explanation that because a juror was a pharmacist he "could possibly

homemakers.[82] Furthermore, jurors occasionally are struck because they are married or related to someone who has a particular kind of job.[83]

Although in several of the above cases the prosecutor struck a juror even though his occupation was unrelated to the case,[84] prosecutors frequently explain that a juror was struck because of work related to law enforcement. In *United States v. Briscoe*,[85] for example, the prosecutor was permitted to strike a juror who worked at a youth detention center, under the theory that the juror might be sympathetic toward criminal defendants.[86] Other prosecutors have been allowed, at least by trial courts, to strike jurors who were employed by criminal defense law firms,[87] by the courts,[88] by establishments frequented by criminal offenders,[89] by a police crime laboratory,[90] and by a city jail.[91]

Moreover, trial attorneys sometimes explain that they struck a juror because of the relationship between the juror's job and the particular case being tried. For instance, a juror who worked as a cardiology technologist was dismissed in a civil suit in which the plaintiff claimed that the defendant police officer's use of excessive force in arresting the plaintiff had aggravated his heart condition.[92] In a rape case, a juror

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form an individual opinion on the narcotics charge"), *cert. denied*, 489 U.S. 1058 (1989).

82. *See, e.g.*, United States v. Allen, 666 F. Supp. 847, 852 (E.D. Va. 1987), *aff'd sub nom.* United States v. Harrell, 847 F.2d 138, 139 (4th Cir.) (accepting the explanation that the prosecutor wanted jurors with jobs), *cert. denied*, 488 U.S. 944 (1988).

83. *See, e.g.*, State v. Brown, 522 So. 2d 1110, 1114 (La. Ct. App. 1988) (excluding the son of a minister); State v. Harris, 520 So. 2d 911, 914 (La. Ct. App. 1987) (excluding the wife of a pastor); Davis v. State, 551 So. 2d 165, 172 (Miss. 1989) (excluding a woman because, among other reasons, she was the wife of a preacher); State v. Kilgore, 771 S.W.2d 57, 63 (Mo. 1989) (excluding the sister of a prison worker); State v. Walton, 418 N.W.2d 589, 593 (Neb. 1988) (excluding the spouse of a social worker).

84. *See, e.g.*, Pritchett v. State, 548 So. 2d 509, 510 (Ala. Crim. App. 1988); State v. Jackson, 368 S.E.2d at 838, 839 (N.C. 1988).

85. 896 F.2d 1476 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990).

86. *Id.* at 1488.

87. *See, e.g.*, People v. Mack, 538 N.E.2d 1107, 1112 (Ill. 1989), *cert. denied*, 493 U.S. 1093 (1990).

88. *See, e.g.*, Ricks v. State, 542 So. 2d 289, 290 (Ala. Crim. App. 1987).

89. *See, e.g.*, United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

90. *See, e.g.*, People v. Walker, 547 N.E.2d 1036, 1038 (Ill. App. Ct. 1989).

91. *See, e.g.*, State v. Hall, 785 S.W.2d 652, 656 (Mo. Ct. App. 1990).

92. Soler v. McHenry, 771 F. Supp. 252, 254–55 (N.D. Ill. 1991).

who worked as a motel maid was dismissed in part because prosecutors reasoned that she might be too quick to believe that the victim consented.[93] In another case, an engineer who worked in the police department was excused because the prosecutor felt that he would not take police testimony as seriously as someone who did not work with police.[94] Finally, in a case against a truck driver charged with drunk driving and killing a motorcyclist, the prosecutor dismissed five jurors, claiming that they or their relatives drove trucks.[95]

Courts have rejected several job-based explanations, however, particularly when they discover that white jurors with the same jobs as the dismissed black juror were not excused. In *People v. McDonald*,[96] the prosecutor dismissed two spouses of teachers, asserting that teachers tend to think independently and ignore counsels' arguments, and that teachers are "too precise" to understand circumstantial evidence.[97] The prosecutor also struck a nurse due to her medical knowledge.[98] Nevertheless, the court rejected both explanations because the prosecutor had let a white teacher and a white nurse's assistant sit on the jury. The court reasoned that such a "patent inconsistency" was unacceptable.[99] In another case, the prosecutor claimed to have excused a juror who did detail work with photography because work with details was an undesirable characteristic in the particular case.[100] In rejecting the explanation, the Kansas Supreme Court noted that the prosecutor had not dismissed white jurors whose jobs also involved a great deal of work with details.[101]

Some courts have rejected explanations where prosecutors made no effort to determine whether a dismissed juror actually

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93. People v. Jones, 559 N.E.2d 112, 115–16 (Ill. App. Ct. 1990).

94. Rodgers v. State, 725 S.W.2d 477, 480 (Tex. Ct. App. 1987).

95. Pollard v. State, 549 So. 2d 593, 595–96 (Ala. Crim. App. 1989). For other examples of occupation-based explanations in which the occupation bore some relation to the case at bar, see United States v. Tindle, 860 F.2d 125, 129 (4th Cir. 1988) (same occupation as two government witnesses); United States v. Biaggi, 673 F. Supp. 96, 104–06 (E.D.N.Y. 1987) (place of employment had ties to the defendant congressman).

96. 530 N.E.2d 1351 (Ill. 1988).

97. *Id.* at 1355–56.

98. *Id.* at 1355.

99. *Id.* at 1358–59.

100. State v. Belnavis, 787 P.2d 1172, 1174 (Kan. 1990).

101. *Belnavis*, 787 P.2d at 1174. The prosecutor did not challenge a sign language interpreter, computer technician, controller, or secretary. *Id.*

possessed the traits alleged to characterize members of the juror's occupation. For example, in *Slappy v. State*,[102] the prosecutor excused two black teachers because he felt that teachers were too liberal.[103] When the defense counsel noted that he had not excused a white teacher for that reason, the prosecutor said that the white teacher had been in the army and therefore was less likely to be liberal.[104] The Florida Appellate Court rejected the prosecutor's explanation, holding that, to combat racial discrimination, the reviewing court must go beyond the facial neutrality of the reasonableness of the explanation.[105] The court noted the vagueness of the "liberal" characteristic, as well as the tenuous connection between teaching or serving in the army and being "liberal."[106] Specifically, the prosecutor asked no questions to determine whether the teachers excused actually maintained "liberal" views.[107]

Using related logic, the California Supreme Court stated that striking a black juror for being a truck driver was unjustified without some demonstration that the individual embodied some undesired characteristic that truck drivers as a group tend to share.[108] Also, in *State v. Payton*,[109] a Missouri appellate court refused to accept the prosecutor's explanation that a juror was struck for being a liquor store owner who probably knew police officers because the prosecutor never inquired whether the juror in fact knew any police officers.[110]

Two courts have rejected occupational explanations where the occupation was unconnected to the case at hand. In *Mayes v. State*,[111] the court rejected the prosecutor's explanation that

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102. 503 So. 2d 350 (Fla. Dist. Ct. App. 1987).

103. *Id.* at 352.

104. *Id.*.

105. *Id.* at 355–56.

106. *Id.* at 355.

107. *Id.* Furthermore, the prosecutor failed to demonstrate how a juror's liberalism would prove "antagonistic to the State's interest" in this case. *Id.*

108. People v. Turner, 726 P.2d 102, 108–09 (Cal. 1986). The court examined the record and found in the juror "no lack of intelligence whatever," and therefore rejected the inference that the truck driver would not be intelligent enough to serve on the jury. *Id.*

109. 747 S.W.2d 290 (Mo. Ct. App. 1988) (involving one defendant who was a police officer).

110. *Id.* at 293.

111. 550 So. 2d 496 (Fla. Dist. Ct. App. 1989).

he struck a juror because she worked as a nurse.[112] The court vacated the conviction, holding that a prosecutor may strike a juror based upon occupation only if the occupation has some relationship to the immediate case.[113] In another case, the prosecutor claimed to have struck a black nurse because the prosecutor's past experience indicated that, in general, nurses feel compassion for defendants.[114] The court rejected this explanation, however, stating that the prosecutor's reason for the strike must be related to the particular case, and not based merely upon such past experience.[115]

3. Unemployment—A common explanation for excusing jurors is their lack of employment, and courts in all but one of the cases in our sample accepted this explanation when offered. Typically, prosecutors simply explain that the juror is unemployed.[116] Prosecutors occasionally attempt to explain why the juror's unemployment is relevant to the particular case. For instance, in *Chisolm v. State*,[117] the prosecutor excused five unemployed blacks, explaining that they might sympathize with the defendant, who also was unemployed.[118] Prosecutors commonly justify dismissing unemployed jurors by claiming that they lack roots in the community.[119] Prosecutors sometimes imply that the juror's proclaimed unemployment hints that she may be earning money illegally. For example,

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112. *Id.* at 498.

113. *Id.* The court also stated that the prosecutor left a white juror who worked in the medical profession on the jury. *Id.* ("A challenge based on reasons equally applicable to jurors who were accepted tends to show that the reasons relied upon in the exercise of the peremptory challenge were pretextual.").

114. State v. Butler, 731 S.W.2d 265, 271 (Mo. Ct. App. 1987).

115. *Id.* at 272. Additionally, the prosecutor had allowed a white person who worked for the American Nurses Association to serve on the jury. *Id.*

116. For examples of accepted unemployment explanations from a variety of jurisdictions, see United States v. Ferguson, 935 F.2d 862, 864–66 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992); United States v. Jackson, 914 F.2d 1050, 1052–53 (8th Cir. 1990); United States v. Allen, 666 F. Supp. 847, 852 (E.D. Va. 1987), *aff'd sub nom.* United States v. Harrell, 847 F.2d 138 (4th Cir.), *cert. denied*, 488 U.S. 944 (1988); People v. Taylor, 524 N.E.2d 1216, 1221 (Ill. App. Ct. 1988); State v. Foote, 791 S.W.2d 879, 882 (Mo. Ct. App. 1990).

In addition, prosecutors sometimes explain that they strike a juror who has an unemployed spouse. *See, e.g.*, People v. Harper, 279 Cal. Rptr. 204, 207 n.1 (Cal. Ct. App. 1991); Levy v. State, 749 S.W.2d 176, 178 (Tex. Ct. App. 1988).

117. 529 So. 2d 635 (Miss. 1988).

118. *Id.* at 637. For another example, see United States v. McCoy, 848 F.2d 743, 745 (6th Cir. 1988).

119. *See, e.g.*, People v. Morgan, 568 N.E.2d 755, 761 (Ill. 1991), *rev'd on other grounds*, Morgan v. Illinois, 112 S. Ct. 2222 (1992); People v. Hope, 560 N.E.2d 849, 857 (Ill. 1990); People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989).

in *People v. Mack*,[120] the prosecutor struck a black woman juror, asserting that her status as unemployed and divorced raised "'some questions'" about how she supported herself.[121] Similarly, in another case, the prosecutor claimed that a black man's unemployment raised concerns about how he supported himself and his child.[122] In the only case in which an unemployment explanation was rejected, the Arkansas Supreme Court described the explanation as a "pretty thin" reason for rebutting the defendant's prima facie case.[123]

4. Religion—In only a handful of the cases we studied did the prosecutor offer a neutral explanation based upon religion. It was simply a matter of excusing persons with particular or strong religious beliefs. In most cases, the court did not attempt to determine whether other venire members with similar religious beliefs were also excused. Nevertheless, in every case, the court upheld the explanation. For instance, in *Johnson v. State*,[124] the court permitted the dismissal of a juror who gave "non-committal" responses to questions about religion, even though the court made no attempt to determine whether any of the seated jurors were similarly noncommittal.[125] Moreover, prosecutors have been permitted to excuse jurors simply because of the jurors' general religious beliefs.[126] In addition, prosecutors also have excused jurors for belonging to a "fringe religious group."[127]

5. Demeanor—A juror's demeanor is an extremely frequent neutral explanation in our study. It is also the most subjective type of explanation and thus, the easiest and most likely pretext for striking black jurors.

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120. 538 N.E.2d 1107 (Ill. 1989).

121. *Id.* at 1112.

122. People v. Jones, 559 N.E.2d 112, 115 (Ill. 1990).

123. Ward v. State, 733 S.W.2d 728, 730 (Ark. 1987).

124. 529 So. 2d 577 (Miss. 1988).

125. *Id.* at 584; *see also* Grady v. State, 730 S.W.2d 191, 195 (Tex. Ct. App. 1987) (allowing dismissal of a juror for, among other reasons, not listing religious preferences despite the lack of determination that other jurors had acted differently).

126. *See, e.g.*, People v. Malone, 570 N.E.2d 584, 589–90 (Ill. App. Ct. 1991) (allowing a strike because religion played a major role in the juror's life); State v. Worthy, 532 So. 2d 541, 553 (La. Ct. App. 1988) (allowing a strike because the juror carried a Bible); State v. Brown, 522 So. 2d 1110, 1114 (La. Ct. App. 1988) (allowing a strike because the juror had strong religious experiences).

127. Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (excluding a Jehovah's Witness, and a member of the Church of Christ); *see also* State v. Young, 569 So. 2d 570, 578 (La. Ct. App. 1990) (allowing the strike of member of the Greater New God Church).

The veracity of many demeanor explanations are completely unverifiable by a judge. This occurs particularly when the prosecutor says that the juror was dismissed simply because the prosecutor did not like the juror's demeanor in general.[128] It also occurs when the prosecutor says that a juror generated a "bad feeling,"[129] that "something seemed unfavorable,"[130] or that the juror made the prosecutor "feel uncomfortable."[131] It is just as difficult to verify the fairly common explanation that the juror did not make eye contact with the prosecutor.[132]

On the other hand, some demeanor explanations refer to aspects of the juror's behavior that a trial judge could confirm and compare to that of white jurors who were not dismissed. For instance, some prosecutors have explained that a struck juror's manner of dress indicated a personality defect. In *Lockett v. State*,[133] for example, the prosecutor successfully dismissed a black juror purportedly because he indicated a lack of respect for the proceedings by wearing a hat into the courtroom.[134] In *State v. Williams*,[135] a juror wearing sunglasses was excused for the same reason.[136] Prosecutors commonly

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128. *See, e.g.*, Levert v. State, 512 So. 2d 790, 795–96 (Ala. Crim. App. 1987); People v. Murff, 574 N.E.2d 815, 819 (Ill. App. Ct. 1991); People v. Talley, 504 N.E.2d 1318, 1327–28 (Ill. App. Ct. 1987); Stockton v. Commonwealth, 402 S.E.2d 196, 205–06 (Va. 1991).

129. State v. Willis, 552 So. 2d 39, 42 (La. Ct. App. 1989).

130. Rodgers v. State, 725 S.W.2d 477, 480 (Tex. Ct. App. 1987).

131. State v. Melvin, 392 S.E.2d 740, 748 (N.C. Ct. App. 1990); *see also* State v. Minor, 755 S.W.2d 318, 321 (Mo. Ct. App. 1988) (allowing the prosecutor to strike a juror because the juror seemed to be a "strange person"); Rice v. State, 746 S.W.2d 356, 357 (Tex. Ct. App. 1988) (allowing the prosecutor to strike a juror because the prosecutor and juror did not relate well).

132. *See, e.g.*, People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989); State v. Guillory, 544 So. 2d 643, 650 (La. Ct. App. 1989); Stanley v. State, 582 A.2d 532, 538 (Md. Ct. Spec. App. 1990); Wheeler v. State, 536 So. 2d 1347, 1351 (Miss. 1988); State v. Jones, 789 S.W.2d 545, 549 (Tenn. 1990). Conversely, in one case, a prosecutor explained that he struck a juror because the juror *did* make eye contact with him. The prosecutor stated that the venireperson "just kept glaring at me . . . [j]ust for that reason I struck him"); State v. Shanks, 809 S.W.2d 413, 415–16 (Mo. Ct. App. 1991).

133. 517 So. 2d 1346 (Miss. 1987).

134. *Id.* at 1351.

135. 545 So. 2d 651 (La. Ct. App. 1989).

136. *Id.* at 654–55 (citing the difficulty in making eye contact); *see also* United States v. Rodrequez, 859 F.2d 1321, 1324 (8th Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989) (disrespectful chain outside juror's clothing); United States v. Biaggi, 673 F. Supp. 96, 105 (E.D.N.Y. 1987) (disrespectful t-shirt); Stephens v. State, 580 So. 2d 11, 15 (Ala. Crim. App. 1990) (disrespectful sunglasses); Stanford v. Commonwealth, 793 S.W.2d 112, 113 (Ky. 1990) (excusing a juror with a "handkerchief flowing out of his

explain as a reason for dismissal that the juror fell asleep during questioning; this explanation is also verifiable and can be compared to the behavior of jurors not challenged.[137]

A solid majority of demeanor explanations are not objectively verifiable; rather, they are subjective judgments about behavior with which another observer may or may not agree. For instance, prosecutors have explained that they dismissed jurors for acting "totally off the wall" during questioning,[138] appearing inattentive,[139] strong-willed, headstrong or opinionated,[140] seeming weak or tentative,[141] nervous,[142] and too casual.[143] Explanations have been based on grimaces,[144] sympathetic looks,[145] smiles,[146] nods,[147] and blank stares.[148]

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suit with a red shirt on"); Chambliss v. Commonwealth, 386 S.E.2d 478, 479 (Va. Ct. App. 1989) (disrespectful sweatsuit); Taitano v. Commonwealth, 358 S.E.2d 590, 591 (Va. Ct. App. 1987) (excusing a juror who was "dressed as if he were going to work at the shipyard").

137. *See, e.g.*, People v. Jenkins, 545 N.E.2d 986, 1003 (Ill. App. Ct. 1989); State v. Rush, 788 S.W.2d 784, 785 (Mo. Ct. App. 1990). It is more difficult to verify and cross-check an explanation that the juror was drowsy during questioning. *See, e.g.*, Seubert v. State, 749 S.W.2d 585, 586 (Tex. Ct. App. 1988), *rev'd on other grounds*, 787 S.W.2d 68 (Tex. Crim. App. 1990).

138. State v. Griffin, 563 So. 2d 334, 339 (La. Ct. App. 1990).

139. *See, e.g.*, United States v. Allen, 666 F. Supp. 847, 851 (E.D. Va. 1987), *aff'd*, 847 F.2d 138 (4th Cir.), *cert. denied*, 488 U.S. 944 (1988); People v. Daniels, 517 N.E.2d 626, 627 (Ill. 1987); State v. Jackson, 548 So. 2d 29, 33–34 (La. Ct. App. 1989); State v. Gilmore, 522 So. 2d 658, 661 (La. Ct. App. 1988). For cases where specific examples of inattentiveness are given, see United States v. Hendrieth, 922 F.2d 748, 749 (11th Cir. 1991) (striking a juror who was "rubbing and rolling her eyes"); United States v. Garrison, 849 F.2d 103, 105 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988) (striking two jurors who talked during voir dire); State v. Brown, 522 So. 2d 1110, 1114 (La. Ct. App. 1988) (reading a book during voir dire).

140. *See, e.g.*, *Ex parte* Williams, 571 So. 2d 987, 990 (Ala. 1990); People v. Murff, 574 N.E.2d 815, 819 (Ill. 1991); People v. Taylor, 524 N.E.2d 1216, 1220 (Ill. 1988); State v. Sanders, 383 S.E.2d 409, 414 (N.C. Ct. App. 1989).

141. *See, e.g.*, United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990); State v. Otis, 586 So. 2d 595, 602 (La. Ct. App. 1991); State v. Griffin, 563 So. 2d 334, 339 (La. Ct. App. 1990); State v. Wiley, 513 So. 2d 849, 863 (La. Ct. App. 1987).

142. *See, e.g.*, Chew v. State, 527 A.2d 332, 341 (Md. Ct. Spec. App. 1987); State v. Smith, 400 S.E.2d 712, 727 (N.C. 1991).

143. *See, e.g.*, United States v. Biaggi, 853 F.2d 89, 96 (2d Cir. 1988) (flippant attitude), *cert. denied*, 489 U.S. 1052 (1989); People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989); People v. Jenkins, 545 N.E.2d 986, 1003 (Ill. App. Ct. 1989) (cavalier attitude).

144. *See, e.g.*, Baker v. State, 555 So. 2d 273, 274–75 (Ala. Crim. App. 1989).

145. *See, e.g.*, State v. Williams, 545 So. 2d 651, 654 (La. Ct. App. 1989).

146. *See, e.g.*, Stewart v. State, 748 S.W.2d 543, 545 (Tex. Ct. App. 1988); Yarbough v. State, 732 S.W.2d 86, 90 (Tex. Ct. App. 1987).

147. *See, e.g.*, Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987).

148. State v. Collier, 553 So. 2d 815, 820 (La. 1989).

When courts reject demeanor-based explanations, they often recognize the possibility that the explanation was invoked as a pretext for a race-based strike. In *Avery v. State*,[149] the prosecutor explained that he struck four blacks because of their general demeanor and body language.[150] Little or no voir dire questioning of the black jurors took place,[151] and the court noted the unlikelihood of having four blacks who actually displayed objectionable demeanor.[152] Accordingly, the court rejected the prosecutor's explanations, holding that they appeared to be post-hoc rationalizations for striking blacks from the jury.[153] In another case, a court rejected the prosecutor's dismissal of a juror for yawning and appearing inattentive because the explanation seemed unreasonable and unsupported by the record.[154] In *Williams v. State*,[155] the court rejected the explanation that an excused juror appeared "docile" because the explanation appeared suspect upon considering the weaknesses of various other explanations for that juror's dismissal.[156] Likewise, a prosecutor's explanation that a dismissed juror "looked a little slow" was rejected by the Georgia Supreme Court as insufficient when juxtaposed with the weakness of other explanations offered during the same proceeding.[157]

Some courts rejected demeanor-based explanations and stressed the need for evidence that corroborates the explanation. *State v. Payton*[158] rejected three demeanor-based explanations, stating that the trial court should closely examine such explanations.[159] Because the prosecution asked no questions of the dismissed jurors, the *Payton* court rejected the explanations.[160] In an Alabama case, the prosecutor's explanation that

149. 545 So. 2d 123 (Ala. Crim. App. 1988).
150. *Id.* at 126.
151. *Id.* at 127.
152. *Id.*
153. *Id.* at 128.
154. Hill v. State, 547 So. 2d 175, 176–77 (Fla. Dist. Ct. App. 1989).
155. 548 So. 2d 501 (Ala. Crim. App. 1988).
156. *Id.* at 505. The court considered "implausible" the prosecutor's assumption that the juror was opposed to punishing criminals simply because she worked for a public school, and characterized as conjectural the assumption that because she had heard of the defendant, she knew of a previous mistrial. *Id.* at 506–07.
157. Gamble v. State, 357 S.E.2d 792, 796 (Ga. 1987). Other explanations rejected by the court included Masonic membership and knowledge of persons with alcohol problems. *Id.*
158. 747 S.W.2d 290 (Mo. Ct. App. 1988).
159. *Id.* at 293.
160. *Id.* at 293–94.

three jurors were struck for improper demeanor was rejected as "superficial and show[ing] a lack of proper examination."[161] The prosecutor in *State v. Butler*[162] claimed to have struck two black jurors because they laughed.[163] Because no questions were asked to check the jurors' seriousness or respect for the judicial system, the court rejected the explanations.[164] The *Butler* court also rejected an explanation that a juror seemed intimidated because the prosecution did not attempt to determine whether the juror actually was intimidated.[165] Also, in *Mitchell v. State*,[166] the Arkansas Supreme Court rejected a demeanor explanation because the trial court had accepted it at face value without investigating its accuracy.[167]

The South Carolina Supreme Court rejected a demeanor explanation because the explanation rested upon racial stereotypes. In *State v. Tomlin*,[168] the prosecutor justified dismissing a black woman because she "walked slow [and] talked low,"[169] and excusing a black man because he "shucked and jived" as he walked.[170] Both, the court said, represented racial stereotypes and thus impermissible grounds for a neutral explanation under *Batson*.[171]

6. Relationship with a Trial Participant—Another common neutral explanation is that the prospective juror has a personal relationship with, or special knowledge of, a trial participant. Such explanations invariably are accepted by trial courts and upheld by appellate courts. The objective rationale behind a prosecutor striking a juror for these reasons seems clear: concern about juror bias. A closer examination of the relationship, however, may show that it is so attenuated as to be mere pretext. Jurors are struck because of purported relationships to trial participants in a range of situations from being a member of the defendant's

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161. Madison v. State, 545 So. 2d 94, 97, 99 (Ala. Crim. App. 1987). The prosecutor's voir dire of these jurors was so desultory that the prosecutor was actually unable to say what about the jurors' demeanor troubled him. *Id.* at 97.

162. 731 S.W.2d 265 (Mo. Ct. App. 1987).

163. *Id.* at 270.

164. *Id.* at 271–72.

165. *Id.* at 272–72.

166. 750 S.W.2d 936 (Ark. 1988).

167. *Id.* at 939–40. The prosecutor had asserted that the venireperson's manner in responding to questions indicated his dishonesty. *Id.*

168. 384 S.E.2d 707 (S.C. 1989).

169. *Id.* at 708.

170. *Id.* (emphasis omitted).

171. *Id.* at 710.

family[172] to having mere potential knowledge of a participant's identity.[173] Furthermore, prosecutorial racial bias is the more likely factor when blacks and whites with similar relationships to trial participants are treated differentially. The existence of racially segregated social communities also may contribute to the use of this explanation to exclude blacks disproportionately in those cases where the defendant is black.

Courts routinely accept explanations from prosecutors who claim that they challenged a juror based upon that juror's relationship with the defendant. In most states, prospective jurors related to the defendant by blood or marriage may be excused for cause.[174] If the trial judge nonetheless chooses not to excuse the juror for cause, perhaps because the juror's relationship to the defendant is too attenuated,[175] then the prosecutor can exercise a peremptory challenge to exclude the juror. In *Ex parte Lynn*,[176] the prosecutor successfully challenged a juror whose husband was related to the defendant.[177]

More often, however, peremptories are exercised in cases in which the juror's relationship to the defendant lies outside family ties. For example, in *State v. Henderson*,[178] a Louisiana court found that because a venireperson knew the defendant's family, the prosecutor permissibly exercised a peremptory challenge against her.[179] *Henderson's* holding is consistent with other case law.[180] Typically, the cases do not

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172. *See, e.g.*, *Ex parte* Lynn, 543 So. 2d 709, 711 (Ala. 1988) (striking a venireperson whose husband was related to the defendant's father).

173. *See, e.g.*, Hillman v. State, 362 S.E.2d 417, 418 (Ga. Ct. App. 1987) (striking a venireperson on the belief that he knew the district attorney).

174. *See, e.g.*, MICH. CT. R. § 6.412 (authorizing challenge of cause for a prospective juror who is related within the ninth degree by blood or marriage to a party or an attorney); CAL. CIV. PROC. CODE § 229 (West 1994) (authorizing challenge for cause of any prospective juror who is related within the fourth degree to a party, an alleged witness, or an alleged victim).

175. *See, e.g.*, State v. Bland, 558 So.2d 719, 724 (La. Ct. App. 1990) (stating that mere relationship between the juror and a party is not enough to justify a strike); State v. Lawson, 794 S.W.2d 363, 367 (Tenn. Crim. App. 1990) (retaining a juror who was the widow of the defendant's first cousin).

176. 543 So. 2d 709 (Ala. 1988).

177. *Id.* at 711; *see also* Jackson v. State, 549 So. 2d 616, 618 (Ala. Crim. App. 1989) (excusing a juror whose husband was related to the defendant's stepfather).

178. 571 So. 2d 770 (La. Ct. App. 1990).

179. *Id.* at 773.

180. For other illustrative cases in which the venireperson was struck because the juror knew the defendant, see United States v. Alston, 895 F.2d 1362, 1367

discuss how the juror knew the defendant beyond the declaratory statement by the prosecutor.

Prosecutors also exercise peremptory challenges upon finding a social or professional connection between the defense attorney and the prospective juror. Such social relationships extend across a continuum, from a venireperson's close friendship with the defense counsel[181] to a venireperson's knowledge of a local defense counsel who is not involved in the case at bar.[182] Even jurors who profess only indirect acquaintance with the defense counsel often are struck.[183] In one case, the prosecutor struck a prospective juror in part because the juror knew employees of the defense lawyer.[184] Moreover, courts generally allow prosecutors to strike jurors who have been involved either currently or previously in a professional relationship with the defense counsel[185] or her law firm.[186]

The cases indicate that prosecutors rarely strike venirepersons with whom they share social ties.[187] Predictably,

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(11th Cir. 1990); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989); Avery v. State, 545 So. 2d 123, 126 (Ala. Crim. App. 1988); Chisolm v. State, 529 So. 2d 630, 633 (Miss. 1988); State v. Johnson, 395 S.E.2d 167, 168 (S.C. 1990).

181. *See, e.g.*, McGahee v. State, 554 So. 2d 454, 461 (Ala. Crim. App.), *aff'd*, 554 So. 2d 473, (Ala. 1989); *see also* Strong v. State, 538 So. 2d 815, 816 (Ala. Crim. App. 1988); People v. Young, 538 N.E.2d 453, 456 (Ill. 1989); State v. Melvin, 392 S.E.2d 740, 748 (N.C. Ct. App. 1990); State v. Ramos, 574 A.2d 1213, 1217 (R.I. 1990); State v. Jones, 789 S.W.2d 545, 549 (Tenn.), *cert. denied*, 498 U.S. 908 (1990).

182. *See, e.g.*, Durham v. State, 363 S.E.2d 607, 610–11 (Ga. Ct. App. 1987) (striking a juror on the mistaken belief that the juror was a friend of several defense attorneys in the area); Chisolm v. State, 529 So. 2d 630, 633 (Miss. 1988) (excluding a juror because of the juror's connections with a local defense attorney).

183. *See, e.g.*, State v. Butler, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990).

184. State v. Brown, 522 So. 2d 1110, 1114 (La. Ct. App. 1988), *cert. denied*, 548 So. 2d 1222 (La. 1989).

185. *See, e.g.*, Lewis v. State, 535 So. 2d 228, 231–32 (Ala. Crim. App. 1988) (upholding the prosecutor's dismissal of two jurors who had been clients of the defense counsel). For examples of strikes where the defense lawyer had represented a relative of the juror, see Pollard v. State, 549 So. 2d 593, 595 (Ala. Crim. App. 1989) (juror's father); Ward v. State, 539 So. 2d 407, 408 (Ala. Crim. App. 1988) (juror's son); State v. Mims, 524 So. 2d 526, 548 (La. Ct. App.) (juror's brother), *cert. denied*, 531 So. 2d 267 (La. 1988); State v. Porter, 391 S.E.2d 144, 151 (N.C. 1990) (juror's girlfriend); *cf.* Bedford v. State, 548 So. 2d 1097, 1098 (Ala. Crim. App. 1989) (excusing a juror because the defense counsel's law firm had represented the juror's relative).

186. *See, e.g.*, United States v. Miller, 939 F.2d 605, 609 (8th Cir. 1991) (striking a juror who had professional ties with defense counsel's law firm); *cf.* State v. Knox, 464 N.W.2d 445, 448 (Iowa 1990) (upholding the strike of a juror who knew the defense counsel's law partners and had worked with defense counsel on an organization's board).

187. *But see* State v. Lawrence, 791 S.W.2d 729, 730 (Mo. Ct. App. 1990) (allowing a prosecutor to strike a juror whom he thought was his wife's doctor).

however, the prosector will exercise peremptory challenges when he believes he has previously brought criminal charges against a member of the juror's family[188] or when he has represented a party that opposed the juror in an earlier civil case.[189] For example, in *State v. Brown*,[190] the prosecutor successfully struck a juror because he had represented the juror's husband in a civil matter.[191] Prosecutors also appear concerned when jurors know the court[192] or law enforcement personnel[193] involved in the case.

Lastly, prosecutors strike venirepersons for having ties to the victim of the crime[194] or for having an actual or potential acquaintance with witnesses scheduled to testify.[195] These

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188. *See, e.g.*, Brownlee v. State, 535 So. 2d 221, 223 (Ala. Crim. App. 1988); Johnson v. State, 512 So. 2d 819, 821 (Ala. Crim. App. 1987); State v. Brown, 507 So. 2d 304, 309 (La. Ct. App. 1987); Chisolm v. State, 529 So. 2d 630, 633 (Miss. 1988).

189. *See, e.g.*, Baker v. State, 555 So. 2d 273, 275 (Ala. Crim. App. 1989) (involving a prosecutor who had sued the juror and his son); Pollard v. State, 549 So. 2d 593, 596 (Ala. Crim. App. 1989) (involving a prosecutor who had previously represented the city when the juror had sued the city over voting rights); State v. Moody, 587 So. 2d 183, 187 (La. Ct. App. 1991) (involving a prosecutor whose civil practice had frequently engaged in actions against the juror's father).

190. 507 So. 2d 304 (La. Ct. App. 1987).

191. *Id.* at 309.

192. *See, e.g.*, People v. Sanders, 797 P.2d 561, 575 (Cal. 1990) (involving a juror who knew the trial judge), *cert. denied*, 111 S. Ct. 2249 (1991); State v. Pruitt, 755 S.W.2d 309, 312 (Mo. Ct. App. 1988) (upholding the strike of a juror who knew the deputy sheriff serving the court "to avoid the appearance of any impropriety or bias" in the courtroom), *cert. denied*, 493 U.S. 1093 (1990).

193. *See, e.g.*, State v. Johnson, 395 S.E.2d 167, 168 (S.C. 1990) (involving the juror's neighbor who had been arrested by an officer involved in the case); Garza v. State, 739 S.W.2d 374, 375 (Tex. Ct. App. 1987) (involving the juror's brother who was the chief deputy sheriff who had decided not to investigate the crime for which the defendant was charged).

194. *See, e.g.*, State v. Baker, 528 So. 2d 776, 780 (La. Ct. App. 1988) (upholding the strike of a juror in aggravated kidnapping case in part because the juror was related by marriage to the victims); *cf.* State v. Kilgore, 771 S.W.2d 57, 63 (Mo.) (upholding the strike of a juror who had seen victim's son, a homosexual transvestite, on television and on the street), *cert. denied*, 493 U.S. 874 (1989).

195. *See, e.g.*, United States v. Hendrieth, 922 F.2d 748, 749 (11th Cir. 1991) (sister-in-law of the defense witness); United States v. Biaggi, 705 F. Supp. 867, 869 (S.D.N.Y. 1988) (employee of the defense witness); Davis v. State, 555 So. 2d 309, 314 (Ala. Crim. App. 1989) (acquaintance of the defense witness); Henderson v. State, 360 S.E.2d 263, 266 (Ga. 1987) (same); People v. Hope, 560 N.E.2d 849, 868 (Ill. 1990) (same building as a potential witness), *vacated*, 111 S. Ct. 2792 (1991) (explanations found to be pretextual), *and modified*, 589 N.E.2d 503, 506 (Ill. 1992); State v. Milo, 815 P.2d 519, 525–26 (Kan. 1991) (acquaintance with the victim's daughter or other people involved in the case); State v. Boyd, 784 S.W.2d 226, 227 (Mo. Ct. App. 1989) (acquaintance with a family "with the same surname as two of the [defense] witnesses,"); State v. Rowe, 423 N.W.2d 782, 787 (Neb. 1988) (acquaintance with a witness); Sanders v. State, 727 S.W.2d 674, 676 (Tex. Crim. App.

circumstances raise several concerns for prosecutors. First, the juror may have pretrial knowledge of the case. Second, even without foreknowledge of the facts, the juror may overvalue or undervalue the testimony of witnesses, depending upon the juror's prior relationship to them. Third, if the juror knows a witness who is an associate of the defendant, then the juror may be personally acquainted with the defendant.

A few courts have rejected the explanation that a juror is familiar with the people involved with the case. In *People v. Harris*,[196] the Illinois Supreme Court rejected the explanation that the juror maintained a friendship with a lawyer as sufficient to rebut the prima facie case of discrimination.[197] In *State v. Oglesby*,[198] the South Carolina Supreme Court ruled that the solicitor had applied "blatantly inconsistent standards" when he struck three black jurors on the ground that they were patients of a doctor who was a defense witness, but he did not excuse a white juror who was also the same doctor's patient.[199] In another case, a prosector claimed that he had struck five prospective jurors because they had indicated that they knew the defendant.[200] An Alabama appellate court rejected this explanation because court records indicated that only one of them in fact knew the defendant.[201] In *Gamble v. State*,[202] the prosecutor excluded a prospective juror because he inferred that he previously must have prosecuted the juror for child support because the juror had called the prosecutor "the D.A.," even though the prosecutor did not recognize or know the juror.[203] The Georgia Supreme Court rejected this exclusion as too tenuous.[204] As a last representative example, the Missouri Court of Appeals rejected the state attorney's purported concern over a black juror's potential unease in rendering judgment against the defendant whom the juror knew from church because the prosecutor did not exhibit

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1987) (citing an acquaintance with a defense character witness).

196. 544 N.E.2d 357 (Ill. 1989), *cert. denied*, 494 U.S. 1018 (1990).

197. *Id.* at 384.

198. 379 S.E.2d 891 (S.C. 1989).

199. *Id.* at 892.

200. Floyd v. State, 539 So. 2d 357, 364 (Ala. Crim. App. 1987).

201. *Id.* at 364.

202. 357 S.E.2d 792 (Ga. 1987).

203. *Id.* at 795.

204. *Id.* The prosecutor apparently argued that the juror calling him "the D.A." indicated that the juror had previously been prosecuted by him. The prosecutor himself admitted that the inference was very remote. *Id.*

similar concern regarding a white juror who knew the defendant from work.[205]

7. Lack of "Intelligence"—Prosecutors routinely strike jurors because the jurors lack formal education or because they appear inarticulate. Prosecutors apparently think that criminal trials are so complicated that large segments of the population, the undereducated and the uneducated, should be barred from serving on juries. Occasionally, potential jurors are struck because they have not attained a certain level of formal education, such as obtaining a high school degree.[206] More commonly, when the prosecutor has alleged that the juror had limited educational achievement, appellate courts have not explicitly required trial courts to ensure the accuracy of the assertion.[207] Rather, they tend to defer to trial courts' assessment of the evidence and, consequentially, to their ruling.

In addition, prosecutors strike jurors who appear to be of below-average intelligence, although no formal criteria define what constitutes an acceptable degree of intelligence.[208] For

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205. State v. Reliford, 753 S.W.2d 9, 11 (Mo. Ct. App. 1988).

206. *See, e.g.*, United States v. Lane, 866 F.2d 103, 108 (4th Cir. 1989) (upholding the dismissal of a black juror who had not completed high school because the prosecutor wanted an educated jury, despite the prosecutor's acceptance of a white juror who had not finished high school); United States v. Harrell, 847 F.2d 138, 139 (4th Cir.) (excusing a juror who had no secondary education), *cert. denied*, 488 U.S. 944 (1988); State v. Lindsey, 543 So. 2d 886, 898 (La. 1989) (excusing a juror who had not finished eleventh grade), *cert. denied*, 494 U.S. 1074 (1990).

207. *See, e.g.*, People v. Staten, 746 P.2d 1362, 1366 (Colo. Ct. App. 1987) (ruling without a discussion of the trial court's level of inquiry); State v. Young, 569 So. 2d 570, 578 (La. Ct. App. 1990) (same), *cert. denied*, 575 So. 2d 386 (La. 1991); State v. Moore, 438 N.W.2d 101, 107 (Minn. 1989) (ruling without comment on the trial court's duty to verify independently the prosecutor's reasons for dismissal, despite defense's arguments at trial for such); Lockett v. State, 517 So. 2d 1346, 1352 (Miss. 1987) (lacking court comment on the level of the investigation), *cert. denied*, 487 U.S. 1210 (1988).

208. *See, e.g.*, United States v. Biaggi, 705 F. Supp. 867, 869 (S.D.N.Y. 1988) (striking a juror for the inability to understand complex RICO charges and not speaking or understanding English well); Gaston v. State, 581 So. 2d 548, 550 (Ala. Crim. App. 1991) (striking a juror who prosecutor believed had a mental problem that would hinder her understanding of DNA identification testimony); Pollard v. State, 549 So. 2d 593, 595 (Ala. Crim. App.) (excusing a juror who was unemployed, had two prior convictions, and could not handle complex issues), *cert. denied*, No. 809–1224 (Ala. 1989); Brownlee v. State, 535 So. 2d 221, 223 (Ala. Crim. App. 1988) (excusing a juror for not being smart enough to understand the accomplice theory of criminal liability); State v. Jackson, 760 P.2d 589, 591 (Ariz. Ct. App. 1988) (upholding the strike in part because of the prosecutor's explanation that "given her responses, it was my impression that she wasn't a particularly bright juror").

example, in *Stanford v. Commonwealth*,[209] a black juror was stricken successfully because the prosecutor perceived him as mentally "slow."[210] Prosecutors also exercise peremptory strikes when the interrogating attorney and the prospective juror miscommunicate, whether the misunderstanding was real or apparent. These miscommunications involve jurors experiencing difficulty in answering questions or miscomprehending either the voir dire or the trial process. Such a miscomprehension occurred in *United States v. Sherrills*,[211] in which, during voir dire, an inattentive juror misunderstood the term "foreperson" and inaccurately answered that she had served as one on a prior jury.[212] In *State v. Lindsey*,[213] a juror was struck because she had difficulty articulating her response to a multiple-part question regarding her background.[214] Further, prosecutors do not necessarily wait for verbal blunders before striking jurors; some facial expressions also precipitate strikes.[215] Alternatively, if the prosecutor does not immediately understand the juror's response, because the juror had an accent or the juror's meaning was unclear, then the prosecutor may strike the juror without seeking further elaboration.[216]

8. Socioeconomic Status—Consistent with efforts to keep lesser-educated people off juries, prosecutors use peremptory challenges to keep low-income people off the jury.[217]

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209. 793 S.W.2d 112 (Ky. 1990).

210. *Id.* at 114.

211. 929 F.2d 393 (8th Cir. 1991).

212. *Id.* at 394. The court explained that it had allowed challenges based on jurors' inattentiveness, but that it did so only with a fully developed record. *Id.* at 395.

213. 543 So. 2d 886 (La. 1989), *cert. denied*, 494 U.S. 1074 (1990).

214. *Id.* at 898. The juror's "giddy" manner also bothered the prosecutor. *Id.*; *see also* United States v. Hoelscher, 914 F.2d 1527, 1541 (8th Cir. 1990) (involving a juror who did not know if the previous case for which she was a juror had been civil or criminal); People v. Mack, 538 N.E.2d 1107, 1111 (Ill. 1989) (involving a juror who did not seem to understand questions she was asked), *cert. denied*, 549 U.S. 1093 (1990); State v. Carter, 522 So. 2d 1100, 1105 (La. Ct. App. 1988) (involving a juror who did not seem to understand the proceedings).

215. *See, e.g.*, State v. Guillory, 544 So. 2d 643, 650 (La. Ct. App.) (involving facial expression that indicated that the juror did not understand voir dire questions), *cert. denied*, 551 So. 2d 1334 (La. 1989).

216. *See, e.g.*, United States v. Ruiz, 894 F.2d 501, 506–07 (2d Cir. 1990); People v. Staten, 746 P.2d 1362, 1366 (Colo. Ct. App. 1987); State v. Gonzalez, 538 A.2d 210, 215–16 (Conn. 1988); State v. Boyd, 784 S.W.2d 226, 227 (Mo. Ct. App. 1989).

217. *See, e.g.*, United States v. Hughes, 911 F.2d 113, 114 (8th Cir. 1990) (juror of low economic status); State v. Andrews, 770 S.W.2d 424, 425 (Mo. Ct. App. 1989) (poor and unemployed juror); *cf.* Killens v. State, 362 S.E.2d 425, 427 (Ga. Ct. App. 1987) (social security disability recipient).

Prosecutors also strike middle-class workers from juries, based upon their socioeconomic status. For example, in *Shelton v. State*,[218] the prosecutor struck three blue-collar workers from the jury because she felt that an earlier mistrial had resulted from the victim's appearing arrogant to blue-collar workers on the first jury.[219]

9. Residence—In the numerous cases in which the place of the juror's residence is used as the neutral explanation for the prosecutor's strike, the vast majority of such explanations were accepted by trial courts and affirmed by courts of appeal. These geographically based challenges, even if not obviously race-based, at least raise the specter of discrimination, given that racial segregation in housing persists throughout the United States.[220]

When a venireperson is struck because the juror resides in the "neighborhood" of the defendant or a witness, "neighborhood" seemingly can be defined as broadly as necessary to support the strike. The size of the defendant's neighborhood ranges from a one-block radius from her home[221] to her entire town.[222] It is unclear whether courts consider the actual size of the municipality. In most cases, the lack of a defined "neighborhood," results in courts endorsing the bare assertion of proximity.[223] Prosecutors also exercise challenges when a

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218. 521 So. 2d 1035 (Ala. Crim. App. 1987), *cert. denied*, 521 So. 2d 1038 (Ala. 1988).

219. *Id.* at 1037; *see also* People v. Barber, 245 Cal. Rptr. 895, 900 (Cal. Ct. App. 1988) (striking a juror who wore a Coors jacket and worked on an assembly line).

220. *See, e.g.*, Alex S. Nevarro, Note, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statute*, 81 GEO. L.J. 2727, 2727, 2744 (1993). For a discussion and statistical compilation of racial segregation in housing, see A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

221. *See, e.g.*, *Ex parte* Lynn, 543 So. 2d 709 (Ala. 1988), *cert. denied*, 493 U.S. 945 (1989).

222. *See, e.g.*, United States v. Angiulo, 847 F.2d 956, 985 (1st Cir.) (finding neutral the explanation that the juror was from the same small town as a number of the defendants), *cert. denied*, 488 U.S. 852 (1988).

223. *See, e.g.*, United States v. Williams, 936 F.2d 1243, 1247 (11th Cir.) (striking a juror because she lived in the same geographical area as persons convicted by same prosecutor in an earlier case), *cert. denied*, 112 S. Ct. 612 (1991); *Ex parte* Lynn, 543 So. 2d 709, 711 (Ala. 1988) (allowing the exclusion of jurors who lived in the same neighborhood as the defendant's relatives), *cert. denied*, 493 U.S. 945 (1989); People v. Davis, 234 Cal. Rptr. 859, 869 (Cal. App. Ct. 1987) (striking a juror because she was from a suburb adjacent to the one where the crime had occurred); People v. Jones, 559 N.E.2d 112, 115 (Ill. App. Ct.) (allowing a strike where the juror lived in the defendant's neighborhood), *appeal denied*, 561 N.E.2d 700 (Ill. 1990), *cert. denied*, 112 S. Ct. 1593 (1992); Johnson v. State, 529 So. 2d 577, 583

relative of the juror lives in the defendant's neighborhood[224] or when a relative of the defendant lives in the same neighborhood as the juror.[225] Attending the same high school as the defendant supports a challenge as well.[226] One juror was struck in part because of some "familiarity" with the defendant's area of residence, although the prosecutor did not explain the extent of that familiarity.[227]

Prosecutors also strike jurors who live or work near the crime scene.[228] The court in *People v. Baisten*[229] noted that residence in the location where the crime was committed might cause the juror to overhear relevant information outside the courtroom and thus lose objectivity.[230] In *People v. Harper*,[231] the juror worked at the post office near the location of the defendant's alibi.[232] Although the juror indicated that she had never seen a drug deal, the court accepted the prosecutor's questioning of the juror's probity and consequently accepted the strike.[233]

10. Marital Status—Our sample uncovered numerous instances in which courts accepted explanations from prosecutors who said that they struck a juror because the juror was single. One case upholding the deliberate strike of unmarried black jurors is *Thomas v. State*,[234] in which a

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(Miss. 1988) (accepting the prosecutor's explanation that the juror was from the same county as the defendant and his family).

If the defendant is a political figure, venirepersons are often struck if they are constituents of the defendant; the cases rarely mention whether the jurors even voted for the defendant. *See, e.g.*, United States v. Mitchell, 877 F.2d 294, 303 (4th Cir. 1989); United States v. Biaggi, 705 F. Supp. 867, 870 (S.D.N.Y. 1988).

224. *See, e.g.*, State v. Guillory, 544 So. 2d 643, 650 (La. Ct. App.), *cert. denied*, 551 So. 2d 1334 (La. 1989); State v. Threet, 407 N.W.2d 766, 771 (Neb. 1987).

225. *See, e.g.*, *Ex parte* Lynn, 543 So. 2d 709, 711 (Ala. 1988), *cert. denied*, 493 U.S. 945 (1989).

226. United States v. Peete, 919 F.2d 1168, 1179 (6th Cir. 1990).

227. Watkins v. State, 551 So. 2d 421, 422 (Ala. Crim. App. 1988), *cert. denied*, No. 87-1440 (Ala. 1988), *and cert. denied*, No. 88-1413 (Ala. 1989).

228. *See, e.g.*, Brownlee v. State, 535 So. 2d 221, 223 (Ala. Crim. App. 1988) (striking a juror who lived in the general area of the crime); State v. Wylie, 525 A.2d 528, 534 (Conn. App. Ct.) (striking a juror who had knowledge of the general area and the store where the crime occurred because he stopped there "perhaps twice" to purchase coffee), *cert. denied*, 528 A.2d 1154 (Conn. 1987); Garza v. State, 739 S.W.2d 374, 375 (Tex. Ct. App. 1987) (striking a juror who frequented the bar that was the crime scene).

229. 560 N.E.2d 1060 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 840 (Ill. 1990).

230. *Id.* at 1071.

231. 279 Cal. Rptr. 204 (Cal. Ct. App. 1991).

232. *Id.* at 207.

233. *Id.*

234. 555 So. 2d 320 (Ala. Crim. App. 1989).

black male defendant was charged with murdering his girlfriend.[235] The Court accepted strikes based upon unmarried status, reasoning that a "single male might be sympathetic" to the defendant under the facts of the case.[236]

Not surprisingly, prosecutors often combine the explanation of dismissing unmarried jurors with another rationale, such as the juror's age or employment status. For example, in *People v. Taylor*,[237] the prosecutor struck a black prospective juror because he was young, single, and unemployed.[238] The appellate court noted that although whites selected for the panel shared two of the three characteristics, none had all three.[239] The court added that the prosecutors may have thought that a young, single, unemployed person was immature and would relate well to the young defendant who faced drug charges.[240] In two instances, courts have upheld strikes when prosecutors argued that single, unemployed persons lacked ties to the community and thus could not serve effectively as jurors.[241] Prosecutors also frequently strike single mothers,[242] purportedly because they would be unable to focus on the trial given their parental responsibilities[243] or, in one case, because the juror lacked the "moral fiber" to evaluate a criminal case.[244] Finally, prosecutors may exercise

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235. *Id.* at 321.

236. *Id.* at 322. The prosecutor also struck single jurors who were not black. *Id.*; for other such cases, see Bedford v. State, 548 So. 2d 1097, 1098 (Ala. Crim. App. 1989); Mathews v. State, 534 So. 2d 1129, 1130 (Ala. Crim. App. 1988).

237. 524 N.E.2d 1216 (Ill. App. Ct. 1988).

238. *Id.* at 1221.

239. *Id.*

240. *Id.* For other cases in which courts upheld strikes because a juror was young, unemployed, and single, see United States v. Jackson, 914 F.2d 1050, 1052 (8th Cir. 1990); United States v. Ross, 872 F.2d 249, 250 (8th Cir. 1989); Stephens v. State, 580 So. 2d 11, 19 (Ala. Crim. App. 1990), *aff'd*, 580 So. 2d 26 (Ala. 1991); Minnifield v. State, 530 So. 2d 245, 249 (Ala. Crim. App. 1987); Funches v. State, 518 So. 2d 781, 783 (Ala. Crim. App. 1987); People v. Daniels, 517 N.E.2d 626, 627 (Ill. App. Ct. 1987), *appeal denied*, 522 N.E.2d 1249 (Ill. 1988).

241. *See, e.g.*, People v. Harris, 544 N.E.2d 357, 380 (Ill. 1989), *cert. denied*, 494 U.S. 1018 (1990).

242. *See, e.g.*, United States v. Nichols, 937 F.2d 1257, 1263 (7th Cir. 1991) (white and black single mothers), *cert. denied*, 112 S. Ct. 989 (1992); United States v. Williams, 934 F.2d 847, 849 (7th Cir. 1991); State v. Bell, 759 S.W.2d 651, 652 (Tenn. 1988), *cert. denied*, 489 U.S. 1091 (1989).

243. United States v. Williams, 934 F.2d 847, 849 (7th Cir. 1991).

244. People v. Thomas, 559 N.E.2d 262, 266 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 846 (Ill. 1990), *cert. denied*, 112 S. Ct. 89 (1991). The court allowed the strike, despite its misgivings about the prosecution's prejudice against unwed mothers. *Id.* *See also* Wheeler v. State, 536 So. 2d 1347, 1351 (Miss. 1988) (striking a juror because

peremptory challenges against single women due to fear they may be attracted to a male defendant.[245]

Prosecutors generally do not relate the marital status of the juror directly to an element of the case, although they do occasionally connect alternative reasons given for the strike with the case at hand. For example, in *State v. Richburg*,[246] in which the defendant was charged with possession of crack cocaine, the prosecutor struck a single college student on the presumption that college students are more tolerant toward drugs.[247] Similarly, in another drug case, a federal prosecutor who struck a thirty-three-year-old single female reasoned that jurors who are single and young are more likely to have liberal attitudes toward drugs.[248] In *Mathews v. State*,[249] the defendant was charged with unlawful possession of phenobarbital.[250] A possible defense to this charge was that the defendant received the drugs from a friend to relieve his pain.[251] The State's attorney successfully challenged two single black jurors whose friends had given them drugs to relieve ailments after stating that young, single jurors tend to be too sympathetic to defendants in general and drug defendants in particular.[252]

In extremely rare instances, courts rejected explanations premised in part on the juror's being unmarried.[253] In *People v. McDonald*,[254] the Illinois Supreme Court rejected the explanation that young, single males are the "worst jurors for a rape case"[255] because the prosecutor had challenged a thirty-four-year-old single black male but accepted an eighteen-

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an unwed mother of two would not be "conservative" enough for the state).

245. State v. Pratt, 452 N.W.2d 54, 58 (Neb. 1990); *see also* Yarbough v. State, 732 S.W.2d 86, 90 (Tex. Crim. App. 1987) (allowing the strike of a young, single juror because she smiled at the defendants), *vacated on other grounds*, 761 S.W.2d 18 (Tex. Crim. App. 1988) (en banc).

246. 403 S.E.2d 315 (S.C. 1991).

247. *Id.* at 317.

248. United States v. Prine, 909 F.2d 1109, 1113 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1318, *and cert. denied*, 111 S. Ct. 2263 (1991).

249. 534 So. 2d 1129 (Ala. Crim. App. 1988).

250. *Id.* at 1129.

251. *Id.* at 1130.

252. *Id.*

253. *See, e.g.*, Powell v. State, 548 So. 2d 590, 592–94 (Ala. Crim. App. 1988), *cert. denied* No. 88-435, (Ala. 1989); Owens v. State, 531 So. 2d 22, 24–26 (Ala. Crim. App. 1987).

254. 530 N.E.2d 1351 (Ill. 1988).

255. *Id.* at 1358.

year-old white male.[256] In *Marks v. State*,[257] an Alabama appellate court approved the trial court's finding that it was unreasonable for the prosecutor to strike a potential juror solely because she was single and unemployed.[258]

11. Previous Involvement with the Criminal Justice System—The most common explanation proffered by prosecutors for exercising a challenge to a black venireperson is that the individual has been involved with the criminal justice system.[259] For instance, in *State v. Oglesby*,[260] the prosecutor successfully struck a juror who had a conviction for driving under the influence of alcohol.[261] In another case, a juror who once had been convicted but still claimed innocence was struck because he exhibited "lack of respect for the criminal justice system."[262] In these cases courts take a broad view of an individual's criminal record. They uphold strikes both where the jurors themselves have been involved with the system and where some involvement by a family member or friend can be imputed to jurors who themselves have otherwise "clean" records.[263]

Prosecutors also strike those who were arrested, tried, and acquitted because they may refuse to consider certain evidence and may display bias toward defendants.[264] For example, in a federal trial for conspiracy, the court upheld a challenge to a juror who had been acquitted because the evidence against him was "too circumstantial."[265] The court accepted as race-neutral explanations that the juror would empathize with the defendant in the case at bar and might

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256. *Id.*

257. 581 So. 2d 1182 (Ala. Crim. App. 1990), *cert. denied*, No. 1901196, 1991 Ala. LEXIS 745 (Ala. 1991).

258. *Id.* at 1187.

259. *See, e.g.*, Werts v. State, 395 S.E.2d 922, 924 (Ga. Ct. App. 1990) (guilty plea to writing bad checks); People v. Talley, 504 N.E.2d 1318, 1327–28 (Ill. App. Ct. 1987) (theft conviction); State v. Carter, 522 So. 2d 1100, 1105 (La. Ct. App. 1988) (same); Spencer v. Commonwealth, 384 S.E.2d 785, 795 (Va. 1989) (criminal record), *cert. denied*, 493 U.S. 1093 (1990).

260. 379 S.E.2d 891 (S.C. 1989).

261. *Id.* at 891.

262. State v. Johnson, 561 So. 2d 922, 926 (La. Ct. App. 1990).

263. *See, e.g.*, Baker v. State, 555 So. 2d 273, 274–76 (Ala. Crim. App. 1989) (allowing the strike of twelve venirepersons because they had personal or family trouble with the law).

264. *See, e.g.*, State v. McMillian, 779 S.W.2d 670, 673 (Mo. Ct. App. 1989) (involving a juror found innocent in a murder trial).

265. United States v. Briscoe, 896 F.2d 1476, 1488 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990).

not consider the circumstantial evidence that constituted much of the government's case.[266]

In dismissing black jurors who were accused of a crime but were not necessarily[267] tried, prosecutors claim that such individuals may have concerns about the fairness and impartiality of the criminal justice system. In one case, an Illinois district attorney struck the only black venireperson because the juror, among other reasons, previously had been arrested by the police force involved in the case at bar and felt that they had treated him rudely.[268] Prosecutors also strike blacks when the attorneys are under the impression—but are not certain—that the juror had some previous problems with the police, regardless of the degree of that supposed involvement. Consequently, the bare assertion that a juror "had been in trouble with the law here" sufficed to strike her from a jury.[269]

A black venireperson, however, need not have been arrested or even suspected of a past crime to lead to a prosecutor's successfully exempting the juror from the petit jury. Courts routinely uphold strikes based upon the actual or suspected criminal activities of the juror's family

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266. *Id.*

267. We say "not necessarily" because the cases do not always disclose whether the venireperson was actually tried.

268. People v. Woods, 540 N.E.2d 1020, 1021–23 (Ill. App. Ct. 1989); *see also* United States v. Ferguson, 935 F.2d 862, 864–65 (7th Cir. 1991) ("Prior encounters with the criminal justice system which might cause a juror to be hostile toward the government have been upheld as racially neutral explanations."), *cert. denied*, 112 S. Ct. 907 (1992); People v. Jenkins, 545 N.E.2d 986, 1003 (Ill. App. Ct. 1989) (involving a juror who was falsely accused of crime), *appeal denied*, 550 N.E.2d 562 (Ill. 1990); State v. Thompson, 516 So. 2d 349, 359 (La. 1987), (involving two jurors with prior arrests), *cert. denied*, 488 U.S. 871 (1988); State v. Howard, 789 S.W.2d 191, 192 (Mo. Ct. App. 1990) (striking a juror once caught in stolen car); State v. Rush, 788 S.W.2d 784, 785 (Mo. Ct. App. 1990) (striking a juror who was arrested for felony, but not prosecuted because falsely accused).

269. Baker v. State, 555 So. 2d 273, 275 (Ala. Crim. App. 1989); *see also* United States v. Alston, 895 F.2d 1362, 1367 (11th Cir. 1990) (striking a juror who had "a reputation with the [police] for involvement in the drug trade"); Leonard v. State, 551 So. 2d 1143, 1150 (Ala. Crim. App.) (accepting the explanation that the juror had been charged with "manslaughter and traffic violations, including one DUI") (dictum), *cert. denied*, No. 88-1548 (Ala. 1989); State v. Price, 763 S.W.2d 286, 288, 290 (Mo. Ct. App. 1988) (involving many persons with the same surname had been prosecuted in the past, although the prosecutor did not know whether there was, in fact, any relation).

members.[270] For instance, in *United States v. Biaggi*,[271] former Congressperson Mario Biaggi was charged with violations of the federal racketeering laws.[272] At trial, Biaggi argued that the prosecutor deliberately struck Italian-Americans and Puerto Ricans from the jury because of their ethnicity.[273] The district judge inquired into and accepted the prosecutor's explanations. In particular, the court held that one juror was reasonably struck because she felt bitter against the government for its having prosecuted her husband in the 1950s for making false statements to Congress during an investigation of alleged communists.[274]

In a few cases, courts upheld strikes when the black jurors themselves were victims of crime, or were related to victims of crime.[275] An Illinois capital murder case, however, demonstrates how this explanation can be misused.[276] There, the state had claimed that it challenged a juror primarily because she was a victim of an unsolved felony, an experience that might have affected her impartiality.[277] The Illinois

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270. *See, e.g.*, United States v. Hoelscher, 914 F.2d 1527, 1538 (8th Cir. 1990) (striking a juror whose niece had drug problems); People v. Chambie, 234 Cal. Rptr. 308, 312 (Cal. Ct. App. 1987) (involving a juror whose son and brother were convicted of narcotics violations); People v. Young, 538 N.E.2d 453, 457, 459 (Ill. 1989) (excusing a juror whose ex-husband was arrested for violent crimes and convicted of armed robbery); Yarbough v. State, 732 S.W.2d 86, 90–91 (Tex. Ct. App. 1987) (striking a juror whose sister had been arrested).

For cases in which there was no independent inquiry into whether a relative had been involved in criminal activities, see United States v. David, 844 F.2d 767, 768–69 (11th Cir. 1988) (involving a juror with a son on probation); Benson v. State, 551 So. 2d 188, 192 (Miss. 1989) (allowing the explanation that the prosecutor believed the juror was either the mother or aunt of someone prosecuted three years earlier); State v. Johnson, 395 S.E.2d 167, 168 (S.C. 1990) (striking a juror with same last name as man who had a criminal indictment against him).

271. 705 F. Supp. 867 (S.D.N.Y. 1988).

272. *Id.* at 869.

273. *Id.* at 868.

274. *Id.* at 870; *see also* State v. Henderson, 750 S.W.2d 555, 558 (Mo. Ct. App. 1988) (holding that it was not racial discrimination for the prosecutor to strike a black female who might be resentful toward police because her uncle had been charged but acquitted of rape, despite evidence that white jurors who had convicted relatives were not challenged).

275. *See, e.g.*, United States v. Briscoe, 896 F.2d 1476, 1489 (7th Cir.), *cert. denied*, 488 U.S. 863 (1990); United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987) ; People v. Batchelor, 559 N.E.2d 948, 954 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); Stanford v. Commonwealth, 793 S.W.2d 112, 113 (Ky. 1990); Stanley v. State, 582 A.2d 532, 535 (Md. Ct. Spec. App. 1990), *cert. denied*, 587 A.2d 247 (Md. 1991).

276. People v. Hope, 560 N.E.2d 849 (Ill. 1990), *vacated and remanded*, 111 S. Ct. 2792 (1991), *and vacated on reh'g*, 589 N.E.2d 503 (Ill. 1992).

277. *Id.* at 856–57.

Supreme Court at first found this explanation racially neutral, given that whites were struck for similar reasons.[278] On remand from the United States Supreme Court, however, the court found this explanation pretextual given that some white victims of crime had been admitted to the jury.[279]

Although a juror's prior criminal history often is unrelated to the criminal offense charged, prosecutors occasionally base their strikes upon a particular link between the charged offense and the past criminal background of the juror or a person related to the juror. Two representative cases are *People v. Parker*[280] and *Stephens v. State*.[281] In *Parker*, an armed robbery case, the only black juror had a brother-in-law with a past conviction for robbery.[282] The prosecutor struck the juror because the crimes were similar.[283] In *Stephens*, another armed robbery case, the juror himself had been arrested for armed robbery.[284]

A handful of courts rejected explanations stemming from the alleged criminal involvement of a juror, generally either because the prosecutor failed to challenge white jurors with similar criminal involvement or because the prosecutor failed to substantiate her speculations concerning the black juror's impartiality.[285] In the capital murder case of *Powell v. State*,[286] the court rejected prosecution challenges to blacks who had minor traffic offenses because whites who served on the jury had similar driving records.[287] In *State v. Marrs*,[288] the prosecution struck the only black on the venire, because the prosecutor saw his surname on a bench warrant and did

278. *Id.* at 866–67.
279. *Hope*, 589 N.E.2d at 506 (case on remand).
280. 519 N.E.2d 703 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 258 (Ill. 1988).
281. 559 So. 2d 687 (Fla. Dist. Ct. App. 1990).
282. *Parker*, 519 N.E.2d at 706.
283. *Id.*
284. *Stephens*, 559 So. 2d at 689. The prosecutor, however, did not know whether the juror had been convicted for that offense. *Id.*
285. *See, e.g.*, Maloney v. Washington, 690 F. Supp. 687, 691 (N.D. Ill. 1988); Avery v. State, 545 So. 2d 123, 126–27 (Ala. Crim. App. 1988); *Ex parte* Branch, 526 So. 2d 609, 613–14, 625–26 & 626 n.13 (Ala. 1987); Floyd v. State, 539 So. 2d 357, 358, 362–63 (Ala. Crim. App. 1987); People v. Pagel, 232 Cal. Rptr. 104, 105 (Cal. App. Dep't Super. Ct. 1986), *cert. denied*, 481 U.S. 1028 (1987); State v. Price, 763 S.W.2d 286, 288 (Mo. Ct. App. 1988); State v. Herron, 745 S.W.2d 835, 837 (Mo. Ct. App. 1988); State v. Butler, 731 S.W.2d 265, 271 (Mo. Ct. App. 1987).
286. 548 So. 2d 590 (Ala. Crim. App. 1988), *aff'd*, 548 So. 2d 605 (Ala. 1989).
287. *Id.* at 593. Other reason were also given.
288. 379 S.E.2d 497 (W. Va. 1989).

not want a relative of someone arrested to serve.[289] The West Virginia Supreme Court deemed this explanation to be pretextual, because the State's attorney did not ask the juror whether he was aware if a criminal warrant was pending for any of his relatives.[290]

12. Jury Experience—While courts have accepted prosecutor explanations that venirepersons were struck because of prior jury experience,[291] few such explanations appeared in our study. Paradoxically, courts also have upheld explanations that venirepersons were struck due to a lack of prior jury experience.[292]

Prosecutors who claim to be concerned with the prior service of a venireperson usually perceive it as a liability to the individual's present jury service. For example, in *People v. Jones*,[293] the court upheld a peremptory challenge because the venireperson previously had served on a civil jury and might confuse the burdens of proof.[294] Prosecutors also exclude jurors who voted "not guilty" in earlier cases, most likely on a suspicion that such jurors are likely to do so again.[295] For instance, in *State v. Brown*,[296] a juror was struck because she had recently cast the sole "not guilty" vote in a criminal trial.[297] Prosecutors also strike jurors who have sat

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289. *Id.* at 498.

290. *Id.* at 499.

291. *See, e.g.*, Smith v. State, 531 So. 2d 1245, 1248 (Ala. Crim. App. 1987); People v. Batchelor, 559 N.E.2d 948, 954 (Ill. App. Ct.), *appeal denied*, 564 N.E.2d 840 (Ill. 1990); State v. Carter, 522 So. 2d 1100, 1105 (La. Ct. App. 1988); State v. Rogers, 753 S.W.2d 607, 610 (Mo. Ct. App. 1988); State v. Davis, 386 S.E.2d 418, 424 (N.C. 1989), *cert. denied*, 496 U.S. 905 (1990).

292. *See, e.g.*, People v. Buckley, 522 N.E.2d 86, 92 (Ill. App. Ct. 1987); People v. Howard, 533 N.Y.S.2d 404, 406 (N.Y. App. Div. 1988), *appeal denied*, 535 N.E.2d 1345 (N.Y. 1989); Chambers v. State, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987).

293. 541 N.E.2d 161 (Ill. App. Ct. 1989); *appeal denied*, 548 N.E.2d 1074 (Ill. 1990).

294. *Id.* at 163.

295. *See, e.g.*, United States v. Thomas, 914 F.2d 139, 142 (8th Cir. 1990); People v. Chambie, 234 Cal. Rptr. 308, 311 (Cal. Ct. App. 1987) (involving a juror who had served on an acquitting jury and found serving as a juror difficult); State v. Brown, 522 So. 2d 1110, 1114–15 (La. Ct. App. 1988) (striking a juror who had cast the only not guilty vote of 12 jurors in a prior case); Garza v. State, 739 S.W.2d 374, 375 (Tex. Ct. App. 1987) (upholding the strike of a juror who had "a tendency to not enforce the law"); *cf.* Minnifield v. State, 530 So. 2d 245, 248–49 (Ala. Crim. App. 1987) (challenging a juror who had sat on a jury that convicted the defendant on a lesser included offense in murder case).

296. 522 So. 2d 1110 (La. Ct. App. 1988).

297. *Id.* at 1114.

on juries that resulted in hung juries or mistrials.[298] Courts rarely rejected explanations based upon prior jury service.[299]

IV. IMPROVING THE TREATMENT OF EXPLANATIONS

The analysis in Part III shows that *Batson*'s neutral explanation requirement is, regrettably, a relatively simple hurdle for a prosecutor to clear. Even a prosecutor who has dismissed jurors for racial reasons can concoct a neutral explanation for his actions that the courts will accept as proof that his strikes were not racially motivated.[300] Moreover, in those cases in which race was but one of a combination of reasons supporting a peremptory strike, the prosecutor's opportunity to proffer nonracial reasons is unlimited, thereby denying a remedy for the racially motivated element.[301]

The question, then, is how judicial treatment of explanations can be improved. How can the courts refrain from accepting rationalizations for race-based strikes without unfairly restricting the prosecutor's discretion to strike jurors for nonracial reasons? Like all areas of discrimination law, no ideal resolution exists, for the trial judge cannot read the prosecutor's mind to ascertain without doubt whether an explanation is truthful or merely a sham. Any reasonable judicial test that

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298. A federal prosecutor called one venireperson who had served on two hung juries "a professional hung juror." United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990); *see also* Allen v. State, 555 So. 2d 1185, 1187 (Ala. Crim. App. 1989) (striking nine venirepersons who had served on hung jury the previous day); Davis v. State, 551 So. 2d 165, 171 (Miss. 1989) (excusing a juror who had sat on a jury for a trial resulting in mistrial), *cert. denied*, 494 U.S. 1074 (1990); Levy v. State, 749 S.W.2d 176, 178 (Tex. Ct. App. 1988) (striking a juror who had served on criminal jury that did not reach a verdict).

299. One court did reject a jury-service explanation. People v. Kindelan, 572 N.E.2d 1138 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 126 (Ill. 1991). The *Kindelan* court held that the State had not rebutted the prima facie case of discrimination by explaining its peremptory challenges against three black jurors on the ground that each previously had been called and not selected for jury service because four seated white jurors also had been called previously and not selected. *Id.* at 1144–45.

300. Justice Marshall anticipated this problem. *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

301. The Equal Protection Clause forbids the prosecutor from dismissing a juror even in part because of the juror's race. *See Batson*, 476 U.S. at 97 ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.").

still retains peremptory challenges will allow some race-based strikes that appear legitimate and will reject some legitimate strikes that appear highly suspicious.

We believe that our empirical analysis shows that the courts now lean far too heavily towards accepting prosecutors' rationalizations for their peremptory challenges and demanding few limitations on prosecutors' discretion to use strikes, notwithstanding *Batson*'s inference of discrimination. The current approach vitiates the very goal of *Batson*: stopping race-based peremptories. Given the small likelihood of success in challenging peremptories under *Batson*, a corresponding cost is the waste of judicial time and litigation resources.

The touchstone for improving *Batson*'s neutral explanation requirement is to recall that, at the time the neutral explanation is offered, an "inference of purposeful discrimination" has been established against the prosecutor.[302] This inference justifies not only the burden of producing any explanation that is facially neutral, but also the burden of providing a clear and specific explanation that reasonably rebuts the inference that has been established.[303]

If *any* facially neutral explanation can rebut the inference, the folly of *Batson* is clear. To take an extreme example, which one hopes lies beyond the bounds of what any court would tolerate as a "reasonable" rebuttal, a prosecutor might explain her strike by simply using the juror's name as a basis. "I struck him because his name is X" is facially neutral; however, it obviously is neither unique nor explanatory. If accepted, such an "explanation" could excuse even a strike actually based upon race. Clearly then, courts must demand more than facial neutrality.

V. A NEW APPROACH

Because *Batson* as it currently stands is so easily manipulated, we suggest that the following four methods be used to

302. *Id.* at 96.

303. *See* Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987).

tighten judicial scrutiny of supposedly neutral explanations.[304] The trial court must:

(A) independently confirm the basis of the explanation;
(B) affirmatively find that any other jurors with similar characteristics to the challenged juror were struck;
(C) determine that an explanation based on characterizations of a group which includes a juror be shown specifically true of the challenged juror; and
(D) find that an explanation is rational, meaningful, and related to the particular case.

A. Confirmability

The reason for rejecting explanations that cannot be factually confirmed is simple: otherwise, prosecutors could always explain away race-based strikes.[305] For instance, if a prosecutor says that a juror gave her a "bad feeling,"[306] or that a juror makes her feel "uncomfortable,"[307] it is impossible for a judge— whether questioning the prosecutor at trial or reading the record on appeal—to confirm that the prosecutor actually excused the juror for the reason given. Such excuses could be used in nearly any situation by a prosecutor acting in bad faith. Even if genuine, they are a dubious means of rebutting the inference of discrimination, for, as Justice Marshall explained, prosecutors' so-called instincts may reflect nothing more than stereotypes based

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304. Other writers, to varying degrees, have advocated heightened judicial scrutiny of neutral explanations. *See, e.g.*, Paul H. Schwartz, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1564–66 (1991); David D. Hopper, Note, Batson v. Kentucky *and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?*, 74 VA. L. REV. 811, 826–31 (1988); Joshua E. Swift, Note, Batson's *Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 361–66 (1993).

305. Swift, *supra* note 304, at 361–63, argues for the complete rejection of what he terms "soft-data" explanations, *i.e.*, those which cannot be confirmed by the record. His central argument is that courts should accept only "hard-data" explanations, *i.e.*, those which can be confirmed by the record and that have a "substantial nexus" to the facts of the case at bar. *Id.* at 338. Schwartz, *supra* note 304, at 1566, urges that "vague and highly subjective" explanations should be rejected if unsupported by evidence in the record.

306. State v. Willis, 552 So. 2d 39, 42 (La. Ct. App. 1989).

307. State v. Melvin, 392 S.E.2d 740, 748 (N.C. Ct. App. 1990).

upon nationality and race.[308] Furthermore, allowing racial stereotypes to enter jury selection undermines the integrity of the judicial process.[309]

Most of the unconfirmable explanations fall under the "demeanor" category in our taxonomy.[310] Such unverifiable, subjective judgments should be rejected unless the trial judge affirmatively confirms that the juror's behavior was markedly different from that of the other jurors. Thus, for example, an appellate court should accept the prosecutor's explanation that he struck a juror because that juror fell asleep during voir dire only if the juror's dozing off was confirmed on the record by the trial court.[311] On the other hand, an appellate court should reject the prosecution's explanation that a juror appeared too "casual,"[312] if no evidence in the record supports that characterization. Holding otherwise would enable a prosecutor to employ that reason as a pretext for a race-based strike. As a Virginia appellate court stated, "[r]ubber stamp approval of all nonracial explanations" that "are only facially legitimate," makes the *Batson* inquiry "amount to little more than a charade."[313] These demeanor-based explanations constitute probably the easiest method of abusing *Batson*—and the easiest to stop.

B. Consistency

Courts all too often evaluate the contested explanation without considering the rest of the voir dire by looking only

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308. Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring). Thus, for example, a prosecutor who thinks that blacks are inherently untrustworthy may especially notice a black person not making eye contact and thus strike the juror, whereas a prosecutor may never notice, let alone dismiss, a white juror acting similarly.

309. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 639 (1991) ("[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution."); Powers v. Ohio, 111 S. Ct. 1364, 1371 (1991) ("[R]acial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt."); *Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

310. *See supra* Part III.B.5; *see also* Hopper, *supra* note 304, at 828–29 (arguing for heightened scrutiny of the sort of explanations this Article refers to as demeanor-based).

311. *See* People v. Jenkins, 545 N.E.2d 986, 1003 (Ill. App. Ct. 1989).

312. *See* cases cited *supra* note 143.

313. Jackson v. Commonwealth, 380 S.E.2d 1, 6 (Va. Ct. App. 1989).

at whether the prosecutor's explanation itself was neutral. However, the court should determine whether the prosecutor dismissed other venirepersons with traits similar to the those objected to by the prosecutor. For instance, if the prosecutor claims to have struck a black juror because the juror listed a religious affiliation on her juror information form, the trial judge should determine and note for the record, whether other jurors who listed a religious affiliation also were struck. This approach both can be a powerful tool for determining whether an explanation is pretextual and can create a needed record for the reviewing court—but it is not the standard practice.

As part of the inquiry, courts also should determine whether the prosecutor has engaged in any examination at all, or only cursory examination, of the challenged black juror. When prosecutors strike blacks after asking them comparatively few substantive questions, courts should reject explanations as not neutral. Conversely, courts should determine whether the prosecutor questioned black and white jurors disparately.[314] For example, if the prosecutor questions only black jurors about whether they know court personnel, then the explanation should be rejected as pretextual. Such disparate questioning indicates that the prosecutor is fishing for an excuse to dismiss the juror. It strongly suggests that the prosecutor is concerned less with determining whether the jurors know court employees than with finding an excuse to dismiss the black juror. Given the prima facie inference of discrimination established against the prosecutor, such disparate questioning should be enough to reject the explanation.

The trial court should demand voir dire extensive enough to ensure that black persons are not struck while white persons with the same characteristics are asked to serve on the jury. When a black person is questioned early in the voir dire process, the trial judge can require the prosecutor to ask all subsequent jurors, regardless of their race, those queries

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314. Another writer also has emphasized the importance of comparing the extent to which the prosecutor questions black and white venirepersons. Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 322–324 (1989). *See also, e.g.*, State v. Smith, 791 S.W.2d 744, 750 (Mo. Ct. App. 1990) (allowing the explanation that the prosecutor struck a black juror because she was old even though an older white juror was not struck).

that led to the striking of the black juror. Of course, it would be more difficult for a judge to mandate this procedure when the juror being challenged appears near the end of the venire draw, as preceding white venire members would have been questioned already and empaneled on the jury.

There are several possible solutions to this problem. First, when a prosecutor strikes a black juror based on the juror's answer to a series of questions, the trial judge can return to the record to verify that the same series was addressed by whites already selected for the jury. Although this method is time-consuming, it would ensure that blacks and whites were not treated differently.

Alternatively, the court can treat all selections and strikes as tentative until a jury of twelve is determined. The trial judge then can search the record, checking to see if a stricken black was asked questions materially different from those asked of accepted whites. If so, then the trial judge could order the black venireperson to be placed on the jury in the place of the last white juror accepted. This process could be repeated for all black persons struck from the jury.[315]

As a third approach, the trial court could require the lawyers to present in pretrial memoranda their criteria for dismissing jurors. For example, a prosecutor who wished to strike all prospective jurors of a young age would be required to submit this factor to the trial court in advance of voir dire, prior to having any information about the identity of the persons on the jury venire. This requirement protects the factual accuracy of the prosecutor's stated reasons for the strikes, helping to ensure that the explanations are not post hoc creations.

Without further refinement, this procedure could allow prosecutors to choose criteria that correlate highly with race—such as screening out persons who live in certain racially segregated neighborhoods or those of a lower socioeconomic class—thus enhancing prosecutors' opportunities to use these criteria as proxies for race. The use of such criteria nonetheless can be reduced by requiring the prosecutor to

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315. A potential problem arises if the answers by a black and a white juror to the same question differ such that different follow-up questions must be asked. In such a case, the trial judge can determine whether the different questions are material. If not, then the juror selection need not be disturbed. If the difference in the questions is material, the court could then recall the relevant jurors to voir dire and ask them the appropriate omitted questions.

proffer not only the undesired factors but also the underlying reasons why those characteristics would lead to a strike. Hence, in our example above, the prosecutor might submit his plan to strike relatively young jurors in a case where the defendant is young and the victim middle-aged by explaining that young jurors might be more likely to sympathize with a defendant of comparable age. Demanding such a list is a proactive way for a judge to determine whether other jurors with characteristics similar to the challenged juror were not struck, a clear indication of a *Batson* violation.

C. Connection With Group Bias

Explanations that prosecutors give for excluding black jurors sometimes focus upon evidence that the juror belongs to a particular nonracial group or classification of people. Occasionally, the prosecutor will claim further that any given member of this group is statistically more likely than the average citizen to harbor a bias against the prosecutor's case.[316] Courts should reject such an explanation unless the prosecutor (1) shows conclusively that the juror is indeed a member of that class of individuals; (2) demonstrates good reason to think that members of the group are more likely prejudiced against the state's case; and (3) establishes that the particular juror who was dismissed possessed the undesired characteristics.

For example, prosecutors commonly explain that they struck a juror on the basis of unemployment.[317] Classification in such a group should not by itself be enough to rebut the prima facie inference of discrimination.[318] The prosecutor should be required to articulate a reason why unemployment is undesirable and show that the juror indicated a significant connection to the unwanted characteristic during the voir dire. In explaining why unemployment is undesirable,

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316. *See, e.g.*, ROBERT A. WENKE, THE ART OF SELECTING A JURY 77–78 (2d ed. 1989) (guiding practitioners in how to use stereotypes to predict biases of venirepersons).

317. *See supra* Part III.B.3.

318. Unemployment is a particularly good example in this regard, given the high black unemployment rate relative to that of whites. Consequently, lack of employment easily may be used as a pretext for a race-based strike.

prosecutors often state that unemployed persons lack ties to the community.[319] In our view, courts should accept that explanation only when the prosecutor has explored during voir dire the struck juror's actual ties to the community, apart from her employment status, and elicited some minimal response that indicates a lack of community ties. Without some record that the particular juror possess the undesired characteristic ascribed to the group, courts should not accept a strike based upon mere group status.

D. Relation to the Case

If the prosecutor's explanation is irrelevant to the facts of the case at hand, it should be rejected. An explanation with an unusually attenuated connection to the case at bar justifies the court in concluding that the prosecutor has likely invented a post hoc rationale for a race-based strike.

As an example at one extreme, the prosecutor is surely justified in keeping a venireperson off the jury when the prospective juror knows a trial participant.[320] Thus, in *Chisolm v. State*,[321] two jurors were struck because they knew the defendant,[322] and in *Marks v. State*,[323] several jurors were struck because they were either friends or a former partner of the defense counsel.[324] Actual previous involvement with the criminal justice system is another rational reason for striking a juror.[325]

At the other extreme, however, are cases in which the prosecutor's reason for striking the juror is so unrelated to the case at bar that it is likely that the prosecutor is motivated by nothing more than excluding blacks from the jury. For instance, the *Chisolm* court also accepted the prosecutor's explanation that he struck a juror because her husband worked for a radio station that once aired a documentary

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319. *See supra* note 119.
320. See *supra* Part III.B.6.
321. 529 So. 2d 630 (Miss. 1988).
322. *Id.* at 633.
323. 581 So. 2d 1182, 1187 (Ala. Crim. App. 1990).
324. *Id.* at 1187.
325. *See, e.g.*, Spencer v. Commonwealth, 384 S.E.2d 785, 795 (Va. 1989) (involving a juror's criminal record which extended back 50 years), *cert. denied*, 493 U.S. 1093 (1990).

unfavorable to law enforcement.[326] There was no further evidence of what job the husband performed at the radio station or whether the juror herself held any views unfavorable to law enforcement.[327] One could probably establish an equally attenuated connection to something undesirable to virtually anyone. Accordingly, when an explanation is unusual or vague, courts should ask the prosecutor to explain how it is linked to the cases. Prosecutors' scattershot claims, akin to asserting that a juror "had been in trouble with the law here,"[328] should be valued no more than an assertion of good faith; they should be rejected as failing to overcome the presumption of discrimination.

VI. CONCLUSION

Race-based peremptory challenges still occur far too frequently, but our analysis indicates that there are broad patterns to prosecutors' discriminatory use of their challenges. As shown in Part III, prosecutors often strike blacks based on how they look, where they live, and who they know, without showing how these attributes are at all relevant to the case to be tried. These patterns can be used to identify constitutional violations. Knowledge of the suspicious justifications actually used provides an opportunity to help *Batson v. Kentucky* fulfill its promise to eradicate discriminatory uses of the peremptory challenge. By prohibiting peremptory strikes which apply only to blacks, which only vaguely concern the demeanor of jurors, which employ illegitimate group biases targeted at minority jurors, and which relate only tenuously to the case at hand, the voir dire process can work more fairly and effectively.

With improvements such as those suggested in Part V, the basic framework established in *Batson* can reduce discrimination while simultaneously retaining peremptory challenges as part of the criminal justice system.[329] Even if courts were to

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326. *Chisolm*, 529 So. 2d at 638–39.

327. *Id.* at 638–39.

328. Baker v. State, 555 So. 2d 273, 275 (Ala. Crim. App. 1989).

329. Many observers of the criminal justice system advocate the abolition of peremptory challenges altogether, arguing that they allow too much discretion unchecked for racism. *See e.g.*, Batson v. Kentucky, 476 U.S. 79, 108 (1986) (Marshall,

evaluate neutral explanations more critically, as we suggest, prosecutors would still retain their traditional ability to challenge jurors.[330] After all, it is not until a prima facie case of discrimination has been proven that prosecutors must offer an explanation to the court. We present our suggestions with an eye toward allowing trial lawyers to maintain most of their traditional influence upon the jury selection process. We simply believe that the inference of discrimination established under *Batson* demands greater restrictions than those placed by most courts today upon allegedly "neutral" explanations.

J., concurring) ("If the prosecution's peremptory challenge could be eliminated only at the cost of eliminating defendant's challenge as well, I do not think that would be too great a price to pay" to end racial discrimination in jury selection.); 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, 157 (1989) ("Arbitrary exclusions from jury service have no place in a constitutional system grounded on concepts of equality and individual worth.") Although this idea has great force, we consider it unrealistic at the present time. Given that *Batson* is the law and that there is little indication that Congress, the states, or the Supreme Court are likely to ban peremptory challenges in the near future, the challenge for those who wish to eradicate discrimination in jury selection is not to malign *Batson* but to develop ways to make it work.

330. Defense counsel would also retain their right to make peremptory challenges.