Bias, Batson, and "Backstrikes": Snyder v. Louisiana Through a Glass, Starkly

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“In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.”

Justice Harry Blackmun

I. INTRODUCTION: SUSPICION & SANCTION

Two unspoken, unwritten words wreak profoundly harmful effects on jury selection, as well as on the trials and verdicts that follow: “whites only.” This phrase may not be posted above jury boxes, but systematic exclusion of minorities from jury service sends the message. Discriminatory misuse of the peremptory challenge effectively etches the words into courtroom walls, as vivid as the eagle in the American seal.

It is unconstitutional to strike jurors because of their skin color, a principle the U.S. Supreme Court established and repeatedly affirmed throughout history. This line of jurisprudence, which stretches over more than a century, demonstrates the Court’s continuing concern with the deeply rooted, intractable problem of racism. In the most recent example, Snyder v. Louisiana, an all-white jury convicted a black defendant of first-degree murder and sentenced him to death after five black people were struck from the venire. The Supreme Court remanded the case and granted a new trial to the defendant, Allen Snyder.

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1. See Batson v. Kentucky, 476 U.S. 79, 87 (1986) (noting the “harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine confidence in the fairness of our system of justice”).
4. See Strauder, 100 U.S. at 304 (finding that excluding black people from juries is “practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others”).
Snyder marks a rare reversal by the Court of a murder conviction, and the seven-two decision is particularly unusual because racism during jury selection caused the reversal. Snyder’s prosecutor had removed a juror whom he previously empaneled by using a type of peremptory challenge called a backstrike. The Louisiana Supreme Court, which twice before had examined the record, did not discern prejudice in the prosecutor’s peremptory challenges. But the U.S. Supreme Court inferred discriminatory intent from a single strike. The Court did not question the backstrike as a valid procedure, but its decision was based on the only backstruck juror. Writing for the majority, Justice Alito deemed the prosecutor’s explanation for striking the student “suspicious.” As the result of Snyder suggests, the backstrike itself incurs suspicion.

Snyder brings to the fore an issue Louisiana’s justice system must address. A prosecutor’s dismissal of a juror whom he previously accepted deserves heightened judicial scrutiny, especially if his reason is unconvincing. Backstrikes enable lawyers to eject jurors long after they have been questioned and tendered. Delaying a peremptory challenge this way can disguise a discriminatory pattern. As a procedural tool, the backstrike can be deceptive.

Racism is often deceitful. It can hide in plain sight, clothed by colorblindness. It also can be mistakenly read into neutral behavior that appears discriminatory. Shortly after the Snyder decision, the prosecutor insisted that the U.S. Supreme Court was wrong and that “race was never an issue” in the case. Ultimately, his


8. A backstrike is a type of peremptory challenge used to strike jurors after they have been accepted onto the jury panel but before the panel has been sworn. Snyder III, 552 U.S. 472.

9. See State v. Snyder (Snyder II), 942 So. 2d 484 (La. 2006), cert. granted, 551 U.S. 1144 (2007); State v. Snyder (Snyder I), 750 So. 2d 832 (La. 1999), cert. granted, 545 U.S. 1137 (2005). The Louisiana Supreme Court considered Snyder’s appeal in Snyder I then reconsidered it on remand from the U.S. Supreme Court in Snyder II.

10. Snyder III, 552 U.S. at 474.
11. Id. at 477.
12. Id. at 482.
13. Paul Purpura, Supreme Court Casts Out Murder Conviction; Race Used in Picking Jury in St. Rose Man’s Death, TIMES-PICAYUNE (New Orleans), Mar. 20, 2008, at A1 (the prosecutor said, “With all due respect to the U.S. Supreme Court, I think the majority was wrong on this one . . . . Race was never an issue in this case. An all-black jury would have convicted Allen Snyder on the evidence presented, which was overwhelmingly against him”).
motivation is moot. The Court could not tolerate the appearance of racism, even though its existence could not be proven. Snyder shows that courts must avoid even the appearance of prejudice in jury selection. A discriminatory effect can be worse than a discriminatory cause because it erodes the public's faith in the justice system.

This Note analyzes the holding of Snyder, assesses its impact on the jurisprudence of discrimination in juror selection, and proposes practical and legislative changes. Part II describes the background of peremptory challenges, explains the significance of Batson v. Kentucky and Snyder, and explores the background of backstrikes in Louisiana. Part III analyzes Snyder in the context of backstrikes, demeanor justifications, deference to trial judges, and mixed motive analysis. Part IV proposes solutions to make peremptory challenges less problematic. It concludes that backstrikes do too much damage to the justice system and should be banned in Louisiana.

II. BACKGROUND: FROM SHIELD TO SWORD

Traditionally, the peremptory challenge was considered an "arbitrary and capricious right" to be "exercised with full freedom." Modern jurisprudence restricts this right. The challenge need not be explained "unless the challenge was used to discriminate on the basis of race, ethnicity or sex." In other words, its use can be capricious no longer. This increased restriction reflects a growing awareness of, and reaction to, its misuse. Forged as a shield against bias, the peremptory challenge has been sharpened into a sword.

A. Free Reign Fosters Abuse

The peremptory challenge was created as a tacit challenge for cause, a device typically used to dismiss prospective jurors who cannot be impartial, for reasons such as having a relationship to the defendant, defense counsel, or district attorney. At common law, the peremptory challenge was used to dismiss jurors whose

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15. BLACK'S LAW DICTIONARY 245 (8th ed. 2004).
obvious biases made them unfit for jury service. By excluding those citizens who showed conspicuous prejudice or predisposition, British courts protected juries’ impartiality. But the modern use of the peremptory challenge has a contrary effect.

Rather than pursuing an open-minded panel, American lawyers look for jurors whom they see as sympathetic to their side. When both sides try to tilt a jury in their direction, however, the effect is not equality: “Two sets of partial jurors do not an impartial jury make.” A strategy of seeking slanted jurors fosters a fundamental imbalance in the panel’s deliberations.

Moreover, lawyers’ own leanings permeate the jury selection process. With limited time and information about each prospective juror, lawyers typically rely on preconceptions, excluding people based on certain characteristics instead of challenging them on the basis of an articulated or demonstrable bias. Discrimination in jury selection is legitimate and acceptable, as long as it is not based on race, ethnicity, or sex. But the subjective motivation for a peremptory challenge is impossible to prove.

The peremptory challenge’s purpose is to eliminate jurors whose prejudice is hidden or nonobvious. Lawyers therefore rely on intuition or some telling outward sign of a potential juror’s predilections, even subtle reactions to questions such as a twitch, glance, or frown. The challenge gives lawyers the power to strike jurors for virtually any reason, but this power to discriminate freely is easily misused. For example, the peremptory challenge historically has been used to keep black people from serving on juries. It enabled and perpetuated racial discrimination that developed out of America’s slaveholding history.

Before the Civil War, African-Americans were not permitted to serve on juries. Congress made it a criminal offense to exclude people from jury service based on their race in the Civil Rights Act of 1875. In 1880, the U.S. Supreme Court recognized in *Strauder v. West Virginia* that state laws on juror qualification were being

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19. *Id.* at 865 (noting the “use of peremptory challenges tends [ ] to result in juries with six pro-prosecution and six pro-defense jurors”).
20. *Id.*
23. *Id.*
25. NEIL J. KRESSEL & DORIT F. KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 172 (2002) (noting that the only state that allowed black jurors to serve before the war was Massachusetts).
used to prevent African-Americans from serving.\textsuperscript{27} The Court held that excluding black jurors because of race violated the Equal Protection Clause, but its decision evoked the racist tenor of the times.\textsuperscript{28} When the Fourteenth Amendment was adopted, the Court said, the "colored race" was "abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence."\textsuperscript{29}

When desegregated jury pools became inevitable, southern states used the peremptory challenge to keep black people off juries.\textsuperscript{30} Higher courts began to intervene, but political leaders used other discriminatory selection procedures to sidestep the law and ensure mostly white or all-white juries.\textsuperscript{31} Effective reform did not occur until the civil rights era.\textsuperscript{32} In 1965, an eighteen-year-old black man named Robert Swain challenged his sexual assault conviction and death sentence in Alabama because his jury was entirely white.\textsuperscript{33} The Supreme Court rejected his appeal because it found no intentional effort to exclude black jurors, though all eight of the empaneled black jurors had been struck by peremptory challenges.\textsuperscript{34} The Court held that the challenges reflected "no studied attempt to include or exclude a specified number of Negroes."\textsuperscript{35} To prove peremptory challenges were used purposefully to exclude African-Americans, the Court said, a challenger would have to show systematic abuse over time.

Congress reacted to the decision by passing the Jury Selection and Service Act of 1968, which prohibited the dismissal of federal jurors on the basis of race, skin color, religion, gender, national origin, or economic status.\textsuperscript{36} The Act codified the Supreme Court's stance against discrimination in juror selection.\textsuperscript{37} But minority exclusion from federal juries continued despite the ban.\textsuperscript{38} For example, in fifty-three criminal trials between 1972 and 1973 in

\begin{footnotes}
\footnotetext[27]{100 U.S. 303, 306 (1880).}
\footnotetext[28]{\textit{Id.} at 306.}
\footnotetext[29]{\textit{Id.}}
\footnotetext[30]{Hoffman, \textit{supra} note 16, at 829.}
\footnotetext[31]{KRESSEL \& KRESSEL, \textit{supra} note 25, at 173–74.}
\footnotetext[32]{\textit{Id.} at 174.}
\footnotetext[33]{Swain v. Alabama, 380 U.S. 202 (1965).}
\footnotetext[34]{\textit{Id.}}
\footnotetext[35]{\textit{Id.} at 209.}
\footnotetext[36]{\textit{Id.} at 227.}
\end{footnotes}
the United States District Court for the Eastern District of Louisiana, prosecutors used sixty-nine percent of their peremptory challenges to dismiss black jurors, though only twenty-five percent of the eligible jurors on the venires were black.\textsuperscript{40}

As \textit{State v. Washington} demonstrates, some state prosecutors routinely excluded black jurors.\textsuperscript{41} In the 1979 case, a black defendant in Louisiana appealed his armed robbery conviction because the East Baton Rouge Parish prosecutor used peremptory challenges to strike the first twelve prospective black jurors.\textsuperscript{42} The Louisiana Supreme Court reversed the conviction because the prosecutor openly acknowledged that he struck black jurors without examining their qualifications or ability to serve on the panel.\textsuperscript{43} He explained himself in these words:

I have found through experience, some 23 years in the district attorney’s office, that blacks, where you have a black defendant, will generally vote not guilty, in spite of the strength of the state’s case . . . I find, not without justification, particularly young blacks, they are very resentful of the white establishment.\textsuperscript{44}

The court held that it was unjustified and unconstitutional to assume that all black jurors are so biased that they would ignore evidence.\textsuperscript{45} But one dissenting justice approved of the prosecutor’s method, calling him “one of the most capable tacticians” in the state.\textsuperscript{46} The justice was “unable to criticize him for performing his duties in accordance with the law” and found fault with the criminal justice system, not the prosecutor.\textsuperscript{47}

Although the U.S. Supreme Court repeatedly has articulated the principle that juror discrimination is illegal,\textsuperscript{48} litigants had no way to pursue a remedy for violations of that principle until 1986. When the Court decided the watershed case of \textit{Batson}, it established a procedural framework to protest such discrimination.\textsuperscript{49}

\textsuperscript{40} Id.
\textsuperscript{41} 375 So. 2d 1162 (La. 1979).
\textsuperscript{42} Id. at 1163.
\textsuperscript{43} Id. at 1162.
\textsuperscript{44} Id. at 1163.
\textsuperscript{45} Id. at 1164.
\textsuperscript{46} Id. at 1165 (Blanche, J., dissenting).
\textsuperscript{47} Id.
\textsuperscript{49} \textit{Batson}, 476 U.S. 79.
B. The Batson Breakthrough

An all-white jury convicted James Kirkland Batson, an African-American, of second-degree burglary and receipt of stolen goods. During voir dire, the prosecutor used his peremptory challenges to strike all four African-Americans in the venire. The U.S. Supreme Court held that the intentional exclusion of potential jurors on the basis of race violated the Equal Protection Clause of the Constitution.

The Court also reiterated that a defendant has no right to be tried by a jury composed, in whole or in part, by members of his race. In other words, it can be constitutional for an all-white jury to try a black man, but it is unconstitutional to use the peremptory challenge to purposefully exclude black jurors solely because they are black. Batson redefined the peremptory challenge; the Court's decision recognized it as a valid, useful, and beneficial trial procedure.

Batson also established a three-step procedure through which objections to peremptory challenges should be raised. To initiate the process, a party must establish: (1) a prima facie case of purposeful discrimination by showing that he or she is a member of a "cognizable" racial group; (2) that the prosecutor has used peremptory challenges to remove members of that race from the venire; and (3) that the facts and "relevant circumstances" raise an inference of discriminatory intent. The burden then shifts to the prosecutor to rebut the defense's case by providing a race-neutral reason for exercising the peremptory challenge. Finally, the trial judge must evaluate the prosecutor's stated reason for the challenge, decide whether it is credible, and grant or disallow the objection.

Batson not only created a simpler mechanism for protesting a peremptory challenge, but it also subjected a lawyer's reasons for striking jurors to judicial scrutiny. By making those reasons assailable immediately, it made such protests much easier and also added a level of accountability to the exercise of peremptory challenges. They could no longer be used with full freedom, and the subjective motivations for their use could be called into question in an adversarial context. Because it was the prosecutor...

50. Id. at 82.
51. Id. at 83.
52. Id. at 90.
53. Id. at 85 (citing Strauder, 100 U.S. at 305).
54. Id. at 98.
55. Id. at 86.
56. Id. at 96.
57. Id. at 97–98.
58. Id. at 98.
whose peremptory challenge was scrutinized in *Batson*, the threestep process it outlined was created for that same scenario. However, the procedure applies to the use of peremptory challenges by both plaintiffs and defendants. For simplicity’s sake, this Note routinely refers to parties exercising peremptory challenges as prosecutors, but the principles involved apply equally to both sides.

*Batson* led to a series of U.S. Supreme Court rulings that modified and extended the underlying principle.59 The Court established that the race of the defendant did not matter, i.e., that a white person could challenge the exclusion of black jurors, or vice versa.60 It then endorsed the use of *Batson* challenges in civil trials.61 The Court also confirmed that a defendant, like a prosecutor, cannot make racially discriminatory challenges.62 The U.S. Supreme Court has since refined the analytical framework through which a trial court must evaluate a *Batson* challenge.63 In *Miller-El v. Dretke*, the Court explained that racial discrimination could be discovered using evidence outside the “four corners” of the case, including: (1) a statistical analysis of the venire; (2) side-by-side comparisons of the potential jurors; (3) historical discrimination by the prosecution; and (4) whether the excluded juror was subjected to disparate questioning.64 In *Snyder*, the Supreme Court employed one of those methods: side-by-side juror comparison. The Court compared three potential jurors, two of whom were struck peremptorily and one who was eliminated through a backstrike; it deemed the latter’s dismissal discriminatory.65

**C. The Snyder Sequel**

Allen Snyder was convicted of first-degree murder on August 29, 1996, and sentenced to death.66 On a vengeful rampage motivated by marital infidelity, he killed the man his wife was dating.67 Snyder and his wife, Mary, separated after Snyder had

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64. *Id.* at 240–46.
67. *Id.* at 836.
physically abused her several times. Snyder confronted Mary and Howard Wilson, the murder victim, when he drove her home after midnight on August 16, 1995. Snyder stabbed his wife nineteen times and stabbed Wilson nine times.

Before Snyder’s trial began, the prosecutor struck five black people from the venire, beginning with Greg Scott and Thomas Hawkins, Jr. The defense did not object but noted the excluded jurors’ race for the record. Defense counsel “felt that no ‘pattern’ of exclusion had emerged because the State had accepted an African-American juror, Jeffrey Brooks.”

Brooks was in his final semester at Southern University in New Orleans, and his academic program required him to teach 300 hours in order to graduate. At the beginning of voir dire, when the trial judge asked members of the venire whether serving on the jury would pose a hardship to any of them, Brooks was one of more than fifty people who came forward. He said that he needed to student-teach five days a week. The trial judge offered to speak to his dean, and Brooks accepted the offer. The judge called the college and told Brooks that the dean would allow him to make up his missed time. Brooks expressed no further concerns, and the prosecutor did not question him about his reservations. Nevertheless, the prosecutor struck Brooks the day after questioning him.

Under Batson, a defendant can make a prima facie showing that a peremptory challenge was made on the basis of race by establishing a pattern of strikes against black jurors. When a prosecutor provisionally accepts a black juror and then strikes a second, no pattern has been established. Snyder’s defense attorney objected when the prosecutor struck Brooks, who had already been tendered by both sides. He was the fourth black person struck.
When the prosecutor used his peremptory challenge to backstrike Brooks, he offered the following explanation:

I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, 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 for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn’t be a penalty phase. Those are my two reasons.84

The defense attorney protested, saying that the student’s concern about missed classes had been resolved85 “[E]verybody out here looks nervous,” he added. “I’m nervous.”86 The trial judge overruled his objection, saying only that he was going to allow the peremptory challenge.87 The prosecutor then struck two more black jurors, Elaine Scott and Loretta Walker.88 The defense made Batson challenges after each strike, and the prosecutor explained that both women had indicated that they would be reluctant to impose the death penalty.89 The trial judge accepted both of those explanations as race-neutral.90

Snyder was sentenced to death.91 He appealed to the Louisiana Supreme Court, contending that the trial court erred in allowing the prosecutor to exercise five of his peremptory challenges against black prospective jurors, in violation of Batson.92 The court refused to consider the first two of those challenges because the defense had failed to make the proper objection at the time the jurors were struck.93 The lawyer therefore did not trigger the Batson inquiry. The prosecutor offered no reasons, and the judge did not rule on those strikes. Consequently, the supreme court considered those claims waived.94 As to the other three struck

83. Id. at 863 (Lemmon, J., concurring in part and dissenting in part).
84. Snyder III, 552 U.S. at 477 (emphasis added).
85. Snyder I, 750 So. 2d at 863.
86. Id. at 840.
87. Snyder III, 552 U.S. at 477.
88. Snyder I, 750 So. 2d at 840.
89. Brief for The Capital Appeals Project as Amicus Curiae Supporting Appellant at 14–16, Snyder II, 552 U.S. 472 (No. 06-10119).
90. Id.
91. Snyder I, 750 So. 2d at 836.
92. Id. at 839.
93. Id. at 841–42.
94. Id.
jurors, the court accepted the prosecutor’s justification. “None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State’s discriminatory use of peremptory challenges,” said Justice Kimball, writing for the majority in the five–two decision.95

Snyder appealed to the U.S. Supreme Court, which vacated the judgment and remanded the case to the Louisiana Supreme Court for further consideration in light of Miller-El, which it decided just days before.96 Upon reconsideration of Snyder in Snyder II, the Louisiana Supreme Court again found no discriminatory intent in the prosecutor’s use of peremptory challenges, and the court reaffirmed Snyder’s conviction by a notably smaller margin, four–three.97 Writing for the majority, Justice Weimer said that the record “simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied.”98 Snyder again appealed to the U.S. Supreme Court, which granted his writ application and ultimately reversed, seven–two.99

D. A Tale of Three Jurors

In its final decision in Snyder III, the U.S. Supreme Court’s ruling relied on two side-by-side comparisons of three jurors: Jeffrey Brooks, Roland Laws, and John Donnes.100 Brooks was backstruck; Laws and Donnes were accepted. Brooks is black; Donnes and Laws are white.101 Each man noted previous commitments that would clash with jury duty.102 Brooks was one of more than fifty members who expressed concern that jury service would interfere with work, school, family, or other obligations.103 The Court drew an adverse inference of discrimination because the prosecution decided to retain Laws and Donnes but rejected Brooks.104

95. Id. at 842.
96. Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined Justice Alito’s majority opinion. Justice Scalia joined Justice Thomas’ dissent. The Court explained that a court may look beyond the “four corners” of a case to examine purposeful discrimination, including juror comparison. Miller-El v. Dretke, 545 U.S. 231, 240 (2005).
98. Id. at 499.
100. Id. at 482–84.
101. Id. at 483–84.
102. Id.
103. Id. at 473.
104. Id. at 484.
The Supreme Court neither accepted nor rejected the prosecutor’s assessment of Brooks’ demeanor.\textsuperscript{105} They Court acknowledged that deference is “especially appropriate” in the context of a demeanor justification because, as the Louisiana Supreme Court noted in Snyder II, “nervousness cannot be shown from a cold transcript.”\textsuperscript{106} However, such deference is appropriate only when the trial judge has affirmatively accepted a demeanor justification on the record, the Court ruled.\textsuperscript{107} Because the trial judge accepted both of the prosecutor’s reasons without explanation, the Court could not “presume that the trial judge credited the prosecutor’s assertion that Mr. Brooks was nervous.”\textsuperscript{108}

The Court declared that the prosecutor’s stated apprehension that Brooks would be tempted to pursue a lesser verdict “highly speculative.”\textsuperscript{109} Even if Brooks had been eager to return to the university, that would not have necessarily caused him to pursue a lesser verdict, the Court reasoned.\textsuperscript{110} If most of the other jurors favored first-degree murder, he might have agreed with them to speed up the outcome.\textsuperscript{111} Only if the majority of jurors had been leaning toward a lesser verdict would an anxious Brooks be able to quicken deliberations by his agreement.\textsuperscript{112}

Further, the Court noted that the prosecutor anticipated a quick trial, which would have alleviated Brooks’ concern about lost student-teaching time.\textsuperscript{113} The prosecutor struck Brooks on August 28, and the jury convicted Snyder on August 30, which would have represented a total of two more lost days early in the semester.\textsuperscript{114} The Court concluded that Brooks could have made up such lost time easily.\textsuperscript{115} “When all these considerations are taken into account,” Justice Alito wrote, “the prosecutor’s second proffered justification for striking Mr. Brooks is suspicious.”\textsuperscript{116}

The Court then compared Brooks to Laws.\textsuperscript{117} Like Brooks, Laws approached the judge at the onset of voir dire to express his

\begin{flushright}
105. Id. at 479. \\
106. Id. (citing Snyder II, 942 So. 2d 484, 496 (La. 2006), cert. granted, 551 U.S. 1144 (2007)). \\
107. Id. \\
108. Id. \\
109. Id. at 480. \\
110. Id. \\
111. Id. \\
112. Id. \\
113. Id. \\
114. Id. at 483. \\
115. Id. \\
116. Id. \\
117. Id. \\
\end{flushright}
concern about jury service. \textsuperscript{118} Laws was "a self-employed general contractor" who had "two houses that [were] nearing completion, one whose owners would be moving in that weekend." \textsuperscript{119} He also told the judge that his wife recently had a hysterectomy, so he was taking on extra parental duties, and the call to jury service was "bad timing." \textsuperscript{120}

Despite Laws' alleged hardship, the prosecutor asked him whether he could work around his conflict. \textsuperscript{121} He asked Laws whether, if he were seated on the jury, he would "try to make other arrangements" as best he could. \textsuperscript{122} The Court noted that Laws' obligations seemed "substantially more pressing" than Brooks' student-teaching duty. \textsuperscript{123} It questioned why the prosecutor did not have the same concern that Laws would seek a lesser verdict in order to end his courthouse commitment sooner. \textsuperscript{124} Like Laws and Brooks, John Donnes had cited a work-related hardship. \textsuperscript{125} If called to serve, he said, "I'd have to cancel too many things," including an urgent appointment he allegedly could not miss. \textsuperscript{126} Despite this, the prosecutor retained Donnes. \textsuperscript{127} His treatment of Donnes and Laws was apparently different from his treatment of Brooks.

The Court refused to consider whether the prosecutor's first reason for striking Brooks, his alleged nervousness, would have been sufficient by itself to justify a strike. \textsuperscript{128} The Court did not believe the prosecutor's second justification, Brooks' time commitment. Because it drew an adverse inference of discrimination, because the prosecutor referred to both reasons as his "main concern," and because the trial judge did not explicitly credit his demeanor justification on the record, the Court reversed and remanded the case. \textsuperscript{129} Although the Court did not single out backstrikes as particularly objectionable, its action emphasizes the practice as problematic.

\textsuperscript{118} Id. \\
\textsuperscript{119} Id. \\
\textsuperscript{120} Id. \\
\textsuperscript{121} Id. \\
\textsuperscript{122} Id. \\
\textsuperscript{123} Id. \\
\textsuperscript{124} Id. \\
\textsuperscript{125} Id. \\
\textsuperscript{126} Id. at 484. \\
\textsuperscript{127} Id. \\
\textsuperscript{128} Id. \\
\textsuperscript{129} Id.
E. Backstrikes in Louisiana

The timing of peremptory challenges in Louisiana is governed by Code of Criminal Procedure article 795, which codifies the principles of *Batson.* Article 795 specifies that challenges "shall be exercised prior to the swearing of the jury panel."131 Jurors are sworn twice, however—once after they are accepted by the state and defendant, and once after jury selection is complete.132 Although it is somewhat ambiguous when peremptory challenges may no longer be exercised, "swearing of the jury panel" implies the later oath administered to the entire body rather than the oath sworn by individuals. Therefore, a challenge can be lodged at any time before the jury is impaneled.

Louisiana law governing the timing of peremptory challenges has not been consistent. A 1986 amendment to the Code of Criminal Procedure limited the time when a prosecutor could make a challenge. It read: "A peremptory challenge may be made by the state at any time before the juror is accepted by it, and by the defendant at any time before the juror is sworn."133 The provision treated the timing for defense and prosecution differently, limiting the prosecution's challenges to the time before acceptance.134 The article was amended in 1990, eliminating the restriction.135 As the Code's commentary notes, "there were too many exceptions which created confusion and encouraged a contest between the prosecution and defense."136 In a 1991 decision that interpreted the amended Code of Criminal Procedure, the Louisiana Supreme Court held that a temporarily accepted and sworn juror "may nevertheless be challenged peremptorily prior to the swearing of the jury panel."137

Historically, the right to peremptorily challenge jurors in Louisiana ended when they were tendered and accepted by both sides, but it was within the discretion of the trial judge to allow

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134. *Id.*
136. *Id.* cmt. a.
137. State v. Watts, 579 So. 2d 931, 931 (La. 1991) (per curiam).
what later became known as backstrikes. As the Code of Criminal Procedure in 1937 stated:

After a juror has been accepted by both sides, neither side has the right to challenge him peremptorily, but it shall be within the discretion of the court, and not subject to review to allow either side to peremptorily challenge jurors up to the time that the jury is impaneled.

The Louisiana Supreme Court emphasized the limits of the right to peremptorily challenge a juror in State v. Thornhill. In Thornhill, the defendant appealed his murder conviction, citing the state’s peremptory challenge of a juror who had been accepted and sworn. The trial judge held that “either side has a right to challenge a juror peremptorily up to the time of taking the testimony.” The Louisiana Supreme Court said this ruling was “stated too broadly” and needed “qualification.” It held that if a backstrike compelled a defendant to accept an “obnoxious juror, we would not hesitate to set aside the conviction and sentence in such a case, as both prejudice and injury to the defendant would be clearly shown.” Subsequent cases demonstrate that, although backstrikes were discretionary, judges granted them routinely. Backstrikes became so pervasive that they evolved into a prerogative.

The availability of backstrikes in criminal cases is “established beyond question” in Louisiana today. However, backstrikes in civil trials remain discretionary. The trial court in a 1998 tort case refused to allow plaintiff’s counsel to backstrike jurors, and the Louisiana Supreme Court affirmed its decision on appeal. The supreme court recognized that some lower courts allowed backstrikes in civil trials but others expressly prohibited it.

139. Id. (emphasis added).
140. Id.
141. Id.
142. Id.
143. Id.
144. Id.
147. Id.
148. Id. at 802.
149. Id.
150. Id. at 800.
court concluded that a “party does not have a right to back-strike jurors in civil cases . . . .”

As the discrepancy between the treatment of backstrikes in civil and criminal trials indicates, the basis for backstrikes is not legal bedrock. The Louisiana Constitution guarantees a criminal defendant’s right to peremptory challenges. However, nothing in the state’s Constitution grants or guarantees that right to the prosecution. The State’s right to exercise peremptory challenges is therefore “purely statutory.”

The court’s warning that backstrikes should not be allowed to prejudice a defendant has faded from the law, but backstrikes now have that prejudicial effect. For example, the Louisiana Supreme Court reversed and remanded a first-degree murder conviction in 2007 because it held that a backstrike was discriminatory in State v. Coleman. The prosecution in that case provisionally accepted a black juror, Mason Miller. It used peremptory challenges to strike two other black jurors, then backstruck Miller. This was the same pattern that emerged in Snyder.

Snyder spotlights the problematic nature of peremptory challenges. It demonstrates the need for trial courts to take an active role in resolving them, specifically by making explicit findings. The case invites lawmakers, lawyers, and jurists alike to reconsider what is permitted, and what is prejudicial, in culling the venire. Ultimately, it should encourage Louisiana to tighten the judicial reins on jury selection and eliminate backstrikes, a form of peremptory challenge whose potential for abuse outweighs its strategic advantages.

III. Analysis: A Peremptory Ploy

The Supreme Court’s decision in Snyder did not address the subversive effect of backstrikes, but this factor was relevant to the outcome. The prosecution used the backstrike as a ploy to delay the defense’s Batson challenge, a tactic that is evidence of discriminatory intent. The case shows that courts should apply the strictest scrutiny to demeanor justifications, and it emphasizes the need for trial courts to make their findings explicit. It demonstrates

151. Id. at 803.
152. LA. CONST. art. 1, § 17 (“The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily.”).
154. Id.
155. 970 So. 2d 511 (La. 2007).
156. Id. at 514.
157. Id.
that trial courts must take an active role in resolving Batson challenges. Snyder implies that trial judges’ determinations are due little deference unless they are made on the record.

A. Complicated Calculus

Lawyers who lack valid reasons to use a peremptory challenge may be motivated by stereotypes or other classifications. Because voir dire offers lawyers little opportunity to gather information about prospective jurors, they are likely to rely on group affiliations. One study of 191 claims of juror discrimination found that fifty-two percent of the reasons for rejection involved group stereotypes. For example, some prospective jurors were dismissed because they were “from Texas” or an “inner city person.” Attitudes and personality traits are considered relevant to juror behavior and decision-making, as well as demographic characteristics such as occupation, wealth, religion, marital status, age, and ideology. Scientific methods rate these factors according to values such as persuasiveness, open-mindedness, verdict preference, and the obstinacy to maintain one’s verdict in the face of opposition from other jurors, or “holdout status.”

But this complicated calculus leads to flawed conclusions when it is based on erroneous assumptions. Studies “suggest that trial lawyers are not very successful at identifying favorable and unfavorable jurors during jury selection.” Research shows few clear relationships between juror characteristics and their decision-making. Evidence determines the overwhelming majority of verdicts, not who the lawyers manage to seat in the jury box. Just as assessments based on stereotypes have questionable accuracy, evaluation of jurors based on their ethnicity can yield absurd results. One study instructed lawyers that the following

160. Id. at 497.
161. Id.
163. Id.
164. Melilli, supra note 159, at 499.
166. Id.
ethnic groups could be ranked, respectively, from most to least emotional: Irish, Jewish, Italian, French, Spanish, and Slavic.\textsuperscript{167} Nordic, English, Scandinavian, and German jurors were considered “preferable if it is necessary to combat emotional appeals.”\textsuperscript{168} Some evidence supports the proposition that jurors are more sympathetic to defendants of their race.\textsuperscript{169} This stereotype may encourage lawyers to rationalize discrimination; it could be considered “effective advocacy” because its goal is impartiality.\textsuperscript{170} The lawyer may assume that, because he has what he believes to be a logical basis, such a strike would not be racial prejudice. But it is inherently flawed reasoning because racial solidarity cannot be assumed; in fact, some minorities may feel a heightened responsibility to judge members of their own race fairly. Moreover, any such assumptions based on race alone are inherently racist. It is “entirely repugnant to the values and standards of the Constitution” to infer bias based on skin color.\textsuperscript{171}

A recent study confirmed that race influences the use of peremptory challenges, but the study also found that such discrimination is masked because the challenges are justified by race-neutral reasons.\textsuperscript{172} This is exactly what occurred in Snyder, in which the prosecutor justified his backstrikes of black jurors with race-neutral reasons.

\textbf{B. Snookered by a Suspect Strike}

Jeffrey Brooks, the college student whose strike ultimately led to Snyder’s reversal, was the first black juror selected for the jury in that trial.\textsuperscript{173} He was accepted by the prosecutor and the defense attorney and was seated in the jury box during voir dire.\textsuperscript{174} The prosecutor accepted him on August 27 and backstruck him on August 28, after striking two other black jurors.\textsuperscript{175} An inference of discriminatory intent can be drawn from this sequence of events alone. Because the prosecution accepted one black juror before

\begin{itemize}
\item \textsuperscript{167} Hastie et al., supra note 162 (citing I. Goldstein, Trial Technique (1935)).
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Melilli, supra note 159, at 452.
\item \textsuperscript{170} Ogletree, supra note 158, at 1104.
\item \textsuperscript{171} Id.
\item \textsuperscript{173} Snyder II, 942 So. 2d 484, 493 (La. 2006), cert. granted, 127 S. Ct. 3004 (2007).
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Snyder III, 552 U.S. 472, 481 (2008).
\end{itemize}
striking another, no pattern of discrimination emerged until Brooks’ backstrike. As a result, the defense did not lodge a Batson challenge when Hawkins and Scott were struck, and those objections were later deemed waived.176 Therefore, the provisional acceptance of Brooks can be seen as a ruse that obscured the prosecutor’s discriminatory intent. This apparent ploy did not escape the Louisiana Supreme Court’s notice.

“The prosecutor’s action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising Batson challenges to the subsequent exclusions,” Justice Johnson wrote in her dissent.177 Justice Lemmon agreed with her. “[T]he timing of the Brooks backstrike made the early acceptance of Brooks suspect,” he said.178 Justice Kimball, who wrote the majority opinion in Snyder I, dissented in Snyder II and cited the backstrike among her reasons.179 She pointed out that the prosecutor, having provisionally accepted Brooks, did not later question him regarding his alleged anxiety over lost classwork.180 The state did not try to “verify its hypothesis and develop an objective basis for the strike,” she said.181

The dissenters’ concern illustrates that backstrikes become more suspicious than initial peremptory challenges when used to exclude minorities. Once a prosecutor accepts a juror, even provisionally, he has indicated acceptance of that juror’s demeanor or impartiality. To strike a provisionally accepted juror encourages an inference of concealed, or worse, disingenuous doubts. Justice Johnson, who also dissented in Snyder II, likened the backstrike to a process used in Texas that shifts prospective jurors within the venire, essentially moving a panel to the back of the pack.182 This practice was deemed discriminatory in Miller-El.183 “Louisiana does not have the ‘jury shuffle,’ but we do have a practice that can be used in an equally discriminatory fashion,” Johnson said.184

176. Despite this deemed waiver, nothing in Batson suggests that an objection must be raised as soon as the first African-American is struck. See Sheri Lynn Johnson, Race and Recalcitrance: The Miller-El Remands, 5 OHIO ST. J. CRIM. L. 131, 150 (2007).
177. Snyder I, 750 So. 2d 832, 863 (Johnson, J., dissenting), cert. granted, 545 U.S. 1137 (2005).
178. Id. at 863 (Lemmon, J., dissenting in part).
179. Snyder II, 942 So. 2d at 500–01 (Kimball, J., dissenting).
180. Id.
181. Id. at 502.
182. Id. at 508 (Johnson, J., dissenting).
184. Snyder II, 942 So. 2d at 508 (Johnson, J., dissenting).
In argument before the U.S. Supreme Court, Snyder's counsel acknowledged that Brooks' backstrike essentially fooled Snyder's trial attorney, preventing him from objecting earlier when the first two jurors were struck. Justice Ginsburg asked why the attorney had not objected to the first two strikes, and counsel replied, "I think basically the defense was snookered here."

Moreover, the prosecutor's initial pronouncement was suspicious. He prefaced his explanation for his backstrike of Brooks by saying, "I thought about it last night." The statement implies that the prosecutor did not know, initially, why he wanted to strike Brooks—he had to think about it first. His response suggests that he first decided to use the peremptory challenge and then devised his reasons. By letting a lawyer consider his strategy overnight, the backstrike subverts the aim of requiring immediate explanation. If a lawyer has a valid, race-neutral reason for using a strike, he should be able to provide it immediately, or after consulting his notes.

Finally, the prosecutor indicated his duplicity by giving two distinctly separate reasons. If his concern truly had been Brooks' alleged eagerness to reach a verdict, he could have given that reason alone. It was the second reason he gave, after citing Brooks' "nervous" appearance, that indicates it was secondary—yet he labeled both his "main" reason. Had he believed that Brooks seemed nervous about missing school, he would not have separated his reasons. His reliance on Brooks' demeanor as well as Brooks' stated concern suggest deceit.

C. Delaying Justifications

The U.S. Supreme Court declined to credit the prosecutor's impression that Brooks seemed "very nervous" because the trial judge did not specifically accept that explanation. But the Court theorized it was possible that the trial judge "did not have any

186. *Id.* at 8.
188. A prosecutor "simply has to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005). The Louisiana Supreme Court has held that a "gut feeling" is an inadequate explanation for a peremptory challenge, noting that it is "most ambiguous and inclusive of discriminatory feelings." *Alex v. Rayne Concrete Serv.*, 951 So. 2d 138, 153 (La. 2007).
190. *Id.* at 479.
impression one way or the other concerning Mr. Brooks’ demeanor. Mr. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the trial court may not have recalled Mr. Brooks’ demeanor.”

These dicta demonstrate another problematic aspect of backstrikes—that they can insert a significant delay between the strike and its perceived basis.

Delays make it more difficult and impractical for trial judges to assess the demeanor of potential jurors and compare their assessments with those of prosecutors and defense attorneys. Such a task poses extreme practical difficulty. As the Court noted, eighty-five prospective jurors were questioned during Snyder’s voir dire, and thirty-six survived challenges for cause; it was a two-day process. The duration of voir dire, and its potential to process massive crowds, can make memories fade. Once a juror is provisionally accepted, the judge and opposing counsel may forget how that juror behaved.

A trial judge could note his own fleeting perceptions of each juror, but he might be hard-pressed to verify another person’s impressions when they involve behavioral assessments that he did not make. For example, a judge might write down that juror number fifty-eight was “snappish,” but he might not glimpse the “hostile stare” to which a prosecutor refers on the following day. The judge may not witness mannerisms while making notes, questioning other jurors, or looking away. For these reasons, it is nearly impossible for a trial judge to discredit a prosecutor’s demeanor assessment unless the peremptory challenge comes during, or immediately following, the juror’s questioning.

As the U.S. Supreme Court’s decision in Snyder tacitly acknowledges, demeanor justifications are the weakest of race-neutral reasons for a peremptory challenge. They are weakest because they are subjective, unverifiable, and cannot demonstrably be linked to legitimate trial strategy. In other words, using them most closely resembles the “arbitrary and capricious” form of the peremptory challenge that has been restricted. But Snyder does not signify the total demise of peremptory challenges. By refusing

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191. Id.
192. Id. at 475.
193. Batson explained that a race-neutral reason “must be one which is clear, reasonably specific, legitimate and related to the particular case at bar.” Alex, 951 So. 2d at 153.
to credit or discredit the prosecutor’s primary reason, the Court left demeanor justifications viable.\textsuperscript{195}

\section*{D. Undercutting Deference}

The Supreme Court’s speculation that Snyder’s judge may not have remembered Brooks’ demeanor diminishes the deference established in \textit{Batson}: “A trial judge’s determination pertaining to purposeful discrimination rests largely on credibility evaluations; therefore the trial judge’s findings are entitled to great deference by the reviewing court.”\textsuperscript{196} Because \textit{Snyder III} appears to undercut that standard, Justice Thomas said in his dissent that the Court’s decision “reveals that it is only paying lip service to the pivotal role of the trial court.”\textsuperscript{197} He cited established principles that the evaluation of a prosecutor’s motives is a credibility determination that the trial judge, through first-hand observation of the attorney himself, is best able to make.\textsuperscript{198} When the “grounds for a trial court’s decision are ambiguous, an appellate court should not presume that the lower court based its decision on an improper ground, particularly when applying a deferential standard of review.”\textsuperscript{199}

Although this apparent willingness to question the lower court’s judgment signifies a shift in \textit{Batson} doctrine, the change is not drastic. \textit{Snyder} does not hold that the Supreme Court will second-guess all judges who accept demeanor justifications. It does not demonstrate, as one commentator contends, the Court’s “strong reluctance to accept demeanor-based justifications.”\textsuperscript{200} \textit{Snyder} holds that a trial judge must make explicit findings on a race-neutral reason to earn deference for his determination. The Supreme Court held that a demeanor justification is not entitled to deference if “the record does not show that the trial judge actually made a determination” on that justification.\textsuperscript{201} Records do not reflect jurors’ body language, eye movements, or mannerisms,\textsuperscript{202}

\begin{itemize}
\item \textsuperscript{195} Louisiana courts have recognized “eye contact[,] \ldots body language and other sense impressions as important factors in decisions to exercise peremptory challenges.” State v. Seals, 684 So. 2d 368, 375 (La. 1996).
\item \textsuperscript{196} \textit{Snyder I}, 750 So. 2d 832, 839 (La. 1999) (citing \textit{Batson v. Kentucky}, 476 U.S. 79, 98 n.21 (1986)).
\item \textsuperscript{197} \textit{Snyder III}, 552 U.S. at 487 (Thomas, J., dissenting).
\item \textsuperscript{198} \textit{Id}.
\item \textsuperscript{199} \textit{Id}.
\item \textsuperscript{201} \textit{Snyder III}, 552 U.S. at 479.
\item \textsuperscript{202} See State v. Seals, 684 So. 2d 368, 375 (La. 1996).
\end{itemize}
and the Court was unwilling to credit the trial judge's ruling because it made no reference to Brooks' demeanor. The judge accepted the prosecutor's two reasons but did not specify whether he accepted both or only one. The Supreme Court declined to speculate whether the prosecution would have struck Brooks on the basis of his nervousness alone, but it did not indicate that it would have rejected it.\footnote{Snyder III, 552 U.S. at 479.}

A prosecutor's assessment of a juror's demeanor can be refuted by a \textit{Batson} challenge, but Snyder's defense attorney did not dispute that Brooks looked nervous. "Everybody out here looks nervous," he said.\footnote{Id. at 488.} This statement implies either that Brooks looked no more nervous than anyone else or that his nervousness was insignificant. It was not a denial, and therefore Brooks' nervous appearance was not in doubt. But the significance of it was in question, and the prosecutor should have explained how he thought the nervousness was relevant. Because it assumed that the trial court credited the prosecutor's second reason, the Supreme Court did not defer to the judge, as the dissent pointed out.\footnote{Id. (Thomas, J., & Scalia, J., dissenting).} It was unreasonable to presume that the trial judge relied on Brooks' concern about missing class but not on Brooks' alleged nervousness.\footnote{Id. at 479.} Because the judge said nothing to suggest that he favored either explanation, it was unwarranted to presume he credited one justification over the other.

The trial judge clearly accepted both of the prosecutor's reasons equally because he failed to fully assess them.\footnote{Id. at 479.} He did not say anything to suggest that he found one reason more credible than the other. If he had found one explanation doubtful, the judge likely would have questioned the credibility of the prosecutor's justification and articulated his concerns. If he had suspicions, he should have asked the prosecutor to explain himself further. If the judge had any doubts, he kept them to himself. His acceptance signifies no doubt.

\footnote{Justice Ginsburg noted that the trial judge was "quite passive"; she asked Snyder's attorney whether the judge was "present throughout the entire voir dire," indicating she doubted whether he paid full attention. Transcript of Oral Argument at 23, \textit{Snyder III}, 552 U.S. 472 (No. 06-10119).}
E. The Meaning of Mixed Motive

Snyder obliquely addresses another aspect of the Batson doctrine, the mixed motive.\(^{208}\) The quandary this poses is whether it would violate the Equal Protection Clause if a prosecutor gave both a discriminatory and a non-discriminatory reason for a peremptory challenge. Whether a race-biased reason would be constitutional, if it were offered along with a race-neutral one, remains an open question. Snyder does not address the issue head-on but resolves it in the context of demeanor justification.

The Supreme Court acknowledged that, in other situations, "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 other party defending the action to show that this factor was not determinative."\(^{209}\) In other words, a prosecutor who gives two reasons for a peremptory challenge would have to show, if one reason were deemed discriminatory, that it was not his main motivation. But this burden-shifting has not been applied to the Batson framework, and the Court declined to do so in Snyder.\(^{210}\)

However, the Court said a peremptory challenge substantially motivated by discriminatory intent cannot be allowed based on "any lesser showing by the prosecution."\(^{211}\) The Court created a new standard with this vague statement. It established that a race-based reason corrupts an otherwise valid peremptory challenge. A "lesser" race-neutral reason cannot salvage its constitutionality, and a demeanor justification likely is a lesser race-neutral reason.

Discriminatory intent tends to taint a peremptory challenge that is also motivated by legitimate concerns, as illustrated by a hypothetical. Suppose a prosecutor offers several reasons after a Batson challenge. He tells the judge that the challenged juror appeared biased toward the defense, sneered at the prosecutor, rolled his eyes, and gave evasive answers. Finally, he adds, "Oh, and he is a black male, your Honor, and you know what that means." As this hypothetical illustrates, none of the former reasons, all of which could be valid, are likely to overcome the prosecutor's final statement. The taint of racial consideration overshadows the others. Each legitimate justification would be a "lesser" showing. Whether a "greater" race-neutral reason could cure a discriminatory defect remains unclear. The Court did not


\(^{209}\) Snyder III, 552 U.S. at 484.

\(^{210}\) Id.

\(^{211}\) Id.
clarify what type of justification would be "greater." Snyder shows that a behavioral assessment such as "nervous-looking" will not rebut an inference of discriminatory motive if the trial judge does not explicitly accept it as justified.\textsuperscript{212} The implications of this holding are untested but may prove far-reaching.

Trial judges, such as the jurist who presided in Snyder, generally do not selectively reject part of a prosecutor's enumerated reasons, and they do not prioritize them. Their credibility determinations may rest as much upon their assessment of a lawyer as they do upon his explanations. A judge who believes a prosecutor is credible, or who finds his race-neutral reasons credible, may allow a peremptory challenge without ruling on the reasons.\textsuperscript{213} Therefore, a "lesser showing" of tacit acceptance will be overcome by an appellate determination of discriminatory motive in any one reason. To avoid overturned decisions and eliminate this ambiguity, trial courts should make explicit findings after a Batson challenge that specifically accept or reject each element of a lawyer's explanation. In fact, the Louisiana Code of Criminal Procedure specifically mandates such findings.\textsuperscript{214} Thorough judicial scrutiny, well-documented on the record, can help to prevent potential peremptory challenge problems.\textsuperscript{215}

IV. CONCLUSION: STRIKING OUT

Because the peremptory challenge is misused, some commentators have urged its swift demise.\textsuperscript{216} U.S. Supreme Court Justice Marshall believed that the only way to end the discriminatory use of peremptory challenges is to eliminate them entirely.\textsuperscript{217} One federal judge declared in his ruling that it is "time to put an end to this charade" because peremptory challenges "are

\textsuperscript{212} Id. at 479.
\textsuperscript{213} Id.
\textsuperscript{214} "The court shall make specific findings regarding each such challenge." LA. CODE CRIM. PROC. ANN. art. 795(e) (1998).
\textsuperscript{215} As one commentator noted, "Ineffective scrutiny of prosecution explanations is the single greatest problem hindering the effective implementation of Batson." Ogletree, supra note 158, at 1110.
a cloak for discrimination and, therefore, should be banned." But the Supreme Court was aware of Batson's limitations when it issued that decision, and it shows no sign of abolishing the mechanism more than twenty years later. Although it has refined and redefined Batson, the Court has insisted that the limits it imposed on the peremptory challenge "have not been intended to eliminate, and will not have the effect of, eliminating [it]."

A. Peremptory Power

Critics of the peremptory challenge tend to overlook its value as a tool to protect the parties from discrimination. In Swain v. Alabama, Justice White called it "one of the most important of the rights secured to the accused." Blackstone believed that defendants who wielded it felt a measure of control because they had a say about who would judge them. The peremptory challenge enables parties to strike jurors who try to conceal bias. It also serves as a "shield" when a challenge for cause fails, preventing retribution by an alienated juror. Because the peremptory challenge is a valuable tool, and because it is likely to remain a fundamental aspect of procedure, calls for its abolition are misguided and futile. It is best to adapt to Batson's framework and conduct jury selection conscientiously, with a strong awareness of what is permitted and what is required.

Snyder's chief significance is that it invites the state to acknowledge the problem of misused and mishandled peremptory challenges. One law professor has noted that in Louisiana, "the prima facie case is often an insurmountable hurdle to the Batson complainant." If the hurdle is set too high, incomplete records and insufficient findings by a trial judge will exacerbate or

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219. Melilli, supra note 159, at 455.
221. Beck, supra note 218, at 998 n.220.
223. Id.
224. Melilli, supra note 159, at 466.
contribute to the problem by hindering appellate review.\(^{225}\) Between \textit{Batson} and \textit{Snyder}, the Louisiana Supreme Court reached the merits of defendants' \textit{Batson} challenges in thirty-two cases, and it granted relief in two of those.\(^{226}\) In those twenty years, the state's appellate courts have reviewed 178 trial court denials of defense \textit{Batson} challenges and have granted relief in four of those appeals.\(^{227}\) These statistics demonstrate neither discrimination nor improper ruling, but they show that successful appeal of a denied \textit{Batson} challenge is extremely rare and difficult. If, as \textit{Snyder} and other cases indicate, trial and appellate courts are improperly overruling \textit{Batson} challenges, it follows that other valid claims may have been mistakenly denied.

Louisiana's \textit{Batson} jurisprudence demonstrates that trial judges generally do not make findings on a defendant's prima facie case of discrimination.\(^{228}\) They typically do not give reasons for denying a \textit{Batson} challenge, and deference to their rulings is usually granted even when no reasons are offered.\(^{229}\) Tolerance for these omissions poses an impediment to the successful appeal of a legitimate \textit{Batson} claim. For example, the Louisiana Supreme Court reversed a burglary conviction in 2000 because it found that the trial judge improperly ignored defense objections that attempted to make a \textit{Batson} challenge.\(^{230}\) In the case, \textit{State v. Myers}, the judge ignored defense objections and continued as if they had not been made. "[T]he record in this case does not support or explain the judge's dismissive attitude," the supreme court said.\(^{231}\) The trial judge did not rule on the defendant's objections and failed to "articulate a reason for his refusal to require the State to produce race-neutral explanations."\(^{232}\)

\textit{Myers} and \textit{Snyder} emphasize the need for trial judges not only to rule on a challenge, but also to articulate reasons.\(^{233}\) "It is incumbent on the trial judge to address the challenge, either by


\(^{226}\) \textit{Id.} at 12.

\(^{227}\) \textit{Id.}

\(^{228}\) \textit{Id.}

\(^{229}\) \textit{Id.}


\(^{231}\) \textit{Id.} at 502.

\(^{232}\) \textit{Id.}

\(^{233}\) The Louisiana Supreme Court has noted that a judge's "rubber stamp" approval of a race-neutral reason destroys the \textit{Batson} objective. Alex v. Rayne Concrete Serv., 951 So. 2d 138, 153 (La. 2007).
ruling on whether a prima facie case of discriminatory intent has been made or by requiring race-neutral reasons for the strikes.234 Discrimination is a pervasive problem, too difficult to discern in a transcript without findings. Race-neutral reasons are easily supplied.235

Race can be a constant factor in jury selection decisions. According to one commentator, “candor and honesty require us to admit that there is not a decision that we make in terms of social grouping that does not involve an analysis of race.”236 Moreover, such analysis should be expected and anticipated because racism is the persistent, pervasive legacy of America’s slaveholding past.237 Because racism can be subconscious, it may be futile to expect lawyers to police their own motives. Snap judgments based on physical characteristics or demographics other than race can be proxies for racism, and a refusal to face one’s own prejudice can encourage self-deception.238 For this reason, trial judges are obligated to scrutinize all strikes of minority jurors. In addition, judges and lawyers both must ensure a full, accurate record of the proceedings.239 A recent Louisiana appellate court case demonstrates this necessity. The fifth circuit reversed a looting conviction in 2008 because omissions in the trial transcript prevented the court from conducting a side-by-side juror comparison.240 Because of “substantial omissions” in the trial

234. Id.
235. See Covey, supra note 208, at 322. “If the court does allow shallow explanations for arguably discriminatory peremptory challenges, then ‘only a very stupid litigant will ever lose a Batson claim.’” Beck, supra note 218, at 996. See also Peters, supra note 220, at 1756. “Any well-trained and well-prepared attorney should be able to give neutral explanations for the exercise of a challenge when confronted with a claim of discrimination.” Id.
236. “If American society as a whole is still struggling with the difficult legacies left by slavery, subjugation, and misogyny, then it is unrealistic to expect that those legacies have not made their way into the courtroom.” Laura Appleman, Reports of Batson’s Death Have Been Greatly Exaggerated: How The Batson Doctrine Enforces A Normative Framework Of Legal Ethics, 78 TEMP. L. REV. 607, 624 (2005).
237. Id.
238. “The inherent nature of the human mind then has the potential to cause attorneys and parties to exercise their peremptory challenges without fully comprehending their true reasons for using these challenges against particular individuals.” Wais, supra note 183, at 456–57.
239. One law professor suggests that lawyers should “articulate in detail the nature of a challenge. Counsel should describe the number of people in the jury venire” as well as the names, race, gender, and ethnicity of the excluded jurors. See Harges, supra note 130, at 122.
transcript, the court found the appellate record “so deficient” that it could not properly review the case for *Batson* errors.\(^{241}\)

Finally, trial judges must make explicit rulings on *Batson* objections, both on the establishment of a prima facie case and on the ultimate evaluation of the proffered reasons’ credibility. These findings need not be detailed, but they are necessary to preserve the record for appeal and for counsel to assess their own conduct. *Snyder’s* ultimate result likely would have been different if the trial judge had said whether he agreed with both or either of the prosecutor’s reasons. The Supreme Court did not mandate these findings, but they are beneficial and essential to a case’s ultimate resolution.

**B. Backstrikes Must Be Banned**

Backstrikes are unnecessary, illogical, and have no constitutional basis; their potential for abuse far outweighs their perceived advantages. To prevent discrimination as well as the appearance of it, to avoid juror inconvenience, to forestall costly appeals, and to restore confidence in its justice system, Louisiana should abolish this backward practice.

Backstrikes are unnecessary because they do not advance or achieve the aim of peremptory challenges. If a strike’s purpose is to prevent biased people from joining the jury, that goal is not achieved by delaying their removal. Because jurors are not questioned after they are tendered, they give no more testimony once they are impaneled. Lawyers, therefore, have no more objective information from which to discern a bias. Allowing them to exercise strikes later allows them to change their minds, but this flexibility injects an element of uncertainty into the process. Lawyers have adequate opportunity to assess jurors’ demeanors before impaneling them.

It is senseless to allow backstrikes freely in criminal trials while they are discretionary in civil trials. To empower a trial judge to forbid backstrikes in a civil trial but deprive him of that oversight in a criminal trial is indefensible. Because they may be abused, backstrikes offer defendants less, not more, protection from bias. When a member of his race is backstruck, a defendant cannot demand that another be tendered. Because a criminal defendant stands to lose liberty—or, in *Snyder’s* case, life—he is entitled to greater protection. The higher stakes demand greater vigilance against unfairness and abuse.

\(^{241}\) *Id.* at 739.
Backstrikes are “purely statutory,” as they have no constitutional guarantee.\(^{242}\) They are not consecrated by the Constitution because they are not fundamental. Their legislative history indicates they customarily were a matter of judicial discretion, and state legislators have banned them before. They should be viewed as a failed experiment, easily erased from the statutory blackboard.

Backstrikes do have strategic advantages that may make prosecutors and defendants reluctant to relinquish them, but their potential for abuse overshadows their utility. Because a juror typically is tendered first to the prosecutor, the prosecutor may decline to strike one who he anticipates will be challenged by the defense, a gamble that allows him to preserve his allotted challenges.\(^{243}\) A defendant may use the same ploy in the hopes that the prosecutor will later backstrike the juror. By giving both sides a second chance, each can use calculated risks to force the other side’s hand and maximize the utility of his challenges. This purported advantage is in fact a disadvantage. The strategy of saving challenges is inherently risky, and it encourages gamesmanship that is more harmful than helpful when one side is saddled with an “obnoxious juror.” It may favor the more skilled gambler, but the result remains unpredictable.

Without backstrikes, lawyers would lose the ability to withhold a challenge in the hope that opposing counsel would exercise one. Both sides would be forced to make a final decision up front, ensuring stability and certainty in the gradual composition of the jury. The restriction would affect both sides equally.

Backstrikes are useful to find the most preferable jurors. They allow both sides to reform the makeup of the jury panel as it is impaneled. Because a jury comprises as many as a dozen individuals, its dynamic is subtly altered by the addition or subtraction of each personality. This advantage is the backstrike’s strongest, but its strategic value is again dependent on chance. The ability to replace an acceptable juror with a “better” one is only useful when a stronger candidate is available. Without backstrikes, defense and prosecution would be forced to devise a strategy with fewer variables, making decisions to strike based on known quantities (i.e., the impaneled jurors) rather than unknown ones. Eliminating backstrikes would add stability to the selection process.


\(^{243}\) “A prospective juror may be tendered first to the state, which shall accept or challenge him.” LA. CODE CRIM. PROC. ANN. art. 788 (1998). Jurors are tendered simultaneously in some jurisdictions, which makes the strategy of withholding peremptory challenges impractical.
by ensuring that, once both sides have accepted a juror, that juror would be impaneled.

Because backstrikes enable a lawyer to wait hours or days before challenging a potential juror, they magnify each strike’s potential for misuse. If a lawyer intends to discriminate, he can wait several hours or even days to concoct his strategy. The delay allows a devious lawyer time to review a juror’s answers and consider his behavior at leisure, searching for a pretext. The delay also weakens memories and may hinder opposing counsel’s resistance by surprise or overall deceit, as was the case in Snyder. This potential for abuse overshadows any strategic advantage.

Backstrikes also make participating in jury service more inconvenient and are likely to foster feelings of resentment. The life of a backstruck juror such as Brooks, whose outside obligations made his initial appearance onerous, is further disrupted when he is called to court for another day, only to be dismissed. To prospective jurors, such procedural antics justifiably seem pointless. Without knowing the reason for his exclusion, the backstruck juror must ask himself why the court and its officers put him through the hassle. If that juror is a minority, he may also wonder whether race played a role.

In this context, perception of racial discrimination is as damaging as actual discrimination. Racism in jury selection “casts doubt on the integrity of the judicial process.” It damages “both the fact and the perception” that juries act as a vital check against the state’s wrongful exercise of power. Even if they are not motivated by discriminatory intent, backstrikes have the same effect when used on minorities who suspect discrimination. They leave court doubting the system’s integrity. A potential juror excluded because of race “suffers profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard.” Banning backstrikes will prevent damaging reputational injuries to the defendant, prospective jurors, and, ultimately, the system itself.

If jury service promotes respect for the law and judicial system, exclusion from service may foster disrespect for them. Jury service “preserves the democratic element of the law, as it guards against

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244. See Davenport, supra note 38, at 964. Even when there is no showing of bias, “due process is denied by circumstances that create the likelihood or other appearance of bias.” Id.


246. Id.

247. Id. at 413–14.
the rights of the parties and ensures continued acceptance of the
laws by all of the people. When a minority juror believes he
was dismissed because of his race, especially when the defendant
also is a member of his race, his esteem for the judicial system and
its laws is certainly undermined.

C. Preserving Integrity and Fairness

The peremptory challenge is a powerful procedural tool that
can be used to prevent or preserve prejudice. It can be used to
perpetuate stereotypes and racial discrimination, but it also can
prevent partial jurors from slanting the scales of justice. It has
become fundamental, rooted in stare decisis and centuries of
jurisprudence. The U.S. Supreme Court has repeatedly restricted
its use to ensure that it is wielded positively, but the Court is
unlikely to abolish it.

The backstrike, however, has more disadvantages than utility,
and it can be banished without any negative effects on justice or
jury impartiality. Lawyers may strongly resist having to relinquish
a procedural plaything, but it does not benefit parties any more
than normal peremptory challenges. The backstrike has no
constitutional basis because it is not a fundamental right. It
promotes distrust toward and resentment of the justice system by
people who are accepted and rejected without any explanation.

As Snyder illustrates, the backstrike can mask discrimination
and subvert the fairness that Batson is intended to ensure. But the
backstrike also undermines the integrity of the judicial system in
the eyes of every juror who sees its use as suspicious. Just as the
U.S. Supreme Court saw racial prejudice in Snyder where the
Louisiana Supreme Court did not, reasonable minds will differ
about whether discrimination is present. Human perceptions are
inherently imperfect, and the prism of discrimination can distort
perceptions drastically. Courts should strive to avoid even the
appearance of bias, which can reflect racism even when it is
neither intended nor effected. To preserve the justice system’s
integrity and foster fairness, the backstrike should be struck.

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248. Id. at 407.

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