Batson, O.J., and *Snyder*: Lessons from an Intersecting Trilogy

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INTRODUCTION

There are few cases that inform our collective understanding of the American jury system more than *Batson v. Kentucky*.[1] This case serves as a touchstone in Equal Protection jurisprudence and can be viewed as "the [U.S. Supreme Court's] most ambitious attempt to impose meaningful prohibitions on the use of race-based peremptory challenges."[2] This case and its progeny provide a framework for the protection of the Fourteenth Amendment's Equal Protection Clause[3] and also implicate the Sixth Amendment's[4] jury-trial guarantees.

The *Batson* holding has been expanded to guard not only against the wrongful exclusion of jurors based upon race, but also against improper exclusions based upon gender and ethnicity.[5] It remains to be seen whether the Court will expand the *Batson* rationale to include exclusions based upon either sexual orientation[6] or religion.[7] Despite these expansions, however,

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

2. Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 284 (2007).

3. Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

4. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI; *see generally* Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501 (1986) (advocating for an analysis of race-based peremptory challenges under the Sixth Amendment instead of the Fourteenth Amendment).

5. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130–31 (1994) (discussing prohibitions against jury exclusions based upon gender). The Court noted that "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *Id.*; *see also* Hernandez v. New York, 500 U.S. 352, 375 (1991) (plurality opinion) (affirming the exclusion of bilingual potential jurors but implicitly recognizing that *Batson* prohibits exclusions based upon ethnicity).

6. *See generally* John J. Neal, *Striking* Batson *Gold at the End of the Rainbow?: Revisiting* Batson v. Kentucky *and Its Progeny in Light of* Romer v. Evans *and* Lawrence v. Texas, 91 IOWA L.

even the original goals articulated twenty years ago in *Batson* remain unfulfilled. *Batson*'s promise of protection against racially discriminatory jury selection has not been realized. While the *Batson* majority proclaimed, "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors,"[8] the challenges posed by cases such as *Snyder v. State*,[9] a case with a deep racial history, belie the achievement of these lofty aspirations. Certainly, the recent U.S. Supreme Court decision in *Snyder v. Louisiana*[10] revealed that the Court would rather whitewash its *Batson* analysis than engage in a robust examination of the racialized circumstances and issues of racism present in, and revealed by, such a case. The Court thereby missed an opportunity to grapple with one of the criminal-justice system's most pressing and enduring concerns—race.

Many commentators have analyzed the racialized nature of the American criminal-justice system.[11] Protection of the American jury system

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REV. 1091 (2006) (arguing that recent Supreme Court jurisprudence should lead to the prohibition of sexual-orientation based peremptory challenges).

7. *See* Davis v. Minnesota, 511 U.S. 1115, 1115–16 (1992) (Ginsburg, J., concurring in the denial of *certiorari*) (reiterating the distinctions drawn by the lower court between race, gender, and religion—specifically, how one's religion is not necessarily self-evident and often can only be discerned with probing); *see also* United States v. Clemmons, 892 F.2d 1153, 1157 (3d Cir. 1989) (upholding a conviction where the prosecutor indicated that he had struck a juror not because of his race but due to his religion), *cert. denied*, 110 S. Ct. 2623 (1990).

8. Batson v. Kentucky, 476 U.S. 79, 86 (1986) (internal citations omitted).

9. State v. Snyder (*Snyder II*), 942 So. 2d 484 (La. 2006), *rev'd*, 128 S. Ct. 1203 (2008).

10. *Snyder*, 128 S. Ct. at 1203.

11. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5–7 (1999) (arguing that the "criminal justice system affirmatively depends on inequality" and that the Supreme Court's jurisprudence regarding search and seizure, the right to counsel, jury selection, sentencing, and prosecutorial discretion has enabled race and class to affect the criminal-justice system deeply). *See generally, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (discussing racial disparities in the charging, plea bargaining, and sentencing phases of the criminal-justice system and noting the vast power wielded by local and federal prosecutors); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) (analyzing the use of racial profiling and how the discretion afforded to police officers perpetuates racial profiling in the criminal-justice system); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (exploring the meaning of race within criminal-law contexts such as the jury-selection process, presumptions of criminal propensity, victimization, and punishment); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998) (discussing the way that media portrayals, historical legal discrimination, discriminatory treatment of blacks by police, and racial hoaxes manifest a racially unjust criminal-justice system); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531 (1997) (using constitutive ethnography to analyze prosecutors' decisions in sexual-assault cases and concluding that characterizations of race, along with gender and geographical location, influence decisions to pursue cases); Bonita R. Gardner, *Separate and Unequal: Federal Tough-On-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305 (2007) (arguing that the

from race-based inequities has been an essential part of jurisprudential attempts at fairness, justice, and equity. Indeed, the aspiration for an impartial administration of the jury system has been the subject of numerous Supreme Court opinions as well as a popular topic of scholarly analysis.[12]

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federal government's Project Safe Neighborhoods program, which aggressively enforces firearms laws, is disparately and discriminatorily enforced against African-Americans); Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1 (2007) (arguing that Rule 404(b) of the Federal Rules of Evidence is frequently used unfairly to admit character and propensity evidence that allows or encourages jurors to make racist or stereotypical inferences); Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19 (2007) (discussing racial disparities in the criminal-justice system and recommending that policymakers consider racial-impact statements that discuss the potential racial effects of proposed laws or policies in order to reduce these disparities); Steven R. Morrison, *Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal*, 2 NW. J.L. & SOC. POL'Y 63 (2007) (arguing that the Supreme Court's criminal-procedure decisions in *Terry v. Ohio*, *Whren v. United States*, *Schneckloth v. Bustamonte*, and *Florida v. Bostick* gave rise to a construction of whites as law abiding and blacks as criminal); Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 33 (2002) ("[T]he undervaluation of black life . . . is seen in the grossly racially disproportionate way in which our entire system of criminal justice operates. These racial differences occur at every stage of criminal processing, from arrest, prosecution, and jury selection to trial conduct, sentencing, and parole.").

12. *See generally* Miller-El v. Dretke, 545 U.S. 231 (2005) (holding that the prosecution's use of peremptory challenges to strike ten qualified black venire members, along with shuffling the venire to avoid black potential jurors and asking different questions of black and white prospective jurors, was sufficient evidence to warrant the grant of federal habeas corpus relief); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (holding that intentional discrimination on the basis of gender by state actors in the use of peremptory strikes in jury selection violates the Equal Protection Clause); Powers v. Ohio, 499 U.S. 400 (1991) (holding that a white defendant has standing to raise an equal-protection claim against systematic jury exclusion of blacks because the excluded jurors and criminal defendants have a common interest in eliminating racial discrimination from the courtroom); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to consider impartially the State's case against a black defendant); Turner v. Murray, 476 U.S. 28 (1986) (holding that a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the victim's race and questioned on the issue of racial bias); Duren v. Missouri, 439 U.S. 357 (1979) (holding that a Missouri jury-selection provision allowing women to opt out of jury duty resulted in an unconstitutionally disproportionate exclusion of women and violated the defendant's constitutional right to a jury composed of a fair cross section of the community); Ristaino v. Ross, 424 U.S. 589 (1976) (holding that a defendant has no right to ask on voir dire if a juror believes that whites are more trustworthy than blacks); Ham v. South Carolina, 409 U.S. 524 (1973) (holding that the Fourteenth Amendment Due Process Clause requires a trial judge, on voir dire, to interrogate jurors about racial prejudice after a defendant's timely request therefor); Irvin v. Dowd, 366 U.S. 717 (1961) (holding that a defendant convicted of murder and sentenced to death was denied a fair trial through the denial of change of venue because heavy publicity of the defendant's alleged confession to notorious crimes resulted in deep jury bias that could not be overcome by voir dire); COLE, *supra* note 11, at 101–31 (1999) (discussing the Supreme Court's jurisprudence regarding race in jury-pool composition and petit-jury selection and arguing that its decisions have not eliminated racial bias in jury selection); Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1 (2007) (analyzing the use of different types of jury

Given the Court's reluctance to explore peremptory challenges under the rubric of the Sixth Amendment,[13] the Fourteenth Amendment is the exclusive jurisprudential lens for analysis. As discussed earlier, the Supreme Court and numerous legal commentators have highlighted the fact that defendants of color must receive a jury of their peers, reinforced the illegality of governmental discrimination on account of race, and focused upon prosecutorial misbehavior.[14] Despite these aspirations, however, the

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questionnaires and suggesting that jury questionnaires should be more limited and narrowly tailored); Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237 (2006) (using surveys of real jurors to consider whether jurors understand and follow jury instructions and contending that the Supreme Court's irrebuttable presumption that jurors do so violates the Due Process Clause, as interpreted by the Court's own jurisprudence); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (discussing social science data illustrating that white juries are more likely to convict black defendants than white defendants and proposing an equal-protection argument that would recognize the social science data as proof of purposeful discrimination); Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167 (2007) (advocating limited admission of jurors' testimony regarding the role that religious beliefs played in the jury's deliberations as a way to guarantee the Sixth Amendment right to an impartial trial); Natasha Azava, Note, *Disability-Based Peremptory Challenge: Need for Elimination*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 121 (2006) (arguing that the use of peremptory challenges based on disability should be prohibited just like the peremptory challenge based on race and gender).

13. In *Holland v. Illinois*, the Court stated:

> We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury. . . . It has long been established that racial groups cannot be excluded from the venire from which a jury is selected. That constitutional principle was first set forth not under the Sixth Amendment but under the Equal Protection Clause.

Holland v. Illinois, 493 U.S. 474, 478–79 (1990).

14. *See generally Miller-El*, 545 U.S. at 231 (holding that the prosecution's use of peremptory challenges to strike ten qualified black venire members, shuffling the venire to avoid black potential jurors, and asking different questions of black and white prospective jurors was sufficient evidence to warrant granting federal habeas corpus relief); Powers v. Ohio, 499 U.S. 400 (1991) (holding that a white defendant has standing to raise an equal-protection claim based on the systematic jury exclusion of blacks because the excluded juror and the criminal defendant share the common interest of eliminating racial discrimination from the courtroom); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant); Hernandez v. Texas, 347 U.S. 75 (1954) (holding that evidence supported the finding that persons of Mexican descent were a separate class, distinct from whites, and reversing a Hispanic defendant's murder conviction because Hispanics were systematically excluded from both the grand and petit juries); Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down a state statute expressly allowing only white men to serve as jurors as an unconstitutional violation of the Equal Protection Clause, though noting that a defendant is not entitled to a jury composed in whole or part of persons of his same race); COLE, *supra* note 11, at 126 ("If the criminal justice system is to be accepted by the black community, the black community must be represented on juries. The long history of excluding

hope of *Batson v. Kentucky*[15] remains unfulfilled due in part to the ease with which a prosecutor may overcome a defendant's showing of a prima facie case of purposeful discrimination in the jury-selection process, and also due to the narrow framework courts employ when examining racially motivated behaviors.[16] Specifically, challenges brought against the discriminatory use of peremptory challenges are too easily explained away because there is insufficient critical thought involved in the assessment of the exercise of this prosecutorial discretion.

This Article will explore the case of *Snyder v. Louisiana*[17] as an example of the low threshold established by some jurisdictions that apply the *Batson* test. By allowing for pretext, inconsistent excuses, and flimsy explanations from prosecutors, many courts have essentially inoculated prosecutors from the rigorous potential of the *Batson* decision. Part I briefly reviews the landmark decision of *Batson v. Kentucky* to reveal the unrealized scope of this legal opinion. Part II explores *Snyder* and analyzes both the prosecutors' use of peremptory challenges to achieve an all-white jury as well as the repeated remarks of one prosecutor who invoked the racially polarizing O.J. Simpson case. Part III uses sociological theories of raced-based perception to examine the racial divisions prompted by the O.J. Simpson case. This subsection draws the connection between the likely manner in which an all-white jury would view the O.J. verdict and its relevance to establishing both discriminatory intent on the part of the prosecutors and the absence of neutral explanations for prosecutorial removal of all of the black jurors from Mr. Snyder's jury. In the conclusion, I suggest that the Supreme Court decision is under-theorized because it fails to address the larger issues of race and ethics so clearly at play in the case. I urge, instead, the adoption of a more critical and reality-based framework for the scrutiny of *Batson* challenges, or alternatively, the abolition of peremptory challenges with respect to capital murder cases.

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blacks from juries is one important reason why blacks . . . are more skeptical than whites about the fairness of the criminal justice system."); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895 (2004) (discussing the historical exclusion of blacks on juries, the unjust treatment that black defendants received from all-white juries, and abolitionists' decades-long efforts to achieve black participation in the legal and jury processes); Stephen E. Reil, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under* Duren v. Missouri, 2007 BYU L. REV. 201 (noting that Hispanics are more likely to be incarcerated than whites and proposing methods for adequately representing Hispanics on jury venires to ensure the satisfaction of the Sixth Amendment right to an impartial trial and the *Duren v. Missouri* fair-cross-section standard).

15. *Batson*, 476 U.S. at 89–98.

16. *See generally* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (providing a comprehensive overview and empirical examination of the use of peremptory challenges in Philadelphia death penalty cases over the course of approximately two decades).

17. State v. Snyder (*Snyder II*), 942 So. 2d 484 (La. 2006), *rev'd*, 128 S. Ct. 1203 (2008).

I. THE LEGACY OF *BATSON*

Mr. Batson, a black man, was indicted for second-degree burglary and the receipt of stolen property in Kentucky.[18] After certain jurors were excused for cause, the prosecutor used his peremptory challenges to construct an all-white jury by striking all four of the black people on the venire.[19] The defense counsel sought to discharge the jury as violative of Batson's Sixth and Fourteenth Amendment rights to a jury "drawn from a cross section of the community"[20] and of guarantees to equal protection of the laws.[21] Rejecting these submissions, the trial judge held that "the parties were entitled to use their peremptory challenges to 'strike anybody they want to.'" [22]

In delivering the opinion of the Court, Justice Powell firmly situated *Batson* as following in the footsteps of the Court's decision in *Swain v. Alabama*.[23] *Swain*, a case decided over two decades prior to *Batson*, involved a black defendant sentenced to death upon conviction, by an all-white jury, of raping a white woman. Robert Swain, then eighteen years old, mounted his appeals based not upon the historically rooted, yet controversial, allegations of rape made against black men accused of raping white women,[24] nor upon the equally controversial use of the death sentence to execute black defendants accused of harming white victims.[25] Rather, his articulations

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

19. *Id.* at 82–83.

20. *Id.* at 83.

21. *Id.*

22. *Id.* (quoting the trial judge).

23. Justice Powell stated, "This case requires us to reexamine that portion of *Swain v. Alabama* concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Batson*, 476 U.S. at 82 (internal citation omitted).

24. *See, e.g.*, N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1333–38 (2004) (relating the facts of the 1931 Scottsboro Boys cases in which nine black youths were falsely accused of raping two white women on a train, a mob called for their lynchings, their trials were blatantly racist and unfair, and eventually one of the white women admitted that neither of them had been raped at all); Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 276–80 (2003) (discussing the lynching of black men following accusations of raping white women in the twentieth century); Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 1 (2006) (contending that the criminal-justice system systematically undervalues rapes of black women and overvalues rapes of white women, resulting in racism in rape prosecutions); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 105 (1983) (noting that during the slavery era, black men convicted of raping white women were frequently sentenced to death or castration).

25. *See* COLE, *supra* note 11, at 132 ("As of June 1998, only . . . [seven] white men had been executed in the United States for killing black victims. In the same 1976–1998 period, 115 black men were executed for killing white victims."); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 81 (2007) (noting that "the death penalty was sought far more

were based entirely upon the racialized use of the jury system in Talladega County.

The substance of Swain's appeal revolved around three issues. First, he challenged the construction of the jury panels in criminal cases—including the jury roll, grand juries, and petit juries—claiming that the disparities indicated racial discrimination.[26] Second, Swain claimed that the prosecutor intentionally struck all six blacks from the petit jury in order to achieve an all-white jury.[27] As such, Swain averred that the exclusion of black people from serving on his petit jury was designedly discriminatory. Third, Swain critiqued the manner in which prosecutors in Talladega County had perverted the peremptory strike system to exclude blacks systematically from ever serving on petit juries.[28]

Remarkably, the Court denied the appeal and affirmed the lower court's determinations on not one, not two, but all three bases of Swain's appeal.[29] Because "Alabama ha[d] not totally excluded [blacks] from either grand or petit jury panels,"[30] and because the inclusion of between six and eight blacks on these panels did not rise to the level of "forbidden token inclusion,"[31] the Court held insufficient the evidence claimed "to make out a prima facie case of invidious [racial] discrimination [in violation of] the Fourteenth Amendment."[32] Further, the Court determined that, because "Negro and white, Protestant and Catholic, are alike subject to being

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frequently in cases involving black defendants and white victims . . . [than] cases involving white defendants and black victims" and attributing these disparities in part to the prosecutor's broad charging power); Ogletree, *supra* note 11, at 33. Oglteree wrote:

> [T]he undervaluation of black life if not just evident in our capital sentencing rates, but is seen in the grossly racially disproportionate way in which our entire system of criminal justice operates . . . . These racial differences occur at every stage of criminal processing, from arrest, prosecution, and jury selection to trial conduct, sentencing, and parole.

Id.; *see also* McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987). The Court discussed the conclusions of Professor David C. Baldus's 1970 study, which found that "the death penalty was assessed in 22% of cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims" and that "black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty." *Id.* at 286–87. Note that the Court declined to consider the Baldus study sufficient evidence of discriminatory purpose to find a violation of the Equal Protection Clause and upheld the defendant's death sentence.

26. Swain v. Alabama, 380 U.S. 202, 205–09 (1965).
27. *Id.* at 209–22.
28. *Id.* at 222–28.
29. *Id.* at 205–28.
30. *Id.* at 206.
31. *Swain*, 380 U.S. at 206.
32. *Id.*

challenged without cause,"[33] opening peremptory challenges up to "the demands and traditional standards of the Equal Protection Clause" would essentially eviscerate the nature and purpose of the challenge.[34] The Court thus decided that the striking of blacks in a particular case was not a violation of equal protection.[35] Finally, with respect to the assertion that Alabama was systematically striking blacks from petit juries, the Court again rejected Swain's arguments, stating that "even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, we think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated."[36] The Supreme Court in *Swain* affirmed the death sentence by stating that "petitioner has not laid the proper predicate for attacking the peremptory strikes as they were used in this case."[37]

Batson both adopted and rejected these *Swain* rationales. The Supreme Court recognized that part of the *Swain* decision acknowledged that 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.'"[38] The key issue to be resolved in *Batson*, however, was the manner and level of proof required to claim such a constitutional violation successfully. As such, the Court in *Batson* embarked upon an evidentiary journey, remarking that "[a] recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the State."[39]

The Court in *Batson*, however, broke from the *Swain* Court's higher evidentiary threshold stating that "[s]ince [lower court] interpretation[s] of *Swain* ha[ve] placed on defendants a crippling burden of proof[,] . . . we reject [*Swain*'s] evidentiary formulation."[40] Importantly, central to the *Swain* Court's rejection of the claim of the racially discriminatory use of peremptory challenges was the Court's granting of a presumption of fairness and impartiality in favor of the prosecutor.[41]

The *Swain* Court reasoned that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury [before whom] to try the case."[42] The Court further

33. *Id.* at 221.
34. *Id.* at 221–22.
35. *Id.* at 222.
36. *Swain*, 380 U.S. at 224.
37. *Id.* at 226.
38. Batson v. Kentucky, 476 U.S. 79, 84 (1986) (quoting *Swain*, 380 U.S. at 203–04).
39. *Id.* at 90.
40. *Id.* at 92–93.
41. *Swain*, 380 U.S. at 222–23.
42. *Id.* at 222.

decided that "it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations."[43] This was a high standard, indeed, as "the presumption protecting the prosecutor may . . . be overcome" where "the State has not seen fit to leave a single Negro on any jury in a criminal case."[44]

Thus, in rejecting *Swain*'s systematic-exclusion rationale, the *Batson* Court noted that it had resulted in an impossible situation as "a black defendant could make out a prima facie case of purposeful discrimination on proof that the peremptory challenge system *as a whole* was 'being perverted.'"[45] Clearly, this test, as Robert Swain found out, was likely insurmountable given the resources of defendants and the fact that only prosecutors had access to certain information. At bottom, the *Swain* test required a defendant to take a bird's-eye view of the manner in which prosecutors were exercising peremptory challenges. The Supreme Court later held this systematic focus beyond the use of peremptory challenges in the specific defendant's case to be inappropriate.[46]

In rejecting this structural approach as inconsistent with constitutional standards of equal protection, the *Batson* Court held that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the . . . [use] of peremptory challenges at the defendant's trial."[47] This purview—focusing upon the construction of the defendant's case—was an important modification that allows for consideration of prosecutorial behavior from the start of the trial process until the trial's conclusion as informing the use of peremptory challenges.

Further, the Court in *Batson* reiterated its centuries-old position that a "State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been

43. *Id.* at 223.

44. *Id.* at 224.

45. *Batson*, 476 U.S. at 91 (emphasis added).

46. *See supra* note 38 and accompanying text. The *Batson* Court held:

> A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. For reasons that follow, we reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

Batson v. Kentucky, 476 U.S. 79, 92–93 (1986).

47. *Batson*, 476 U.S. at 96.

purposefully excluded."[48] In emphasizing one of the constitutional prongs under which the peremptory process should be evaluated, the Court recognized that it is governmental racial discrimination when black citizens are excluded from jury service, and that such governmental activity was "a primary example of the evil the Fourteenth Amendment was designed to cure."[49]

Harkening to the Sixth Amendment, however, the Court in *Batson* also alluded to the preeminent purpose of the jury system. Quoting from their decision in the landmark case of *Strauder v. West Virginia*,[50] the Court in *Batson* reasoned that "'[t]he very idea of a jury is a body . . . 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, persons having the same legal status in society as that which he holds.'"[51] Therefore, to discriminate intentionally on the basis of race in the selection of a jury of a defendant's peers is a violation of the Equal Protection Clause because it denies the very "protection that a trial by jury is intended to secure."[52] Indeed, "to perform its intended function as a check on official power, it must be a body drawn from the community."[53] The *Batson* Court recognized that by "compromising the representative quality of the jury," prosecutors could easily use juries as weapons for the oppression of "'unpopular or inarticulate minorities.'"[54]

For these reasons, the *Batson* Court firmly reasserted that "the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause."[55] Further, the Equal Protection Clause prevents the exclusion of qualified citizens from jury service solely on the basis of race or assumed racial biases.[56] With these dictates in place, the Court in *Batson* returned to the consideration of the evidentiary requirements to establish a violation.

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48. *Id.* at 85 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)). The Court also stated that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors." *Id.* at 86 (citation and footnote omitted).

49. *Id.* at 85.

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

51. *Batson*, 476 U.S. at 86 (quoting *Strauder*, 100 U.S. at 308).

52. *Id.*; *see also id.* at 86–87 ("[T]hose on the venire must be indifferently chosen to secure the defendant's right under the Fourteenth Amendment to protection of life and liberty against race or color prejudice." (internal quotation omitted)). The Court further references its decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), stating that "a defendant's right to be tried by a jury of his peers is designed 'to prevent oppression by the Government.'" *Id.* at 87 (quoting *Duncan*, 391 U.S. at 155).

53. *Batson*, 476 U.S. at 87.

54. *Id.* (quoting Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy J., dissenting)).

55. *Id.* at 89.

56. *Id.*

Ultimately, the *Batson* Court recognized that the systemic evidentiary requirement in *Swain* was virtually impossible for a defendant to satisfy. It commented that "[s]ince this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny."[57] Instead, the Court charted a new path and urged that defendants establish an "'invidious quality'"[58] in the exercise of peremptory challenges which could be "'traced to a racially discriminatory purpose.'"[59]

Again recognizing the difficulty of establishing such purposeful discrimination, the Supreme Court adopted a holistic approach whereby courts were instructed to "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'"[60] allowing for the use of both "circumstantial evidence of invidious intent"[61] and "proof of discriminatory impact."[62] As such, the Court landed at a test whereby the assessment of the appropriateness of the exercise of peremptory challenges is contingent upon an evaluation of the "totality of the relevant facts"[63] to assess whether they give "rise to an inference of discriminatory purpose."[64] While the Court acknowledged that a situation akin to *Swain*, in which the defendant established that "members of his race have not been summoned for jury service over an extended period of time,"[65] would in fact "raise[] an inference of purposeful discrimination because the 'result bespeaks discrimination,'"[66] the defendant need not meet this higher systemic test.

Instead, the Court in *Batson* rejected *Swain* by lowering the evidentiary requirement to allow the defendant to establish a prima facie case in other ways more particular to, and indeed related only to, his or her case; the court thereby fashioned a more accessible test for defendants in that they could now look to the expansive totality of their circumstances to tease out improper prosecutorial motivations.[67] Accordingly, a seemingly isolated or

57. *Id.* at 92–93.

58. *Batson*, 476 U.S. at 93 (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)).

59. *Id.* (quoting *Washington*, 426 U.S. at 240).

60. *Id.* at 93 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

61. *Id.*

62. *Id.*; *see also id.* (recognizing that "'total or seriously disproportionate exclusion of Negroes from jury venires . . . is itself such an unequal application of the law . . . as to show intentional discrimination" (quoting *Washington*, 426 U.S. at 241–42 (internal quotations omitted))).

63. *Batson*, 476 U.S. at 94.

64. *Id.*

65. *Id.*

66. *Id.* (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)).

67. *Id.* at 95 ("[T]his Court had found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination.'" (citation omitted)).

"'single invidiously discriminatory'"[68] prosecutorial act would no longer be inoculated or "'immunized by the absence of such discrimination in the making of other comparable decisions.'"[69] In short, *Batson* held that there need not be an established legacy of prosecutorial discrimination for a defendant to make a viable Fourteenth Amendment challenge. Rather, the court should consider the full range of prosecutorial behavior during the course of the trial proceedings in assessing whether a prima facie case of the discriminatory exercise of a peremptory challenge had been made.

Accordingly, instead of a prosecutorial presumption of fairness per *Swain*, the Court in *Batson* recognized the reality of an adversarial system in which "the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."[70] It is momentous that the Court would make so bold an observation—barring a complete lack of diversity in the jury pool, instances of homogeneity in the construction of juries are not mere happenstance and should, therefore, be regarded with suspicion. Furthermore, recognizing the reality of racially skewed exercises of discretion, the *Batson* Court indicated that the defendant was permitted to rely upon the indisputable fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[71] Therefore, the tremendous promise of *Batson* originates in the Court's critical awareness of the vagaries of race and the reality of having either consciously or unconsciously racially corrupt decision-making processes. This racial reality check led the Court ultimately to conclude that the determination of whether the prosecutor had exercised his or her use of peremptory challenges in a racially discriminatory manner required "consider[ation of] all relevant circumstances."[72]

For purposes of an analysis of the *Snyder* case, it is important to note that the Supreme Court in *Batson* provided further guidance as to exactly what relevant circumstances might include. In this vein, the Court highlighted "a pattern of strikes against black jurors"[73] and the "prosecutor's questions and statements during *voir dire* examination and in exercising his challenges" as illustrative examples of circumstances in which a prosecutor's use of peremptory challenges might rise to the level of purposeful discrimination.[74] These examples are helpful in comprehending the robust interpretive posture expected of a trial judge in assessing a prima facie case of discrimination. After such a showing is made, the burden shifts to the

68. *Batson*, 476 U.S. at 95.
69. *Id.*
70. *Id.*
71. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).
72. *Id.* at 96–97.
73. *Batson*, 476 U.S. at 97.
74. *Id.*

prosecutor to offer a race-neutral explanation for the discriminatory challenges of potential jurors. Only then will the trial court have the "duty to determine if the defendant has established purposeful discrimination"—the third prong of the *Batson* three-part test.[75]

While shifting this burden to the prosecutor, the Supreme Court did not shirk from its longstanding belief in the system of peremptory challenges; in *Swain*, the court affirmed that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that [the] peremptory challenge is a necessary part of trial by jury."[76] Rather, the Court confirmed that the *Batson* challenge was meant to impose some restrictions upon the use of peremptories and that the prosecutor's explanation need not rise to the level required to justify the exercise of challenges for cause.[77] *Batson* requires something more from the prosecutor than intuition or the mere assumption of race-based partiality,[78] or the assertion of good faith or denial of racist motivations.[79] The prosecutor is expected to "articulate a neutral explanation related to the particular case to be tried."[80] In my estimation, this lack of rigor in the examination of the rationale for the prosecutor's racist use of peremptory challenges is the Achilles' heel of the *Batson* decision. The Supreme Court itself in *Miller-El v. Dretke*[81] stated that "*Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give."[82] This weakness, combined with the new emphasis on judicial explanation added by the *Snyder*[83] majority to the third prong of the *Batson*[84]

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75. *Id.* at 98.

76. Swain v. Alabama, 380 U.S. 202, 219 (1965).

77. *Batson*, 476 U.S. at 97.

78. *Id.*

79. *Id.* at 98.

80. *Id.*

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

82. *Id.* at 239 ("[I]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.").

83. Justice Alito, writing for the majority in *Snyder*, stated:

> As noted above, deference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning [the back-struck juror's] demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning [the back-struck juror's] demeanor, the trial judge simply allowed the challenge without explanation.

Snyder v. Louisiana, 128 S. Ct. 1203, 1209 (2008).

84. *See Snyder*, 128 S. Ct. at 1213 (Thomas, J., dissenting). Justice Thomas stated:

> The Court second-guesses the trial court's determinations in this case merely because the judge did not clarify which of the prosecutor's neutral bases for striking Mr. Brooks was dispositive. But we have never suggested that a reviewing court should defer to a trial court's resolution of a *Batson* challenge only if the trial

test, provides easy means of subverting the protection against the type of discrimination against which *Batson* was meant to guard. Now, either a prosecutor can come up with some feasible race-neutral explanation for his or her discriminatory behavior or the trial judge will be accorded deference so long as he or she explains the bases upon which he or she has denied the *Batson* challenge.

The *Batson* decision's tremendous potential is undermined by this punt to prosecutors and excessive deference to the trial judge—it allows for too easy a papering of the file and a posture of protective covering so as to avoid appeal grounds. As seen in *Snyder v. Louisiana*, the neutral-explanation test in *Batson* is too deferential to prosecutors and allows for the use of pretextual, dubious, and inconsistent prosecutorial responses. Thus, as will be shown, despite the further guidance provided by the Supreme Court in *Miller-El*, the *Batson* test has provided trial judges with too flimsy a standard against which to hold prosecutorial misconduct as manifest in the continued racist use of peremptory challenges. The new Supreme Court emphasis on judicial explanation similarly instructs a trial judge to speak his or her rationale for disallowing the *Batson* challenge into the record if judicial deference on appeal is desired—pretext can still operate so long as it is judicial pretext cloaked by race-neutral rationale. The point at which the Court should have arrived was an emphasis on the robust assessment of racial motivation allowed for by its previous decisions.

Indeed, in seeking to further elucidate the promise of *Batson*, the Supreme Court in *Miller-El* bluntly explained the manner in which the neutrality assessment should be made. In recognizing the existence of prejudices that often impact the judgment of jurors,[85] the Court acknowledged that racially skewed juror panels do not happen on their own—"Happenstance," the Court chided "is unlikely to produce this disparity."[86] As such, in delving into the prosecutorial explanation for prima facie discriminatory use of peremptory challenges, the Court gave several concrete prescriptions meant to cure "the rub," meaning the "practical difficulty of ferreting out discrimination."[87]

First, the Court in *Miller-El* deemed "side-by-side" comparisons of struck and retained jurors a more persuasive indicator of discrimination than statistical records.[88] Specifically, in analyzing the prosecutor's rationale for striking jurors of color, an assessment should be made of whether that

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court made specific findings with respect to each of the prosecutor's proffered race-neutral reasons.

Id.

85. *Miller-El*, 545 U.S. at 237–38.

86. *Id.* at 241.

87. *Id.* at 238.

88. *Id.* at 241.

rationale should also have led to the striking of white jurors. This "comparative juror analysis"[89] requires the court to assess, by "contrasting voir dire questions posed respectively to black and non-black panal members,"[90] whether the prosecutor's rationale is "'[]worthy of credence.'"[91] As such, in assessing the neutrality of the prosecutor's explanation, the trial court must query whether the prosecutor has the same concerns and questions of white and non-white jurors alike. Otherwise the proffered explanations likely "reek[] of afterthought."[92] Such inconsistencies reveal the prosecutor's proposed neutral explanation as pretext and, hence, an implausible basis upon which to uphold discriminatory peremptory strikes. Furthermore, the Court affirmed the sentiments expressed in the recent case of *Ex parte Travis*[93] by quoting the Alabama Supreme Court: "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."[94] If there is really cause for concern one would expect a rich exchange before the court on the matter.

While the prosecutor's motives are his or hers alone, the Court goes on to provide guidance as to how this element must be analyzed. Hence the assessment is necessarily objective—whether the prosecutor's explanation for seemingly discriminatory use of peremptory challenges is reasonable,[95] "how reasonable, or how improbable, the explanations are; and . . . whether the proffered rationale has some basis in accepted trial strategy."[96] This stringent objective test does not merely assess whether the trial judge "can imagine a reason [for the race-based peremptory challenges] that might not have been shown up as false."[97] Rather, the "prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."[98] Thus, the objective test component of the neutral-explanation assessment calls for more than an "exercise in thinking up any rational basis"[99] on which to justify the racially discriminatory peremptory challenges; instead, it requires the trial court to assess whether the response is pretext and hence implausible when considered in the context of the

89. *Id.*

90. *Miller-El*, 545 U.S. at 255.

91. *Id.* at 241 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

92. *Id.* at 246.

93. *Ex parte* Travis, 776 So. 2d 874 (Ala. 2000).

94. *Miller-El*, 545 U.S. at 246 (quoting *Travis*, 776 So. 2d at 881).

95. *Id.*

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

97. *Id.* at 252.

98. *Id.*

99. *Miller-El*, 545 U.S. at 252.

entire voir dire testimony.[100] While a systemic analysis is not necessary, this objective assessment of the prosecutor's explanation is further buttressed by any information indicating "broader patterns" or racialized use of peremptory challenges.[101] Again, the Supreme Court's recent decision in *Snyder* makes a mockery of this broader assessment of prosecutorial behavior—the Court had the opportunity to explore in depth the numerous instances of unethical and racially inflammatory behaviors of the prosecutors, yet it remained mute, preferring instead to act as if the prosecutorial misconduct took place in a colorblind manner. The Supreme Court ultimately found discrimination, but failed to name it as racism.

Instead, *Miller-El* requires courts to consider objectively whether the racially homogenous jury construction can be "explained away."[102] The trial court is instructed to consider the prosecutor's responses not in isolation, but in the context of cumulative evidence that leads to the conclusion of discrimination.[103] Thus, when the evidence fits a hypothesis of racial discrimination, as racism explains the resulting jury pool better than the race neutral reason offered,[104] the third step of the *Batson* test is fulfilled and the court should find that the prosecution exercised its peremptory challenges in a discriminatory fashion. This is precisely what was not done in the Louisiana decisions in *Snyder*.[105] By contrast, the Supreme Court found that the prosecution exercised the challenges in a discriminatory way, but failed to undertake an informed and contextual analysis of the many reasons why the Court was correct in so finding.

Despite my agreement with the ultimate outcome of *Snyder*, the analysis of the case demonstrates a lack of rigor—the majority of the Court, while reaching what I believe to be the appropriate outcome, shied away from any serious engagement with the Fourteenth Amendment or its racial underpinning. As will be discussed below, the Court's decision in *Snyder* is whitewashed and does the seemingly impossible—it employs as race-neutral and as colorblind an analysis as possible under the bailiwick of a race-based *Batson* challenge.

II. *SNYDER* AND THE PROSECUTORIAL USE OF RACIAL PROXIES—THE LOUISIANA SUPREME COURT DECISION

Allen Snyder and his wife Mary, both African-American, separated in the summer of 1995.[106] Theirs was a rocky relationship as Allen had been

100. *Id.*

101. *Id.* at 253.

102. *Id.* at 263.

103. *Id.* at 265.

104. *Miller-El*, 545 U.S. at 266.

105. State v. Snyder (*Snyder II*), 942 So. 2d 484 (La. 2006), *rev'd*, 128 S. Ct. 1203 (2008); State v. Snyder (*Snyder I*), 750 So. 2d 832 (La. 1999).

106. *Snyder I*, 750 So. 2d at 836.

physically abusive and both had pursued other relationships toward the end of their marriage.[107] Despite Mary and the kids having left the Snyders' home to live with Mary's mother, Allen contacted Mary seeking reconciliation.[108] Mary agreed to meet with Allen the next day, but declined his request to meet that evening.[109] Instead, that night Mary went out with Howard Wilson and did not accept pages from her estranged husband during the date.[110] Upon returning in Wilson's car to her mother's home after midnight, Allen approached the driver's side, opened the vehicle door and proceeded to stab Wilson nine times and Mary nineteen times.[111] Wilson died from his wounds; Mary survived.[112]

Prior to Snyder's trial, lead prosecutor James Williams made public statements referring to this case as "his O.J. Simpson case."[113] It is important to note that temporally the *Snyder* trial took place less than a year after the acquittal of athlete and celebrity O.J. Simpson.[114] Further, the *Snyder* trial was heard in a community known for its racial divisions—Jefferson Parish, the site of former clansman David Duke's ascendancy.[115] As both *Batson* and *Miller-El* have taught us, context matters.

Defense counsel moved to prevent Williams from making further comparisons of the Snyder and O.J Simpson cases, either to the media or the jury, as "surveys conducted since the verdict in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe that the not guilty verdicts were wrong."[116] However, the trial judge accepted Williams's promise, that "'as an officer of the court' he would make no references to the O.J. Simpson case before the jury."[117] In addition, the court also denied the defense's second motion seeking to stop Williams's continued references to the case as analogous to the O.J. Simpson case

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Snyder I*, 750 So. 2d at 836.

112. *Id.*

113. David G. Savage, *Citing Bias, Justices Reject Death Sentence*, L.A. TIMES, Mar. 20, 2008, at A11.

114. O.J. Simpson was acquitted on October 3, 1995. L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 EMORY L.J. 107, 133 n.162 (1999).

115. *See* Brief of Appellant-Petitioner at 3–4, Snyder v. Louisiana, 128 S. Ct. 1203 (2008) (No. 06-10119) ("Less than six years earlier, white supremacist David Duke, a former grand wizard of the Knights of the Ku Klux Klan, carried Jefferson Parish in primaries for the United States Senate and governor of Louisiana, and completed a term representing a district in Jefferson Parish in the Louisiana House of Representatives." (footnotes omitted)).

116. *Id.* at 6–7 (citations omitted).

117. *Id.* at 2 (citations omitted); *see also id.* at 6 (noting that the defense moved "to preclude the state from making any reference or comparison whatever—direct or indirect—to other notorious prosecutions, specifically *People of the State of California v. Orenthal James Simpson*" (internal quotation marks and citations omitted)).

based on Williams's representations to the court that he would "not at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case."[118]

Thereafter, in constructing the jury, the prosecution struck all five of the thirty-six black prospective jurors—one as a back-strike.[119] While the defense brought a *Batson* challenge at the time that the prosecution peremptorily struck the last three jurors, the trial judge rejected the challenge. Williams, after having achieved an all-white jury, reneged on his promise to the court and told the jurors that this case was "'very, very, very similar' to the O.J. Simpson case, where O.J. 'got away with it.'"[120] Even in his rebuttal argument, Williams again broke his promise to the court by mentioning "the most famous murder case in the last, in probably the recorded history, that all of you all are aware of . . . happened in California very, very, very similar to this case."[121]

Though the *Snyder* case has had a serpentine procedural history with many twists and turns,[122] this Article focuses on the Louisiana Supreme Court's ruling and the subsequent Supreme Court decisions. In its decision, the Louisiana court selectively read *Batson* and *Miller-El* in such a way as to eviscerate the second and third prongs of the *Batson* test. Specifically, in seizing not upon the helpful instructions from the Supreme Court with respect to the manner of interpreting the prosecutor's neutral explanations for facially racially discriminatory peremptory challenges, the Louisiana court instead focused upon the Supreme Court's recent decision in *Rice v. Collins*[123] for the proposition that "the race-neutral explanation need not be persuasive or even plausible."[124] This appears to be a court inclined to revert back to the forbidden prosecutorial presumptions of fairness and equity from *Swain*.

By stating, "It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation," the Louisiana court blithely ignored the Supreme Court's instructions from *Miller-El*. Such logic is exactly what the Court in *Miller-El* moved away from in its adoption of an objective assessment of the prosecutor's stated explanation. Indeed, the Supreme Court plainly stated in *Miller-El* that more is expected from the prosecutor than an

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118. *Id.* at 8 (citation omitted).

119. "Although African Americans made up approximately 20% of the population of Jefferson Parish in 1996, nine—10.6%—of the eighty-five prospective jurors questioned in the six panels were black. Four were dismissed for cause. The prosecutor used peremptory strikes to remove the remaining five." *Id.* at 10 (citations omitted).

120. Brief of Appellant-Petitioner, *supra* note 115, at 2 (citation omitted).

121. *Id.* at 39. The defense counsel had objected, but the trial judge overruled the objection. *Id.*

122. For a description of this procedural posture, see *Snyder v. Louisiana*, 128 S. Ct. 1203, 1206–07 (2008).

123. Rice v. Collins, 546 U.S. 333 (2006).

124. State v. Snyder (*Snyder II*), 942 So. 2d 484, 489 (La. 2006).

"exercise in thinking up any rational basis" on which to justify the racially discriminatory peremptory challenges.[125] The Louisiana court, in its insistence on presumptive prosecutorial race neutrality, ignored not only the fact that *Batson* overruled this logic, but also that *Miller-El* instructed courts to broaden their focus to include more than the prosecutor's proffered statements of explanation, but to analyze the plausibility of that explanation in the cumulative context of questionable prosecutorial behavior; the trial court must consider whether the prosecutor's explanation is pretext and thus implausible in light of the whole voir dire testimony.[126]

The Louisiana court's placement of the burden on the defendant evidences a fixation upon the Supreme Court jurisprudence of *Rice*; it asserted that "[t]he ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge."[127] But *Rice* was a slightly different legal case. First, it involved an objection to the striking of only one juror—a young African-American woman—not the striking of all black jurors as happened in *Snyder*. Second, *Rice* involved an application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In such a case, a federal habeas court has a slightly higher standard—it must find that the state court reached a conclusion that was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[128] Thus the *Snyder* Court seized upon a much more rigorous standard of review—this much is made clear by the Court in *Rice* itself when it stated:

> On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. . . . Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence."[129]

As such, the focus in *Rice* is not on the evidence at hand or on whether the prosecutor's explanation is plausible in light of the totality of his or her conduct at the voir dire, but upon the judge and whether he or she could reasonably have accepted the prosecutor's race-neutral explanation. In short, the focus under AEDPA is not upon error, but upon whether an

125. Miller-El v. Dretke, 545 U.S. 231, 252 (2005).

126. *Id.*

127. *Snyder*, 942 So. 2d at 489 (citation omitted).

128. *Rice*, 546 U.S. at 338.

129. *Id.* at 338–39.

unreasonable judicial decision overcomes a presumption of judicial correctness. It is one thing to find the rationale of a judge unreasonable: it is quite another to view the prosecutor's explanations for error in the cumulative context of the entirety of the voir dire. For these reasons, the Louisiana court should have focused on the Supreme Court's instructions in *Miller-El*, not *Rice*.

Miller-El would have required the Louisiana court in *Snyder* to consider objectively whether the racially homogenous jury construction could be "explained away."[130] The court should have considered the prosecutor's reasons for striking three out of four of the potential black jurors and the later back-strike of the fifth of five black jurors not in isolation,[131] but in the context of cumulative evidence of racialized jury strikes that achieved an all-white jury. This in turn would have led to a finding of discrimination.[132] In addition, the Louisiana court should not have allowed the allegation of purported nervousness on the part of the back-struck juror, as "strikes based on vague references to attributes like demeanor 'are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race.'"[133]

The totality of the *Snyder* voir dire should have led the Louisiana Supreme Court to recognize that the evidence fit a hypothesis of racial discrimination. Racism, not happenstance, explained the resulting jury pool better than the race-neutral reasons proffered by the prosecutors.[134] A

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130. *Miller-El*, 545 U.S. at 263.

131. For instance, in explaining the back-strike of Jeffrey Brooks, Williams stated that

> [T]he main reason is that he looked very nervous to me throughout the questioning, Number 2. [Also], he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is that for that reason, . . . he might [want] to go home quickly [and] come back with guilty of a lesser verdict so there wouldn't be a penalty phase.

Brief of Appellant-Petitioner, *supra* note 115, at 26. Defense counsel challenged these assertions by pointing to the fact that the clerk of the court had called Brooks's school and the dean had indicated that there would not be a problem. Further, regarding nervousness, defense counsel stated, "hell, everybody out here looks nervous. I'm nervous." *Id.* at 27.

With respect to the strike of Elaine Scott, the two prosecutors gave different reasons. Williams claimed that he had "observed she was very weak on her ability to consider the imposition of the death penalty." *Id.* at 34. The prosecution indicated that, "she was very positive [when I mentioned] a life sentence, she was very positive on her reason—her agreement that she could do that." *Id.* The defense brief points out not only that Scott had replied similarly to the white potential jurors, but that she has also unequivocally stated, "I could," when asked about her ability to apply the death penalty. *Id.* at 35. This response was the same as that given by a number of other jurors. *Id.* at 36. As such the petitioner's brief noted that the prosecution had mischaracterized Scott's testimony and declined to seek clarification of her response, as it did with a similarly situated white juror. *Id.* at 37.

132. *Miller-El*, 545 U.S. at 265–66.

133. State v. McFadden, 191 S.W.3d 648, 655 (Mo. 2006).

134. *Cf. Miller-El*, 545 U.S. at 266 (finding discrimination where no other plausible reasons explained the totality of the prosecutor's actions).

cumulative and contextual review of the voir dire reveals that the third step of *Batson* is fulfilled—the court should have found that the prosecution exercised its peremptory challenges in a racially discriminatory fashion. By constructing a racially homogenous jury, the prosecutor found a far more sympathetic audience for his racially polarizing O.J. Simpson analogy.

Not only did the Louisiana court ignore the fact that the Supreme Court plainly held that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial,"[135] but it also failed to hold the prosecutor's proffered race-neutral explanations to an objectively reasonable standard, preferring instead the long-abolished stance of prosecutorial deference and presumptions of fairness in the face of cumulative and contextual evidence that such assertions were mere pretext. Somehow the Louisiana court managed to consider the prosecutor's comments and peremptory challenges in an abstract manner that completely ignored the racial context, and even subtext, clearly at play. Unbelievably, the U.S. Supreme Court has managed to reach a different conclusion while doing the same thing.

III. THE COLLISION OF O.J. AND *SNYDER*

It would not take much insight to recognize the racial polarization surrounding the O.J. Simpson case. Orenthal James Simpson was accused, indicted, and later acquitted of murdering his ex-wife Nicole and her friend Ronald Goldman.[136] Given the history and legacy of racial division, hostility, and segregation in America,[137] what followed the verdict was, in my estimation, similarly expected—generally whites and blacks viewed the case in radically different ways. Indeed, numerous commentators noted that the O.J. Simpson trial was incredibly racially divisive.[138]

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135. Batson v. Kentucky, 476 U.S. 79, 96 (1986). The Supreme Court in *Batson* went on to state that, in order to meet this test, the defendant has to establish that "he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Id.* (citation omitted).

136. *See* JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON 3 (1996); *see also* LAWRENCE SCHILLER & JAMES WILLWERTH, AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE 4–42 (1996).

137. *See* Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267, 285–86 (1989); Dennis D. Parker, *Are Reports of* Brown*'s Demise Exaggerated? Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069, 1073–83 (2004–2005); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 213–24 (2004).

138. *See* VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER 65–90 (1996); CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT 368–72 (1996); Darnell M. Hunt, *(Re)Affirming Race: "Reality," Negotiation, and the "Trial of the Century,"* 38 SOC. Q. 399, 400–02 (1997); Leonard Green, *Racism Is Still the Hot Coal the Nation Refuses to Touch*, BOSTON HERALD, Oct. 2, 1995, at 4, *available at* 1995 WLNR 260446 (stating that the O.J.

Highlighting its centrality in American popular culture, the *People v. Simpson*[139] was frequently referred to as "The Trial of the Century" by newspapers and media personalities alike. It was, however, criminal trial cum media frenzy, which revealed the salience of race in America. If ever there was a doubt, race continues to matter in the United States, not the least because blacks and whites[140] continue to exhibit what has been called "raced ways of seeing"[141] in ordering and understanding their environments.

Simpson case was "one of the most racially divisive trials of our history"); Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin*, L.A. TIMES, Oct. 10, 1995, at S3.

139. People v. Simpson, No. BA097211 (Cal. Super. Ct. Jan. 18, 1995), *available at* 1995 WL 21768.

140. I do not accept the stability of the black–white binary, because America is, and has always been, a multicultural and mixed-race nation. *See* DAVID R. ROEDIGER, COLORED WHITE: TRANSCENDING THE RACIAL PAST 138–68 (2002) (discussing the prejudices suffered by American immigrants of many ethnicities in the nineteenth and twentieth centuries); HOWARD WINANT, THE NEW POLITICS OF RACE: GLOBALISM, DIFFERENCE, JUSTICE 7–8 (2004) (providing examples of racist American actions, policies, and attitudes promulgated by the white majority against blacks, Asians, Hispanics, and Native Americans at the turn of twentieth century); *Id.* at 43–44 ("This [post-civil-rights] period has . . . witnessed the substantial diversification of the North American population, in the aftermath of the 1965 reform of immigration laws. Panethnic phenomena have increased among Asians, Latinos, and Native Americans, reconstituting the U.S. racial panorama in a multipolar (as opposed to the old bipolar) direction."). *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) (illustrating the black–white binary paradigm prevalent in racial discourse, denouncing that paradigm's exclusion of Latinos, and calling for a shift away from the binary paradigm and toward broader and more inclusive concepts of race and racism).

However, given the prevalence of this divide in the literature with respect to the O.J. Simpson case and verdict, I, too, will privilege this exclusive binary paradigm, as it focuses our attention on the fact that the social divide between blacks and whites is greater than the divide between any other two racial groups. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL, at xii (1992) ("In many respects, other [racial] groups find themselves sitting as spectators, while the two prominent players [black and white] try to work out how or whether they can coexist with one another."); *Id.* at 14 ("The fact [is] that blacks are separated more severely than any other group . . . ."); *Id.* at 15–16 (explaining that the book focuses on the black and white races because "intermediate" groups like Asians, Hispanics, and Native Americans are not subject to the presumptions of inferiority associated with blacks and because more members of the intermediate groups are merging into the "white" category); Erica Chito Childs, *Looking Behind the Stereotypes of the "Angry Black Woman": An Exploration of Black Women's Responses to Interracial Relationships*, 19 GENDER & SOC'Y 544, 544 (2005) ("'Blacks and whites continue to be the two groups with the greatest social distance, the most spatial separation, and the strongest taboos against interracial marriage.'" (quoting KERRY ROCKQUEMORE & DAVID BRUNSMA, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA, at ix (2001))); Hunt, *supra* note 138, at 400 ("[T]he labels white and black continue to define the top and bottom of the U.S. racial-socio-economic order, thereby serving as important status anchors in an increasingly multiracial society." (citation omitted)). *See generally* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (5th ed. 2004) (discussing race in American law and focusing on the black–white binary); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (discussing the establishment, maintenance, and future of black–white housing segregation and noting that other racial groups have not experienced the same degree of geographic segregation).

141. Hunt, *supra* note 138, at 403–04.

Despite the dynamism that we now know pervades the fluidity, elasticity, and constructedness of race—that race is a socio-political construct[142]—we are stuck with the essential reality that much of the way in which we "negotiate, contest, and affirm"[143] our existence is a process that is deeply raced. The method of producing race, therefore, is an interactive one, which "works through social interaction to erect structures of thought, to naturalize racial differences, and to reproduce group boundaries."[144]

This reification of race is crucial in understanding Williams's move to construct an all-white jury—given the racial lenses through which society views the world, he must have known that he was constructing a jury more sympathetic to his O.J. analogies and, therefore, a jury more likely to seek the death penalty for Snyder.[145] Viewed in this light, the prosecution's statements, mischaracterizations, and use of peremptory challenges were the ironic playing of the "race card"[146] routinely claimed against the O.J.

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142. The term "sociopolitical construct" is meant to convey the fact that there is no biological reality of race, only a socially constructed reality that gives race meaning. *See* Miriam R. Hill & Volker Thomas, *Strategies for Racial Identity Development: Narratives of Black and White Women in Interracial Partner Relationships*, 49 FAM. REL. 193, 193 (2000) ("[R]ace is not a typology of concrete, mutually exclusive categories. We can best understand it within a social constructionist framework as the negotiated interaction between a societal phenomenon of categorization based on physical markers . . . and a personal phenomenon of identity development.").

143. Hunt, *supra* note 138, at 399.

144. *Id.*

145. *See* Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005) ("Based upon the current meta-analysis, it appears that the effect of racial bias in juror decision-making is small, yet reliable."); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge*, 31 LAW & HUM. BEHAV. 261, 269–72 (2007) (finding that race influences the use of peremptory challenges, but that such use is often justified in race-neutral terms); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1376, 1378 (2000) (noting that the study "demonstrate[d] that explicit references to racial issues in an interracial trial have different effects on White and Black jurors" and "suggest[ed] that White jurors (and by extension White police officers, White Judges, White lawyers, etc.) still demonstrate bias in cases where racial issues are not emphasized, justifying Black jurors' skepticism about the fairness of the criminal justice system").

146. *See* George Skelton, *'Race Cards' Succeed All Too Often*, L.A. TIMES, Oct. 5, 1995, at A3. Skelton reported:

> We can only speculate about the race card's true effect on the Simpson jury, which included nine blacks. It was "barely a blip," one African American juror told The [L. A.] Times. The jury simply did not accept the prosecution's evidence, he said. "It was garbage in, garbage out."
>
> We cannot get into the minds of jurors. But we do not need to get into the mind of defense attorney Johnnie L. Cochran Jr. We heard and read his words to the jury. And its verdict proved that his blatant playing of the race card, at the least, did not hurt Simpson's case.

Simpson "dream team."[147] Thus despite the process through which race is engineered and maintained in American society, there remains a racial fixity

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> "Not only did we play the race card, we dealt it from the bottom of the deck," attorney Robert L. Shapiro, Cochran's colleague, told ABC-TV's Barbara Walters. "(Cochran) believes everything in America relates to race. I don't."

Id.; *see also* Lorraine Adams, *Simpson Jurors Cite Weak Case, Not 'Race Card'; Police Handling of Evidence Was Major Concern for Panel*, WASH. POST, Oct. 5, 1995, at A1. Adams reported:

> Members of the O.J. Simpson jury said today it was a lack of evidence and not the "race card" that led them to acquit the former football star in a verdict that has sharply divided Americans along racial lines.
>
> . . . .
>
> But today juror Brenda Moran, a 45-year-old computer technician, singled out the Los Angeles Police Department's handling of the case as the major factor in the verdict. "We didn't even deal with that deck, period, from the bottom. We didn't even get to that issue," said Moran, who is African American.

Id. Another reporter described the situation:

> The Simpson-Goldman murder trial has been skillfully hijacked. The sideshow has become the main event. Asking the jury to rise up against a racist system is a brilliant defense strategy and a terrible abuse of the criminal-justice system. This is not what juries are supposed to do.
>
> . . . .
>
> Fuhrman's outspoken racism made Cochran's job easier. It is far easier for Cochran to argue that Fuhrman is guilty than that Simpson is innocent. Simpson became the stand-in victim for every African-American who has ever been brutalized by the police—and there have been many—while the murder victims were relegated to the sideshow.
>
> By late last week, Cochran was comparing the Simpson case to Brown v. Board of Education and the fight against slavery, to standing ovations at the Congressional Black Caucus conference on Washington. . . .
>
> . . . . [Simpson's defense attorneys] kept the focus squarely where Cochran wanted it—on race.

Susan Estrich, Op-Ed., *The Simpson Case; Not the Facts: Having a Jury Rule on Social Problems*, L.A. TIMES, Oct. 1, 1995, at M1.

147. Nora Zamichow, *Fred Goldman Deluged by Offers of Help*, L.A. TIMES, Oct. 13, 1995, at A29. Zamichow reported:

> Goldman's legal battle against Simpson has quickly assumed a David vs. Goliath aura. Simpson spent almost $6 million on his defense in the murder trial, pitting Johnnie L. Cochran Jr. and the rest of the "Dream Team" against the county district attorney's office. And Simpson's recent comments indicate he has ample funds to wage his battles in civil court.

Lorraine Adams & Serge F. Kovaleski, *The Best Defense Money Could Buy; Well-Heeled Simpson Legal Team Seemed One Step Ahead All Along*, WASH. POST, Oct. 8, 1995, at A1; *see also* Nell Henderson & Marc Fisher, *O.J. Simpson Acquitted; Football Legend 'Relieved' at Verdicts After 9-Month Double Murder Trial*, WASH. POST, Oct. 3, 1995, at A1. This report described the defense team's strategy:

that strategic actors can easily mobilize for their benefits. This racial divide with respect to the O.J. Simpson case certainly existed at the time of the *Snyder* case, which was within a year of the O.J. Simpson verdict, as it continues to exist to this day. In fact,

> Opinion polls taken shortly after the murders and throughout the trial echoed this divide. Reports typically ignored the perceptions of Latinos, Asians, or Native Americans regarding Simpson's innocence or guilt and focused, instead, on differences between white and black Americans []. For example, a poll taken a few weeks after the murders found that 60 percent of black respondents considered Simpson, "not guilty," compared with only 15 percent of white respondents. A poll taken shortly after the verdicts were announced found the gap still present: this time 78 percent of black respondents considered Simpson innocent, while 75 percent of white respondents considered him guilty.[148]

Indeed, during and following the O.J. Simpson case, much of the media frenzy surrounding the case actually foregrounded this divergent "raced way of seeing."[149] This media coverage made race, and divergent racial

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> Simpson pleaded not guilty at his first arraignment more than a year ago and hired a multimillion-dollar "Dream Team" of more than a dozen expert trial attorneys, including some of the biggest names in the profession, to argue from the start that he was wrongly accused by police and prosecutors.

Id.

148. Hunt, *supra* note 138, at 400.

149. *Id.* at 403–04. For different perspectives on the Simpson trial, see Paul Duggan's article in *The Washington Post*:

> "The issue is, for once in a lifetime, a black man was able to afford adequate representation," said Tene McCoy, 23, a Howard University law student. "We can now do what white people have been doing all the time." Mike Berning, a 60-year-old consultant in the District, declared: "What all of this does show is you can hire justice in this country. Justice can be manipulated. It's all about money. . . ."
>
> . . . There were those who felt disgusted [by the verdict], believing that a wealthy black man, able to hire the best lawyers money can buy, had exploited racial sensitivities among jurors and had escaped justice in a grisly double murder that is likely to go forever unpunished. There was, for instance, Jamie Evanicky, 24, who watched the acquittal on television in the Bennigan's restaurant in Springfield Mall. "I'm shocked," she said, declaring that "justice wasn't done. It turned into more of a racial thing than what actually happened. Race played too big a part in it. It's sad to see that, but that's the way it is in this country. "This proves how screwed-up out justice system is, because [the jurors] were looking at other issues than the matter at hand. . . ."
>
> . . . "As far as I'm concerned, black America was on trial," said William Wilkins, a 51-year-old roofer, voicing what polls indicate is a widely held view among African Americans. "Cops have been doing this to us for years," said Wilkins, walking along Connecticut Avenue NW after Simpson's acquittal. "If cops see me walking up here

at . . . night, they stop me and ask me what I'm doing up here. Like I can't walk Connecticut Avenue. That ain't freedom."

Paul Duggan, *Washington Comes to a Stop; Then Pent-Up Emotions Start Spilling Out*, WASH. POST, Oct. 4, 1995, at A1. For emotions following the verdict, see Howard Kurtz's article in *The Washington Post*:

> Emotions were particularly raw [after the verdict] on talk radio, which reverberated with joyous black callers and angry white callers. On Washington's WOL, where a promotional spot said, "This is Johnnie Cochran and you're listening to WOL," owner Cathy Hughes gleefully sang, "Victory is ours!"
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> . . . On Manhattan's WLIB, a black-oriented station, a woman named Robbie said of whites: "They are out to get us."
>
> Ken Hamblin, a black conservative, spoke with a caller to his syndicated show who said: "There are people, mostly black people, around this country who are saying, 'We beat the white scum at their game. . . ."
>
> . . . New York's Bob Grant called the verdict a "great travesty of justice." Boston [radio] host Howie Carr read faxed messages from white listeners: "Another killer walks the streets tonight." "I'm sick to my stomach."
>
> "Why don't we just open up the prisons and let 'em all go?" one caller said.
>
> "If this was a white guy, he would've been fried," another declared.
>
> "How can we possibly vote for Colin Powell now? How can we give them that much power?"

Howard Kurtz, *Hung Jury in the Court of Public Opinion*, WASH. POST, Oct. 4, 1995, at B1. For other reactions of the verdict, see David Montgomery's article in *The Washington Post*:

> "There are a lot of people in jail who are innocent," said Lorraine Washington, 42, who is black and hailed Simpson's acquittal as justice being done.
>
> She didn't expect it to go that way. She said she was glad defense attorney Johnnie L. Cochran Jr. played the "race card," notably during his closing argument when he cited great civil rights figures of history.
>
> "If he was defending me and didn't bring that out, I would be very upset," Washington said.
>
> At the other end of the table sat Kate Kent, 34, who is white. She deplored the verdict and Cochran's closing speech, because to her it seemed to invite the jury to use their verdict to make a statement.
>
> "The jury said, 'We want a just society and we can't have it, because we've got a racist Los Angeles Police Department so we've got to acquit O.J.,'" Kent said. "I think the prosecution proved he was guilty. . . ."
>
> . . . Everybody said the trial had opened a valuable dialogue about race throughout the country.
>
> "It's uncomfortable, especially for white people, to talk about race because then they might have to admit the system is unfair," Kent said.
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> . . . .

> . . . In the Washington suburb of Arlington, Va., a refrigerator repairman named Albert Lee says he thinks Simpson was guilty. But to this African American, the verdict was sweet revenge, a kind of 'catching up' for three centuries worth of injustices visited upon his people. "Well," he declares, "it's our turn now." Rick Rogers, a white insurance salesman who lives in a small city north of Knoxville, Tenn., recoils at that line of thinking. The trial has made him tired of black complaints about racism. "It's getting a little ridiculous," he fumes. "Any time a white person does anything, it's racist." In Atlanta, Bev Murphy, a corporate banker, is furious over the way the media have stereotyped whites and blacks. She is white and yes, she thinks Simpson did it, as the majority of whites do. But she also thinks the case was tainted—a sentiment many other whites share. "I believe in the true justice system," she says angrily. "I don't believe in finding people guilty based on false evidence. . . ."

David Montgomery, et al., *Simpson Verdict Prompts Debates on Justice*, WASH. POST, Oct. 12, 1995, at M1. For more opinions on the verdict, see Anna M. Virtue and Doug Conner's article in *The Los Angeles Times*:

> "Then the Fuhrman cover-up started, and everything fell into place for me," said Coats, who is African American and a payroll clerk at a Miami employment agency. "For me, it's more than O.J.'s trial. It's a moral issue. If he had been found guilty, any hope I had that racism could be beaten would have disappeared. []Now I think there's hope for the system. . . ."
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> . . . .
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> Halloran said Simpson was acquitted at least partly because of Mark Fuhrman, the Los Angeles police detective, now retired, whose repeated use of racist pejoratives became an angry point of contention. "Justice wasn't served. Race shouldn't have become an issue. After this verdict, spousal abuse will go up. The batterer will say he can get away with it. I'm not sure how to fix the system, but something has to be done. . . ."
>
> . . . Most positive reactions to the Simpson verdict, however, came from blacks, and most negative reactions came from whites. Tyrone Prince Ford, who shines shoes at a Washington, D.C., barber shop, said that anything but an acquittal verdict would have been "100% racism."

Anna M. Virtue & Doug Conner, *The Simpson Verdicts; From Coast to Coast, a Nation Is Divided on Simpson Verdict*, L.A. TIMES, Oct. 4, 1995, at A11. For another response, see Michael Wilbon's article in *The Washington Post*:

> At a church in black Los Angeles, the pronouncement "not guilty" elicited a joyous celebration. In a classroom on the campus of Howard University, students erupted into prolonged cheers. On North Capitol Street, just north of Union Station, young black men who'd never met leaned out of cars and passionately high-fived each other because the Juice was loose. All over urban America you could find these scenes yesterday. It was as if acquitting O.J. Simpson made up for Rodney King and Emmitt Till. For all the black father and uncles and grandfathers who'd been jailed unjustly, for every brother who has been framed or railroaded, beaten into a confession or placed at the scene of a crime when he was a million miles away.

Michael Wilbon, *A Celebrity Goes Free*, WASH. POST, Oct. 4, 1995, at F1.

viewpoints surrounding the O.J. Simpson case, common knowledge, capable of judicial notice.[150] Hence, it is preposterous to privilege the incredible prosecutorial race-neutral explanations in the *Snyder* context—not only because the prosecutor twice lied to the trial judge when he promised to refrain from invoking O.J. Simpson,[151] which was ostensibly a matter of professional misconduct—but because anyone cognizant and paying even the slightest attention would have known that the mere mention of the O.J.

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150. Indeed, some of the media commentary even questioned the motivations and responses that this heightened coverage of race generated during and after the O.J. Simpson case:

> [Chicago Tribune reporter Jessica] Seigel, who like [ABC News Reporter Cynthia] McFadden is white, thinks the polls misstated or at least mischaracterized the attitudes of many African Americans toward Simpson's guilt or innocence. Most of these polls, she suggests, asked only a few questions and got predictably superficial or knee-jerk answers about feelings that were really quite complex. The reporting on these polls has been "creating (racial) divisions where there might not be any," she said.....
>
> Sam Fulwood III, an African American reporter in the Washington bureau of the Los Angeles Times, got similar results in his own, informal barbershop poll. "I don't think any blacks want to give up any black man ... to the white racist criminal justice system," Fulwood said. "If pollsters, 99% of whom are white, ask blacks if he's guilty, then the 'race gene' kicks in and they all say no. Privately, like in my barbershop, they may say, 'Oh yeah, he did it. But I wouldn't tell any white person that.'"
>
> ....
>
> Within days of Simpson's arrest, African Americans were outraged by a Time magazine cover featuring Simpson's face. An artist at Time had modified the arrest photograph that had been released by the LAPD, and the resulting "photo illustration," as Time called it, made Simpson appear darker and more out of focus, more somber than the actual photo.
>
> Blacks and many whites said the cover made Simpson look guilty and they criticized Time for playing into unfair, inaccurate and damaging stereotypes that depict black men as sinister and menacing. James Gaines, the managing editor of Time, apologized for the cover, "a huge embarrassment," he called it and he denied any racist intent. "It was clearly a case of racial insensitivity," he said. "If there had been an African American at that place at that time, I'm sure we wouldn't have run that cover."

David Shaw, *Obsession: Did the Media Overfeed a Starving Public*, L.A. TIMES, Oct. 9, 1995, at S7.

151. *See* Brief of Appellant-Petitioner, *supra* note 115, at 40. As stated in the brief:

> Williams's invocation of the O.J. Simpson case in breach of his promise "as an officer of the court" is indicative of both his intent in striking African American jurors and the credibility of the reasons he proffered for striking them. The closing argument revealed beyond any question that neither Williams nor the reasons he gave for striking jurors were worthy of belief. The Louisiana Supreme Court erred in disregarding this evidence of Williams's discriminatory intent. . . .

Id.

Simpson verdict would be racially polarizing at best and, indeed, racially inflammatory at worst, when spoken to an all-white audience. In short, the intentional and repeated summoning of the O.J. Simpson case should be interpreted as an intentional reference to a racial proxy,[152] as the public was repeatedly told that most blacks in America were relieved or happy about the verdict, while most whites felt the exact opposite.[153] In addition to the sustained media attention, there was much academic commentary on the O.J. Simpson case and verdict as well—the racial overtones were made patently obvious. The country was bombarded from numerous interdisciplinary sources with the divergent racialized opinions brought on by the O.J. Simpson case—there was no escaping these pontifications.

For instance, sociologist Herman Gray said, "'This case has put race on the agenda in a powerful way, a way that it hasn't been. . . . It may actually be another touchstone, like the L.A. riots, that we can point to to understand the nature of our conflicts, the racial organization of our society and our culture.'"[154] As journalist Sheryl Stolberg pointed out:

> [T]he celebration over Simpson's acquittal was not really a celebration over letting the Juice loose; the Juice is no Nelson Mandela. Rather, it was a moment of sweet triumph for all the anonymous black men in America who didn't have the money to buy a dream team of attorneys to fight a system that produces a racist cop like Mark Fuhrman—and does nothing to weed him out.[155]

As such, although there were and are many black people who think that O.J. Simpson may not be innocent, the case is viewed against the backdrop of a criminal-justice system that wreaks havoc in the lives of African-Americans and black men in particular. It is within this context that one should place the remarks of English Professor Mary Helen Washington:

> I can understand the visceral response. You all do it to us every time, but you didn't do it to us this time. This was one strike against the racist, unjust criminal justice system. That's what I think it was. This was one time we fought it, and we succeeded in fighting it.[156]

Professor Joe Feagin went further by stating,

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152. *See* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1297–1308 (exploring the problem of proxy discrimination as demonstrated through racial ascriptions made on the basis of names).

153. *See supra* notes 146–50 and accompanying text (discussing the different perceptions between races of the O.J. Simpson case).

154. Stolberg, *supra* note 138.

155. *Id.*

156. *Id.*

> Black people have been saying [that the system abuses African-Americans] and documenting it with their bloody backs and heads for decades . . . Most African Americans look at the O.J. Simpson case through totally different glasses for a very simple reason, and that is that black people generally don't get justice in the American criminal justice system.[157]

Scholars have noted, however, that the O.J. Simpson case was anything but typical. It was anomalous in a number of important ways. Professor David Cole notes as much by stating:

> [I]t took an atypical case, one in which minority race and lower socioeconomic class did *not* coincide, in which the defense outperformed the prosecution, and in which the jury was predominantly black, for white people to pay attention to the role that class and race play in criminal justice. Yet the issues of race and class are present in every criminal case, and in the vast majority of cases they play out no more fairly. Of course, they generally work in the opposite direction: the prosecution outspends and outperforms the defense, the jury is predominantly white, and the defendant is poor and a member of a racial minority. In an odd way, then, the Simpson case brought to the foreground issues that lurk beneath the entire system of criminal justice. The system's legitimacy turns on equality before the law, but the system's reality could not be further from that ideal.[158]

Interestingly, in addressing the reality of a racially biased criminal-justice system, the Supreme Court in *Batson* recognized that "the reality of practice . . . shows that the [peremptory] challenge may be, and unfortunately at times has been, used to discriminate against black jurors."[159] So if anyone was cognizant of this divergence, it would have been a prosecutor in Jefferson Parish in the same year in which the O.J. Simpson case was decided. "That the social realities of 'white' and 'black' Americans

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157. *Id.* Addressing the inevitable white backlash following the O.J. Simpson verdict, political scientist Andrew Hacker

> expect[ed] the [Simpson] acquittals to have ramifications far beyond the criminal justice system, as white anger translate[d] into a lack of support for affirmative action, welfare and other social programs that are important to blacks. "A lot of white people were very upset to see black people on TV looking that happy," Hacker says. "There are a lot of areas where black people, being in the minority, depend on white support and goodwill. And insofar as white people feel blacks are behaving badly and need to be chastised a bit, there is going to be some lessening of support."

Id.

158. COLE, *supra* note 11, at 3 (emphasis added).

159. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

might diverge around contested issues should come as no big surprise."[160] This is exactly why Williams's remarks, that this was "his O.J. Simpson case,"[161] serve as a double whammy—they were the cross and the hook on the way to his death-sentence knock out of Snyder. Williams must have known the power of his words and the work that race does:

> Indeed, individual actors in the United States helplessly rely upon this bipolar framework [whereby black and white continue to serve as status anchors], despite its shortcomings, to make sense of their own experiences and of their relationship to various social groups (i.e., their identity). Actors also depend upon this framework for sizing up others, for interpreting their actions, and formulating responses to them. In this sense, actors and the others they endeavor to understand are "raced," and raced ways of seeing becomes "ritual."[162]

Therefore, by tapping into loaded racial tropes through his invocation of the most racially toxic case of our lifetimes, Williams must have known that his references to O.J. Simpson would speak volumes to the all-white jury he had intentionally constructed. Even if he did not actually know this, he ought to have been so aware; after all, the assessment of his race-neutral rationale is to be objective, based upon a reasonable-actor standard.[163] Moreover, even denying actual subjective racial animus on the part of Williams, the effect may be the same:

> Even presuming that lawyers are always entirely honest and open about their motivations for striking jurors, there are powerful reasons to believe that much discrimination occurs at the subconscious level. Like all people, lawyers undoubtedly form negative impressions about others based on a wide array of factors, only some of which may be articulable. Often, the factors that trigger these negative assessments may be illicit criteria such as race, ethnicity, or gender. A well-intentioned lawyer thus may not only be unaware that her discomfort with a particular jury is race-based, but might sincerely deny the allegation.[164]

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160. Hunt, *supra* note 138, at 403.

161. Savage, *supra* note 113.

162. Hunt, *supra* note 138, at 404 (internal citations omitted).

163. *See supra* notes 95–105 and accompanying text (discussing the required-objective analysis).

164. Covey, *supra* note 2, at 326; *id.* (noting that Justice Marshall observed that "seat-of-the-pants" and instinctual decisions about jurors may indeed be race-related and may be nothing more than "racial prejudice" at work); *see also* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987), 321–23 (analyzing the difficulties inherent in intent-based discrimination tests given that much discrimination is subconscious).

Moreover, Williams's explanations for striking all the black jurors might be evidence of what has been coined "confirmation bias."[165] "Confirmation bias is the tendency to bolster a hypothesis by seeking consistent evidence while disregarding inconsistent evidence."[166] In this way the prosecution might unwittingly adhere to supportive hypotheses and rationales to buttress a previous decision. As Professor Elllsworth has stated, "They interpret facts, formulate questions, and search for information in a way that supports their beliefs without being aware that they are doing so."[167] It is easy to see how a prosecutor seeking to fulfill step two of *Batson* might easily be susceptible to such bias;

> Confirmation bias can arise when people have a stake in a particular hypothesis or a strong desire to cling to a cherished belief. They may unwittingly seek new information or interpret existing information in a way that maintains their belief. Moreover, people are more likely to believe something is true if they also think it is desirable. But even without a reason to favor a particular hypothesis, people prefer hypothesis-consistent information.[168]

Of course Williams was successful before the Louisiana courts. Unlike another black man, O.J. Simpson, Allen Snyder would not "get away with it," especially not before Williams's all-white jury, as opposed to the mixed-race jury[169] found in the O.J. Simpson trial. Williams knew all too well the disparate power of our "raced ways of seeing," evaluating, and punishing. Unfortunately, the U.S. Supreme Court did not seize upon the occasion presented by *Snyder* to comment upon the heavily racialized environment and context in which the *Snyder* case and many other criminal cases take place. Incredibly, this loaded racial background is entirely ignored and, implausibly, O.J. Simpson and his case are copiously absent from both the majority and dissenting opinions.

IV. CONCLUSION—THE SUPREME COURT'S MISSED OPPORTUNITY

"Race has everything to do with group status."[170]

The racially inappropriate motives of the prosecutors in the *Snyder* case are revealed by reference to one simple question: what legitimate purpose

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165. *See generally* Barbara O'Brien & Phoebe C. Ellsworth, *Confirmation Bias in Criminal Investigations* (1st Annual Conference on Empirical Legal Studies, Sept. 19, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913357 (discussing confirmation bias and factors that influence it).

166. *Id.* at 5.

167. *Id.* at 6.

168. *Id.* (internal citations omitted).

169. *See* Hunt, *supra* note 138, at 400 ("[A] jury composed of nine blacks, two whites, and one Latino found Simpson not guilty of murdering his ex-wife and Goldman.").

170. *Id.* at 403.

did the repeated invocation of the O.J. Simpson case serve? First, as early as *Swain*, the Supreme Court indicated that, "The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[171] As such, by injecting a racial externality—the O.J. Simpson case—into the jurors' minds, the prosecutor himself undermined the very foundations for the peremptory challenge.

Second, not only were the O.J. Simpson references prejudicial, irrelevant,[172] and off-point, but given the pervasiveness of divergent "racial ways of seeing" the O.J. Simpson case, the references should be viewed as racially inflammatory remarks.[173] By invoking an irrelevant sensational case, widely known to be racially polarizing, the prosecutor damaged not only Snyder's prospects for a fair trial, but also the perception that justice had been done.

The use of the peremptory challenge is intricately connected to the perception of fairness. Speaking about this appearance, the Supreme Court recognized that, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"[174] The Court in *Batson* put it thus: "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[175] As such, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."[176]

Additionally, the Supreme Court decision in *Powers v. Ohio*[177] highlights yet another important factor necessitating impartial jury construction. Service on a jury is an important democratic exercise demonstrative of citizenship rights.[178] This service is particularly important for "those who

171. Swain v. Alabama, 380 U.S. 202, 219 (1965).

172. *See* Brief of Appellant-Petitioner, *supra* note 115, at 40.

173. *See* Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 GEO. WASH. L. REV. 173, 173 (1996) ("Many African Americans believe that Simpson was prosecuted because he is black, while many white Americans believe that the jury acquitted Simpson because it was predominantly black. Both groups suspect that race negatively affects the judicial process, but they cannot agree on how it does so."); Stolberg, *supra* note 138 ("Something just as insidious and destructive [as lunch counter boycotts, calling out the National Guard and city blocks in flames] is occurring—a verbal riot of sorts, as people of all colors but particularly blacks and whites, vent their elation and their frustration over the outcome of the 'Trial of the Century.'"). Peterson's and Stolberg's articles are both cited in the petitioner's brief for *Snyder*. Brief of Petitioner, *supra* note 115, at 42.

174. *Swain*, 380 U.S. at 219 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

175. Batson v. Kentucky, 476 U.S. 79, 87 (1986).

176. *Id.*

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

178. *Id.* at 402, 407.

otherwise might not have the opportunity to contribute to our civic life."[179] With some dissatisfaction, the Court noted that despite the fact that it had never "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts,"[180] there remained allegations of racial bias in the jury system.[181] Therefore, in reaching the conclusion that race-based exclusions of jurors offend the Fourteenth Amendment irrespective of the race of the accused, the Court made an important statement which focused upon the rights of "ordinary citizens to participate in the administration of justice."[182] Indeed, the Court recognized the socio-political importance of jury duty by noting that "with the exception of voting, 'for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.'"[183] This in turn ensures that ordinary citizens buy-in to the criminal-justice system by fostering the "continued acceptance of the laws."[184]

V. CARPE DIEM

Had the Supreme Court seized the day, its decision in *Snyder* would have looked very different. Dissenting Justices Thomas and Scalia were able to accuse the majority of "second-guess[ing] the trial court's determinations"[185] because of the majority's failure to engage the fullness of the factual background, i.e., the racial noise of this case. In its refusal to address the record appropriately, which revealed not just the prosecutor's flimsy explanations for his jury strikes, but also his invocation of the O.J. Simpson case shortly after the O.J. Simpson verdict, the majority erases race from this case yet still manages to find discrimination. The manner in which it does this is, ironically, pretextual. I agree with the dissent that, absent the racial context in which the *Snyder* case was decided, it could indeed seem as if the majority was usurping the role of the trial judge. Such a racial vacuum, however, could easily have been filled by the majority based solely on the record before it.

First, the narrative of the facts that Justice Alito laid down is mysteriously silent on the prosecutor's numerous references to the O.J. Simpson case and his broken promises to refrain from mentioning the case to the media and the jury.[186] These facts, as outlined above, form part of the robust circumstantial considerations that courts are supposed to assess per

179. *Id.* at 402.
180. *Id.*
181. *Id.*
182. *Powers*, 499 U.S. at 406.
183. *Id.* at 407.
184. *Id.*
185. Snyder v. Louisiana, 128 S. Ct. 1203, 1213 (2008) (Thomas, J., dissenting).
186. *See id.* at 1206–08 (Alito's iteration of the facts).

both *Batson* and *Miller-El*.[187] They form part of the reason why, under the second prong of *Batson*, a reasonable person would be highly suspicious of Williams's attempts to explain his construction of an all-white jury.

Second, even in the finding of the prima facie case of discrimination under the first prong of *Batson*, the Court neglected to name and deconstruct the nature of the prejudice as displayed. Oddly, while reiterating that "all of the circumstances that bear upon the issue of racial animosity must be consulted"[188] per *Miller-El*, the Court went on to do a cursory analysis of the strike of just one black juror, Brooks. In doing so, it failed to undertake the expansive contextual analysis to which it purportedly subscribes. This was a tremendous missed opportunity. It is remarkable that the Court in assessing the *Batson* challenges in *Snyder* did not even mention the O.J. Simpson case.

The references to O.J. form part of the chain of causation that linked the prosecutor's animus to his strikes and back-strikes of black jurors. The prosecutor's O.J. Simpson refrain formed an important part of the racial context of *Snyder*, as it provided a lens through which to assess Williams's motivations for constructing the jury as he did. His final argument, with the inflammatory references to the O.J. Simpson case, would not have been persuasive to a jury with black members. Our "raced ways of seeing," the abundant media coverage detailing divergent opinions on the verdict along racial lines, and numerous polls indicate that either the prosecutor knew exactly what he was doing in constructing a more receptive jury for his arguments or he should have known. This racialized context is essential to this *Snyder* case. By ignoring it, the majority rendered an abstract opinion devoid of important and informative contextual information.

Third, even in its brevity, the majority opinion evaded *Batson*. Justice Alito all but instructed trial judges on how to usurp *Batson*. In chastising the Louisiana Supreme Court for its failure to provide greater insights into its assessment of the *Batson* challenge in *Snyder*, the majority highlighted the fact that the lower court's findings with respect to Brooks, the juror who was back struck and the only strike analyzed by the Court, were "simply allowed . . . without explanation."[189] Presumably, then "the trial judge's evaluation [would have been] given much deference"[190] had the trial judge explained his reasons for denying the challenges. But given the deep racial history of this case, such an outcome would have worked an injustice. Specifically, it is not until one analyzes the context of this case,[191] the actors at play,[192] the

187. *See supra* Part II.

188. *Snyder*, 128 S. Ct. at 1208 (majority opinion).

189. *Id.*

190. *Id.*

191. Specifically, one must consider the fact that it occurred in the setting of Jefferson Parish. *See supra* note 115 and accompanying text.

racially inflammatory nature of the references to O.J. Simpson at the time, and the construction of an all-white jury by striking all black jurors, that one is able to realize that the three steps of *Batson* are easily made out.

Instead, the majority opinion in *Snyder* stated somewhat meekly that, "when all of these considerations are taken into account [meaning the comparative juror analysis of the back-strike of Brooks], the prosecutor's proffered justification for striking Brooks is suspicious."[193] Trouble is, the Court failed to take all the circumstances into account and thereby rendered a curious opinion that lacks the force that a more fully analyzed case would have.

Even if we step back from the racial toxicity of references to the O.J. Simpson case, we are still left with a deeply problematic outcome in the *Snyder* case. The intentional manipulation of the jury pool by the prosecutors to construct an all-white jury is manifest in any reasoned review of the totality of the circumstances of the voir dire. Further, the reasons articulated by the prosecutors for this racial homogeneity are not plausible, especially when added to the accumulation of insult engendered by the O.J. Simpson references. The Supreme Court therefore should have recalled that ". . . the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[194] As such, the Sixth Amendment overtones, when combined with the dictates of the Fourteenth Amendment, should have properly led the Supreme Court to order yet another trial of Snyder.

Snyder deserves to be punished for his crimes. This determination, however, should be made by a jury of his peers that is equitably and fairly struck. Should the construction of a jury in the absence of the exercise of biased peremptory challenges prove impossible, I would agree with Justice Marshall concurring in *Batson* when he wrote, "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely"[195] and also with Justice Breyer concurring in *Miller-El* when he stated that he "believed it necessary to reconsider *Batson*'s test and the peremptory system as a whole."[196] It might be time to contemplate seriously the elimination of the peremptory challenge, at least insofar as death-penalty cases are concerned—justice, it seems, might depend upon it. Indeed, this step certainly would not be unprecedented. England, for

192. It is relevant that Williams twice reneged on his promises to the court that he would no longer mention the O.J. Simpson case. *See supra* notes 116–18 and accompanying text.

193. *Snyder*, 128 S. Ct. at 1209.

194. Batson v. Kentucky, 476 U.S. 79, 99 (1986).

195. *Id.* at 102–03 (Marshall, J., concurring).

196. Miller-El v. Dretke, 545 U.S. 231, 266–74 (2005) (Breyer, J., concurring).

example, abolished the use of peremptory challenges in 1988.[197] Indeed, the controversial prosecutorial behavior in *Snyder* might have rendered it the perfect case in which to revisit the merits of the peremptory challenge, an opportunity the Court missed in *Miller-El*.[198]

The majority in *Snyder*, however, has provided one glimmer of hope about the manner of assessing a *Batson* challenge. In acknowledging that "in other circumstances [the Court has] held that, once it is shown that a discriminatory intent was a substantial *or motivating factor* in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative,"[199] the Court has left the door open for such a causation-driven[200] modification of *Batson* in the future. Justice Alito remarked that "while they have not previously applied this standard in *Batson*" in the case before them it was indeed enough "to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based upon any lesser showing by the prosecution."[201] This could indeed signal a modification of *Batson* that would allow for greater accessibility to the remedial force of such a challenge through enhanced exploration of prosecutorial motivations. Therefore, no matter the direction that the Court decides to follow, it would appear that *Batson* will continue to form a central part of its jurisprudence. *Batson*, it seems, will survive in some form.

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197. Criminal Justice Act, 1988, c. 33, § 118 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1988/ukpga_19880033_en_13. The statute provides:

> (1) The right to challenge jurors without cause in proceedings for the trial of a person on indictment is abolished.
>
> (2) In addition and without prejudice to any powers which the Crown Court may possess to order the exclusion of the public from any proceedings a judge of the Crown Court may order that the hearing of a challenge for cause shall be in camera or in chambers.

Id.; *see* Sommers & Norton, *supra* note 145, at 269 ("[E]ven when attorneys consider race during jury selection, there is little reason to believe that judicial questioning will produce information useful for identifying this bias."). *See generally* Massaro, *supra* note 4 (suggesting abolishing the government use of peremptory challenges).

198. This was despite Justice Breyer's lengthy assessment of peremptories. *Miller-El*, 545 U.S. at 266–74 (Breyer, J., concurring).

199. Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (emphasis added).

200. *Id.* With respect to the assessment of discriminatory motivation, Justice Alito remarked that in the *Snyder* case there was not "any realistic possibility that this subtle question of causation could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." *Id.*

201. *Id.*