

***Batson* from the Very Bottom of the Well: Critical Race Theory and the Supreme Court’s Peremptory Challenge Jurisprudence**

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INTRODUCTION

Black people are the magical faces at the bottom of society’s well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.¹

The very bottom of the American well has to be inhabited by the black defendant; the suspicion of his or her wrongdoing, a suspicion that both exacerbates and confirms racial stereotypes, pushes him or her to the nadir of respect, privilege, and possibility.² So at first glance, it is surprising that critical race theorists have spent relatively little attention on the criminal justice system; while there are exceptions—several of whom are writing for this symposium on race and criminal justice—there are not very many.

One explanation for the dearth of Critical Race Theory [CRT] and criminal justice articles is the complicated struggle within the black community (and likely within other communities of color) concerning the appropriate stance toward black lawbreakers. As Regina Austin has explained,

Whether “the black community” defends those who break the law or seeks to bring the full force of white justice down upon them depends on considerations not necessarily shared by the rest of the society Black criminals are pitied, praised, protected, emulated, or embraced if

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¹ DEREK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, v (1992).

² Here, I am lumping together the arrested, the indicted, the tried, and the convicted. Black defendants who are already condemned—the Black prisoner, the Black death row inmate—are the bottom of the very bottom.

their behavior has a positive impact on the social, political, and economic well-being of black communal life. Otherwise, they are criticized, ostracized, scorned, abandoned, and betrayed. The various assessments of the social standing of black criminals within “the community” fall into roughly two predominant political approaches.³

Paul Butler, who writes for this symposium, exemplifies one approach, which Austin calls “the politics of identification,”⁴ while Randall Kennedy, symposium noted critic of Critical Race Theory, takes the other, embracing what he calls the “politics of respectability.”⁵ While I probably should have stayed on the sidelines on this issue, I have not, and, at least on this general question, am closer to Butler than to Kennedy.⁶

This is the point at which I must digress a bit. I am only to the third paragraph of this article and I have to confess my doubts about the appropriateness of writing it. I was excited—honored, to be more precise—to be asked to contribute, but just as reticence might have been the better course with regard to the question of the rightness of politics of respectability, it might be more fitting here. Critical Race Theory? As an initial matter, “theory” does not seem to describe my scholarship. I am not a theorist, I am an advocate: sometimes an empiricist, sometimes a doctrinalist, maybe even sometimes a preacher, but not a theorist. I see smaller chunks of the world, chunks that seem wrong, and I write to object and to propose, not to capture the big picture and conceptualize it.

And, more importantly, I am not a person of color. Obviously I could write about race and criminal justice without being a person of color, having done so for my entire career, but one of the central insights of Critical Race Theory is that perspective matters. It is an insight to which I totally subscribe, so what am I doing here?

I think I am a fellow traveler. I share many of the premises, passions, and goals of Critical Race Theorists, and employ some of the same methodologies.⁷ I have benefitted from much of their work, and hope some of them have benefitted from mine; I am always touched when asked if my work can be printed in a CRT

³ Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1772 (1992).

⁴ *Id.* at 1774. See, e.g., Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677 (1995).

⁵ RANDALL KENNEDY, RACE, CRIME, AND THE LAW, 17–21 (1997). See also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1760–87 (1989). But see Austin, *supra* note 3, at 1772 (calling this approach the “politics of distinction”).

⁶ Sheri Lynn Johnson, *Respectability, Race Neutrality and Truth*, 107 YALE L.J. 2619, 2645–46 (1998) (reviewing KENNEDY, *supra* note 5).

⁷ Oddly enough, in my very first article, written before CRT and feminist calls for narrative, I concluded with a personal experience—one that contrasts my own racial privilege with that of my client. Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L. J. 214, 256–57 (1983).

collection. I have felt welcomed, and I do my best to shake off the blinders of my race and privilege.

So I may be missing something here, but it seems to me that jury selection in general, and peremptory challenge law in particular, should be an obvious target for CRT, and, maybe not coincidentally, should be common ground for the adherents of the politics of respectability and the adherents of the politics of identification, for the purported “criminals” have not yet been determined to be guilty, and might end up being respectable, after all, if judged by an unbiased jury.

Below, I consider *Batson v. Kentucky*⁸ and its progeny from, as best as I can imagine, the very bottom of the well. Part I, “The Good,” describes *Batson* in historical context, a peremptory challenge case that initially seems solicitous of the residents of the very bottom of the well. Part II “The Bad,” reports on a decade of the cases that, by any measure, cut back upon “The Good” that *Batson* might have done for those residents. Part III, “Interregnum,” tells the stories of *Miller-El v. Dretke*⁹ and *Snyder v. Louisiana*,¹⁰ two cases that seem to renew some of the promise of *Batson*. And Part IV, “The Ugly,” reports on the Supreme Court’s latest, largely overlooked addition to the *Batson* line of cases.

I. THE GOOD

Long before *Batson*, there was *Strauder v. West Virginia*,¹¹ decided in 1880, which held that a state statute excluding black people from jury service violated the black defendant’s right to Equal Protection.¹² Fairly quickly, the Supreme Court extended its ruling in *Strauder* to the exclusion of grand jurors on the basis of race¹³ and the racially discriminatory administration of facially neutral petit jury selection laws.¹⁴ Eventually, the Supreme Court provided remedies for prohibitions against racial discrimination in selection of the venire in any case in which substantial disparity existed between percentages of minority group members in the population and on the jury list, if the claimant could show that at least part of the disparity originated at a point in the selection process where jury commissioners possessed an opportunity to discriminate.¹⁵

This prohibition did not mean that African American defendants were entitled to racially proportionate—or any—representation on their juries.¹⁶ Moreover, until

⁸ 476 U.S. 79 (1986).

⁹ 545 U.S. 231 (2005).

¹⁰ 552 U.S. 472 (2008).

¹¹ 100 U.S. 303 (1879).

¹² *Id.* at 303.

¹³ *Ex parte Virginia*, 100 U.S. 339, 339–40 (1880).

¹⁴ *Neal v. Delaware*, 103 U.S. 370, 370 (1881).

¹⁵ *Turner v. Fouche*, 396 U.S. 346, 360 (1970).

¹⁶ *See, e.g., Cassell v. Texas*, 339 U.S. 232, 286–87 (1950).

Batson v. Kentucky,¹⁷ prosecutors were free to use peremptory challenges to preclude black venire members from serving as jurors. *Swain v. Alabama*,¹⁸ decided in 1965, was the first Supreme Court case to even consider an Equal Protection challenge against the commonplace practice of striking all African Americans from juries impaneled to decide black defendants' cases.¹⁹ *Swain* upheld the practice, based in part on the purported reasonableness of presuming bias from shared race, which the Court analogized to bias based upon shared occupation, religion, or eye color;²⁰ it seemed to forget in this analogy that racial classifications, unlike occupational classifications, are supposed to be unconstitutional unless they meet strict scrutiny.²¹

The *Swain* Court also defended racially motivated exercise of peremptory challenges as permissible, because prosecutors could strike white jurors in white defendant cases;²² this reasoning ignores both the fact that in most jurisdictions, demographics makes it impossible to strike all white jurors in white defendant cases, and the well-established law that "equal application," whether in segregated schools or marriage restrictions, does not insulate a racial classification from strict scrutiny.²³

Batson v. Kentucky overruled *Swain*, certainly a step forward in the sense that it put jury selection in line with all the rest of Equal Protection doctrine: "Discrimination based upon race" is suspect, "and bears a heavy burden of justification."²⁴ As *Batson* held, the racially motivated use of peremptory challenges—even of a single juror—violated the Equal Protection Clause:

Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, so it forbids the States to strike black venire men on the assumption that they will be biased in a particular case simply because the defendant is black.²⁵

¹⁷ 476 U.S. 79 (1986).

¹⁸ 380 U.S. 202 (1965).

¹⁹ *Id.* at 211–12. See also *Batson*, 476 U.S. at 137 (Rehnquist, J., dissenting) (describing the Court's decision as "unprecedented use of the Equal Protection Clause to restrict the historic scope of the peremptory challenge").

²⁰ *Swain*, 380 U.S. at 211–12.

²¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

²² *Swain*, 380 U.S. at 221 ("In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause.").

²³ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

²⁴ *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

²⁵ *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (citation omitted).

Batson also established a procedure for determining whether a preemptory challenge was racially motivated, one that requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a preemptory challenge on the basis of race.²⁶ Second, upon such a showing, the burden shifts to the prosecutor, a burden that, according to the Court, could not be satisfied by mere denial of discriminatory motives, but could only be satisfied by a race neutral explanation for the strike.²⁷ Finally, if the court finds the explanation on its face to be race-neutral, it must then determine whether the defendant has carried his burden of proving purposeful discrimination.²⁸ This final step involves evaluating “the persuasiveness of the justification” proffered by the prosecutor; that is, determining whether the race neutral reason was pretextual.²⁹

Obviously *Batson* alone could not create a fundamental shift in racial hierarchy; as I have argued elsewhere, in the criminal sphere, a real commitment to equality demands minority representation on the jury of every minority defendant.³⁰ The narrower question was whether it might “let down a rope” to the very bottom of the well. When decided, it seemed to hold out that possibility. After all, on its face it allowed black defendants to challenge the discriminatory removal of black jurors from those who would decide his fate.³¹ That said, from the start, there were three reasons for skepticism even about the rope. First, to whom was this rope really extended? Black defendants, black jurors, or someone else? Second, was the Court committed to enforcing this newly declared right, committed enough to enforce it rather than just announce it? And finally, as Justice Marshall objected, was it even possible to enforce this right, given the ease with which a prosecutor might deceive a judge—or even herself—as to her motivation?³²

II. THE BAD

In the first decade after *Batson* was decided, the Court appeared to resolve both the question of who was the holder of the right, and the question of its own commitment to the enforcement of the right against the black defendant. Neither answer was encouraging.

²⁶ *Id.* at 96–97.

²⁷ *Id.* at 97–98.

²⁸ *Id.* at 98.

²⁹ *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

³⁰ Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1695–1700 (1985); see also Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1804 (1993); Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 186 (2007).

³¹ *Batson*, 476 U.S. at 100.

³² *Id.* at 105–06 (Marshall, J., concurring).

A. *Georgia v. McCollum*

From the bottom, neither *Powers v. Ohio*³³ nor *Edmonson v. Leesville Concrete Company*,³⁴ both decided in 1991, was inherently bad. Both, however, foreshadowed the eventual abandonment of the black defendant at the very bottom, an abandonment completed in *Georgia v. McCollum*.³⁵ *Powers* held that white defendants as well as black defendants could raise the exclusion of black jurors.³⁶ This was not bad in itself, but its holding implied that it might be the juror, rather than the defendant, that was the subject of the Court's concern in *Batson*. *Powers*, however, steered a middle path, saying instead that *Batson* was designed to serve multiple ends, "only one of which was to protect individual defendants from discrimination in the selection of jurors."³⁷ Likewise, *Edmonson's* holding that *Batson* applies to civil cases as well as criminal cases,³⁸ was not necessarily bad. It was, however, somewhat surprising on state action grounds since civil litigants are generally private parties.³⁹ By removing the state action barrier, it raised the possibility that *Batson* would apply not just to a prosecutor's peremptory challenges, but to defense counsel's peremptory challenges as well.

It should be noted that the Court had a choice between the juror and the defendant as the focus of *Batson's* concern; the case law all the way back to *Strauder* waffles on that question.⁴⁰ As I have argued at length elsewhere, it should have chosen the defendant, to whom the right is far more important.⁴¹ Nonetheless, *Georgia v. McCollum* resolved that question against the defendant. *McCollum* determined that the harm to the juror and the public is the same whether it is the defense or the prosecutor that exercises racially motivated peremptory strikes; that defense counsel are state actors when engaged in the state process of jury selection; that the prosecutor has standing to raise the juror's claims; and that the juror and community interests served by *Batson* trump the rights of a criminal defendant.⁴²

Under the facts of *McCollum*—a white defendant striking black jurors—application of *Batson* to defense peremptory challenges might not seem so bad; it

³³ 499 U.S. 400 (1991).

³⁴ 500 U.S. 614 (1991).

³⁵ 505 U.S. 42 (1992).

³⁶ *Powers*, 499 U.S. at 400–01.

³⁷ *Id.* at 406.

³⁸ *Edmonson*, 500 U.S. at 614.

³⁹ *Id.*

⁴⁰ Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 24–25 (1993).

⁴¹ *Id.* at 22–23.

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

would be irrelevant to the very bottom, the black defendant, and perhaps a benefit to the black juror on the bottom. But as the NAACP's amicus brief interjected, extending *Batson* to defense strikes would also mean that black defendants would be prohibited from striking white prospective jurors in order to reach and seat a black juror,⁴³ a perverse result if the goal is to help those at the bottom, especially given racial demographics. Surely the case of a black defendant striking white jurors should be treated differently. Alas, no.

It is a strange world where it is Justice O'Connor who pipes up on behalf of the black defendant.⁴⁴ Justice O'Connor, dissenting, focused on the black defendant, not the juror, and upon outcomes rather than procedures. In her view, because conscious and unconscious racism can affect the way in which white jurors perceive minority defendants and evidence concerning their guilt, a minority defendant's use of peremptory challenges to include some minority jurors may be necessary "to overcome such racial bias, for there is substantial reason to believe that the distorting influence of race is minimized on a racially mixed jury."⁴⁵ The majority did not address this argument directly, but answered it with two platitudes. First, it claimed that if there were racially biased jurors, they could be struck for cause,⁴⁶ a rather disingenuous defense given that its own *voir dire* law did not, in most cases, require trial judges to permit questioning on racial bias.⁴⁷ And second,

[T]here is a distinction between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice. This Court firmly has rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. As this Court stated just last Term in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns."⁴⁸

⁴³ Brief for NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae Supporting Respondent at 14, *Georgia v. McCollum*, 505 U.S. 42 (1992) (No. 91-372).

⁴⁴ *McCollum*, 505 U.S. at 68–69 (O'Connor, J., dissenting). Justice Thomas wrote a concurring opinion also noting that *McCollum* would hurt black defendants, but his point was that *Batson* should be overturned, thus leaving black defendants able to strike white jurors, but also leaving them vulnerable to prosecutors striking black jurors. *Id.* at 60–62 (Thomas, J., concurring).

⁴⁵ *Id.* at 68.

⁴⁶ *Id.* at 58.

⁴⁷ See *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (announcing a due process right to *voir dire* on race, but only in interracial crime cases, and only where the death penalty is at stake).

⁴⁸ *McCollum*, 505 U.S. at 59.

Thus, according to the majority, it is wrong to assume that there is a significant risk that white jurors will be biased against black defendants. But of course, if it is wrong to so assume, then one has to wonder what *Batson* was for.

And the answer, the Court seems to suggest, is that *Batson* was “designed to remedy the harm done to the ‘dignity of persons,’ [i.e., jurors,] and to the ‘integrity of the courts.’”⁴⁹ Thus, *Batson* was not a rope thrown to the very bottom of the well, to the black defendant. Still, with vigilant enforcement, it might nonetheless reach such defendants, at least on occasion. Enforcement, however, in the next dozen years, would be less than vigorous, as *Hernandez v. New York*⁵⁰ and *Purkett v. Elem*⁵¹ would illustrate.

B. *Hernandez v. New York*

In an earlier article, I said most of what I can say about *Hernandez v. New York*, so despite how blind and benighted it is,⁵² I will be very brief here. Decided in 1991, it is as wrong as the more recent *Felkner v. Jackson*,⁵³ which I have put in the “ugly” category; I call *Hernandez* bad rather than ugly only because it was decided twenty years earlier, when the Court had less experience with preemptory challenge discrimination cases.

Hernandez’s prosecutor struck all four Latino jurors presented to him. With respect to two of them, he first claimed he was “not certain” that they were Hispanics, then stated that he struck them because, although they said they would listen only to the interpreter, he was uncertain from their demeanor whether they really would do so, as opposed to listening to the Spanish testimony of one of the witnesses.⁵⁴

The plurality held that the stated reason was “race neutral” because it “rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about” a suspect class.⁵⁵ Rather, according to the plurality, it divided potential jurors into two classes, one whose *voir dire* responses persuaded the prosecutor they might have difficulty in accepting the translator’s rendition of Spanish language testimony and one whose responses caused no concern.⁵⁶ Each category, again according to the plurality, “would include both Latinos and non-Latinos.”⁵⁷ The plurality opinion then addressed the question of discriminatory

⁴⁹ *Id.* at 48 (quoting *Powers v. Ohio*, 499 U.S. 400, 402 (1991)).

⁵⁰ 500 U.S. 352 (1991).

⁵¹ 514 U.S. 765 (1995) (per curiam).

⁵² See *Johnson*, *supra* note 40.

⁵³ 131 S. Ct. 1305 (2011).

⁵⁴ *Hernandez*, 500 U.S. at 356–57 (plurality opinion).

⁵⁵ *Id.* at 361.

⁵⁶ *Id.*

⁵⁷ *Id.*

intent, and began by conceding that the trial took place in a community with a substantial Latino population where many Latinos speak fluent Spanish. Thus, the prosecutor's reason raised "a plausible, though not a necessary, inference that language might be a pretext."⁵⁸ However, because the trial judge's decision to believe the prosecutor's race neutral explanation is reviewed under the "clearly erroneous" standard, it need not be reversed. According to the plurality, this deferential standard is appropriate because the ultimate question of discriminatory intent "largely will turn on evaluation of credibility."⁵⁹

Justices Stevens, Marshall, and Blackmun dissented. Stevens concluded that the prosecutor's explanation was insufficient to rebut the prima facie case, whether or not it was pretextual, because of (1) the inevitable disproportionate effect on Latinos; (2) the ease with which the prosecutor's concerns could have been accommodated without striking Latino jurors, i.e., jury instructions or a physical arrangement that rendered the witnesses' testimony inaudible to the jury; and (3) that the prosecutor's concerns, if inquired into and substantiated, would have supported a challenge for cause, which he did not pursue.⁶⁰

None of these reasons moved the majority. Moreover, neither the dissent nor the majority noted a fourth reason: the state court record reveals that the prosecutor did not ask *all* jurors whether they were fluent in Spanish, but only Latino jurors.⁶¹

From the very bottom—from the perspective of a Latino defendant, this time—it is hard to see how the stated reason was race neutral. From the very bottom, it is also hard to see why one would credit the truthfulness of a prosecutor who claimed he did not know whether jurors were Latino but, low and behold, only asked Latino jurors if they could speak Spanish. Or, for that matter, why one would credit a prosecutor who claimed his concern was with any jurors who might understand Spanish, and yet in actuality limited his concern to Latinos who might understand Spanish.

C. *Purkett v. Elem*

As if *Hernandez* was not bad enough, the Supreme Court then decided *Purkett v. Elem*. The state court had been satisfied with the prosecutor's stated reasons for his strikes, but the Eight Circuit reversed, deeming them implausible:

[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least

⁵⁸ *Id.* at 363.

⁵⁹ *Id.* at 365 (citing *Batson v. Kentucky*, 476 U.S. 79, 98 (1986)).

⁶⁰ *Id.* at 379 (Stevens, J., dissenting).

⁶¹ *People v. Hernandez*, 75 N.Y.2d 350, 363 (1990) (Kaye, J., dissenting).

articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, "I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustach[e] and the beard[] look suspicious to me," do not constitute such legitimate race-neutral reasons for striking juror 22.⁶²

The Supreme Court, however, deemed such skepticism inappropriate. It reversed, stating that the second step of a *Batson* analysis requires a comprehensible reason, but not one that is "persuasive, or even plausible."⁶³ Indeed, if the reason is race neutral, it may be "silly or superstitious" and still satisfy the prosecutor's burden at the second step.⁶⁴

Purkett also made it clear that the prerogative to scrutinize under the third step lay almost entirely with the trial court; it condemned the Eighth Circuit because "[i]t gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility."⁶⁵ Thus, until *Miller-El v. Dretke*,⁶⁶ the enforcement of *Batson* was largely dependent on the willingness of trial courts to find not-credible the testimony of prosecutors whom they saw every day—in effect, to call them liars for the sake of those at the very bottom of the well.

III. INTERREGNUM

In the ten years between *Purkett v. Elem* and *Miller-El v. Dretke*, academics railed that the Court had gutted *Batson*; some presented particularly outrageous cases, while others presented empirical data. Conclusions that Justice Marshall was right, that elimination of racial discrimination in the exercise of the peremptory challenge could only be accomplished by eliminating the peremptory challenge, were common. *Miller-El* looked like a sea change.

A. *Miller-El v. Dretke*

Miller-El came to the Supreme Court twice. The first time, in *Miller-El v. Cockrell* [hereinafter, *Miller-El I*], the Fifth Circuit had denied a certificate of appealability on the *Batson* claim;⁶⁷ AEDPA [Antiterrorism and Effective Death Penalty Act] requires that before a federal circuit court even hears a claim on

⁶² *Purkett v. Elem*, 514 U.S. 765, 767 (1995) (per curiam).

⁶³ *Id.* at 767–68.

⁶⁴ *Id.* at 768.

⁶⁵ *Id.* at 769.

⁶⁶ *Miller-El v. Dretke*, 545 U.S. 231 (2005).

⁶⁷ *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003).

habeas corpus, either it or the district court must have deemed that claim one that “reasonable jurists” might dispute.⁶⁸ After reviewing at length Miller-El’s evidence of discrimination, the Supreme Court held that the evidence was at least debatable by reasonable jurists, reversed the decision of the Fifth Circuit, and remanded the case for full consideration.⁶⁹ The Fifth Circuit, however, refused to take the hint, and found that Miller-El had not proved discrimination,⁷⁰ which necessitated a second grant of certiorari. *Miller-El v. Dretke* [hereinafter *Miller-El II*] reiterated and expanded upon the reasons cited in *Miller-El I*, and again reversed the Fifth Circuit’s decision.⁷¹ Both opinions analyze the reasons the prosecutor proffered and the evidence impeaching those reasons in great detail.

Among the probative factors noted by the Court was the strength of the prima facie case, as reflected in the higher ratio in which African Americans were excluded from Miller-El’s jury. In a contrast to its obliviousness to disparate questioning in *Hernandez*, the *Miller-El I* majority also pointed to two examples, which it found were also probative of discriminatory purpose. First, African American jurors generally were given a more graphic description of the execution process, prompting the Court to observe that “[t]o the extent a divergence in responses [as to their views about the death penalty] can be attributed to the racially disparate mode of examination, it is relevant to our inquiry.”⁷² Second, it detected “an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder”;⁷³ this pattern more frequently tended to cause African American jurors to commit to a sentence harsher than the minimum permissible under Texas law, “ironically,” leading to their disqualification on grounds ordinarily raised only by the defense to weed out pro-state members of the venire.⁷⁴

The *Miller-El II* majority also described the Texas practice of “jury shuffling,” and the State’s use of the practice in a way that strongly suggested racial motivation; on at least two occasions the prosecution requested shuffles when there were a large number of African Americans at the front of the panel.⁷⁵ The Court also gave weight to the pattern and practice evidence Miller-El had adduced, which showed both a historical pattern of racial discrimination in the

⁶⁸ *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

⁶⁹ *Miller-El I*, 537 U.S. at 322.

⁷⁰ *Miller-El v. Dretke*, 361 F.3d 849, 862 (5th Cir. 2005).

⁷¹ *Miller-El II*, 545 U.S. at 264–66.

⁷² *Miller-El I*, 537 U.S. at 332.

⁷³ *Id.*

⁷⁴ *Id.* at 333.

⁷⁵ *Miller-El II*, 545 U.S. at 253–54.

Dallas County District Attorney's Office and a prior formal policy of excluding African Americans from jury service.⁷⁶

The most detailed portion of the *Miller-El* opinion discusses the "powerful . . . side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."⁷⁷ As the Court emphasized, "[i]f [the] proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination"⁷⁸ In an important footnote responsive to the dissent, the majority scolded:

The dissent contends that there are no white panelists similarly situated to Fields and to panel member Joe Warren because "[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror—it means matching *all* of them." None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.⁷⁹

The Court then observed that substitution of an impeached reason by another reason may be probative of discriminatory purpose, characterizing such new explanations as "reek[ing] of afterthought."⁸⁰

At several points the Supreme Court rebuked the Fifth Circuit for its uncritical stance. For example, it pointed out that relying upon a race-neutral reason that might explain a strike, where that reason had not been proffered by the prosecutor, was not appropriate:

If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to

⁷⁶ *Id.* at 253.

⁷⁷ *Id.* at 241.

⁷⁸ *Id.*

⁷⁹ *Id.* at 247 n.6 (citation omitted).

⁸⁰ *Id.* at 246.

satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.⁸¹

Then, after a detailed analysis of the disparate questioning, rejecting the analysis of the State and the Fifth Circuit because it "simply does not fit the facts," the majority deemed⁸² the Fifth Circuit's conclusion, "as unsupportable as the 'dismissive and strained interpretation' of [Miller-El's] evidence that this Court disapproved when deciding that [Miller-El] was entitled to a certificate of appealability."⁸³ Viewed cumulatively, as the Court insisted was required, Miller-El's evidence was "too powerful" to permit any conclusion other than that the prosecutor struck at least two of the jurors because they were black.

In short, *Miller-El*, both in its details and its tone, sounds nothing like either *Hernandez* or *Elem*. Was *Miller-El* a sea change, or aberrational?

B. *The Miller-El Remands*

Several cases were granted, reversed, and remanded in light of *Miller-El*. Two of them, *Hightower v. Terry*⁸⁴ and *Snyder v. Louisiana*,⁸⁵ recalcitrantly reinstated their previous decisions.⁸⁶ One of them, *Snyder*, prompted the Supreme Court to grant certiorari a second time, and to reverse.⁸⁷ *Snyder*, like *Miller-El*, employs a very critical comparative juror analysis, and finds an equal protection violation in the prosecutor's exercise of his peremptory challenges. *Snyder* first quotes *Miller-El*'s insistence that "all of the circumstances that bear upon the issue of racial animosity must be consulted,"⁸⁸ but quickly turns to, and relies upon, a comparative juror analysis. The prosecutor proffered two reasons for striking one of the black prospective jurors in *Snyder*'s capital murder trial: he was nervous during voir dire, and he might have been motivated to find *Snyder* guilty of an offense less than capital murder to avoid the need for a penalty phase and thereby to minimize the student teaching hours he would miss. The *Snyder* majority found those reasons a pretext for racial discrimination for several reasons. First, the prospective juror, after being informed that the court had contacted his dean, who said that he would work with the prospective juror to insure that he could make up any student-teaching time missed due to jury service, expressed no further concern

⁸¹ *Id.* at 252.

⁸² *Id.* at 257.

⁸³ *Id.* at 265 (citation omitted).

⁸⁴ *Hightower v. Terry*, 459 F.3d 1067, 1069 (11th Cir. 2006).

⁸⁵ *State v. Snyder*, 942 So. 2d 484, 492 (La. 2006).

⁸⁶ I have told this story in greater detail elsewhere. Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131 (2007).

⁸⁷ *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008).

⁸⁸ *Id.* at 478.

about serving on the jury.⁸⁹ Second, the prosecutor had stated that the trial would be brief; in fact, the trial and penalty phase were completed two days after the prospective juror was struck.⁹⁰ Finally, and most critically, the prosecutor accepted white jurors who revealed conflicting obligations that, while different than those of the struck black juror, were at least as serious.⁹¹

Thus, *Snyder* reinforces an optimistic reading of *Miller-El*, one that interprets the former as a turning point. *Hightower v. Terry*, however, makes one less sanguine concerning the Court's commitment to either the black defendant or to the black juror. The recalcitrance exhibited by the Eleventh Circuit in adhering to its previous determination, after a remand in light of *Miller-El*, was remarkable. Judge Tjoflat's opinion baldly announced that "*Miller-El* does not control our decision" and that "[o]ur opinion in *Hightower v. Schofield* is accordingly reinstated."⁹² As Judge Wilson's dissent protested, the majority's decision "violates the Supreme Court's express mandate."⁹³ All of the Eleventh Circuit's purported reasons for finding *Miller-El* inapplicable were specious.⁹⁴ And as Judge Wilson's opinion carefully sets forth, the comparative juror analysis mandated by *Miller-El* provides compelling evidence of racial motivation.⁹⁵

⁸⁹ *Id.* at 482–83.

⁹⁰ *Id.* at 482.

⁹¹ *Id.* at 483–84.

⁹² *Hightower v. Terry*, 459 F.3d 1067, 1069, 1072 (11th Cir. 2006).

⁹³ *Id.* at 1078 (Wilson, J., dissenting).

⁹⁴ Its initial distinction between "how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us," *id.* at 1069, turns out to be irrelevant, given explicit language in *Miller-El II* addressing the information that reviewing courts must consider in evaluating *Batson* claims. *Miller-El II*, 545 U.S. 231, 253 (2005). The Eleventh Circuit's position that *Hightower*'s comparative juror analysis could not be considered by a federal court (except in the guise of an ineffective assistance of counsel claim) because he did not present it to the state court, is flatly inconsistent with footnote two in *Miller-El II*, where the majority discusses the parallel contention by the *Miller-El II* dissent that comparisons of black and white prospective jurors (as well as arguments about disparate questioning of black and white jurors and the use of the jury shuffle) were not before the Court because they had not been "put before the Texas courts." *Id.* at 242 n.2. Because the majority unambiguously rejects the dissent's position, holding that this argument "conflates the difference between evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence," *id.*, the *Hightower* majority is simply and inexcusably wrong. Indeed, the footnote specifically states that there can be no question that the transcript of voir dire recording the evidence on which *Miller-El* based his arguments was before the state courts, distinguishing between the jury shuffle, the disparate questioning, and the comparative juror analysis on the one hand, and the juror questionnaires and information cards on the other, and stating that only with respect to the questionnaires and cards was there a question about what was before the state courts. *Id.* Thus, the Eleventh Circuit had no excuse for deeming *Miller-El II* inapplicable, and no excuse for not considering the merits of *Hightower*'s comparative juror analysis. See Johnson, *supra* note 85, at 143–44.

⁹⁵ *Hightower*, 459 F.3d at 1072–78 (Wilson, J., dissenting).

Nonetheless, the Supreme Court denied certiorari, and Hightower was executed.⁹⁶ Looking up from the bottom, what does that mean? That the Supreme Court sometimes will throw a rope now, but only when it feels like it? Or just that it made a mistake?

IV. THE UGLY

The Supreme Court's latest foray into peremptory challenge law, *Felkner v. Jackson*, is more discouraging to me than anything since *Swain*.

A. *Proceedings in California State Court*

At Steven Jackson's 2004 trial, the prosecutor struck two of three black jurors. When those strikes were challenged, he stated that he struck a black female juror "because she had a master's degree in social work, and had interned at the county jail, 'probably in the psych unit as a sociologist of some sort[,] . . . stat[ing] that he does not 'like to keep social workers.'" ⁹⁷ The other struck black juror, Juror Smith, was male. When asked about negative experiences with law enforcement, Juror Smith had stated that from the ages of 16 to 30 years old, he was frequently stopped by California police officers because of his race and age. Although he said that he did not judge all law enforcement by the behavior of these officers, and that his experiences would not affect his ability to fairly judge the trial,⁹⁸ the prosecutor claimed that "[w]hether or not he still harbors any animosity is not something I wanted to roll the dice with."⁹⁹

The trial court credited these reasons, and denied the motion.¹⁰⁰ Jackson was convicted, and on appeal, his counsel argued that a comparative juror analysis revealed that the prosecutor's explanations were pretextual.¹⁰¹ With respect to the struck black male juror, Jackson argued that a seated white male juror also had negative experiences with law enforcement. The white juror stated that Illinois police had stopped him while driving in Illinois several years earlier as part of what he believed to be a "scam" targeting drivers with California license plates. He also complained that he had been disappointed by the failure of law enforcement officers to investigate the burglary of his car. Nonetheless, he was not struck by the prosecution.¹⁰² With respect to the struck black social worker,

⁹⁶ *Hightower v. Terry*, 550 U.S. 952 (2007) (denying cert.).

⁹⁷ *Felkner v. Jackson*, 131 S. Ct. 1305, 1306 (2011) (per curiam).

⁹⁸ Brief for Appellant at 12–14, *Jackson v. Felkner*, 389 F. App'x 640 (9th Cir. 2010) (No. 09-15379).

⁹⁹ *Felkner*, 131 S. Ct. at 1306 (per curiam).

¹⁰⁰ *Id.*

¹⁰¹ Brief of Appellant, *supra* note 98, at 21.

¹⁰² Petition for Writ of Certiorari, *Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (No. 10-797), 2010 WL 5126521, at *5–6.

Jackson argued that the prosecutor engaged in disparate questioning, asking follow-up questions of several white jurors when he was concerned about their educational backgrounds, but struck the black juror without asking her any questions about her degree in social work.¹⁰³ The California Court of Appeals rejected these arguments, concluding that the white male juror's "negative experience out of state and the car burglary is not comparable to [the struck black juror's] 14 years of perceived harassment by law enforcement based in part on race."¹⁰⁴ As for the female juror, the court did not directly address the disparate questioning issues, except to say that the prosecutor's citation of her social services background—"a proper race-neutral reason"—explained his different treatment of jurors with "backgrounds in law, bio-chemistry or environmental engineering," and also noted her internship experience at the county jail.¹⁰⁵

B. Lower Federal Court Proceedings

Jackson filed a habeas corpus petition in federal district court, which denied relief.¹⁰⁶ The Ninth Circuit reversed with an unpublished opinion that explained the background law, then briefly explained:

The prosecutor's proffered race-neutral bases for peremptorily striking the two African-American jurors were not sufficient to counter the evidence of purposeful discrimination in light of the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors.¹⁰⁷

C. The Supreme Court's Response

The Supreme Court in one fell swoop granted certiorari, declined to hear argument, and issued a per curiam opinion reversing the judgment of the Ninth Circuit.¹⁰⁸ That opinion is so dismissive that, looking up from the bottom, I would think the right question is: Does the Supreme Court know anything about the lives of African Americans in this country, or does it just not care at all about eradicating racial discrimination in jury selection?

¹⁰³ Brief of Appellant, *supra* note 98, at 23.

¹⁰⁴ *People v. Jackson*, No. C048079, 2006 WL 1660795 at *5 (Cal. Ct. App. June 15, 2006).

¹⁰⁵ *Id.* at *5–6.

¹⁰⁶ *Jackson v. Felkner*, No. CIV 07-0555RJB, 2009 WL 426651 (E.D. Cal. Feb. 20, 2009) *aff'd sub nom.* *Jackson v. Felkner*, 389 F. App'x 640 (9th Cir. 2010), *rev'd*, 131 S. Ct. 1305 (2011).

¹⁰⁷ *Jackson*, 389 F. App'x at 641.

¹⁰⁸ *Felkner*, 131 S. Ct. at 1305 (per curiam).

1. Dismissiveness

The Supreme Court per curiam opinion sets forth what occurred during jury selection, then summarizes and quotes from the lower court opinions. Next, it condemns the Ninth Circuit opinion: “That decision is as inexplicable as it is unexplained. It is reversed.”¹⁰⁹ The final paragraphs eschew any analysis of the facts, instead stating the importance of credibility determinations and the need for a “highly deferential standard” of review of state court decisions.¹¹⁰

That is fine, and consistent with precedent, but what happened to *Miller-El* and *Snyder*? Why was the *Miller-El* analysis of disparate questioning not applied to the black female juror strike? What happened to the *Miller-El* recognition that jurors are not “cookie cutters,” and therefore struck black jurors and seated white jurors will never be identical, but when similar, are strongly probative of discriminatory purpose?¹¹¹ What happened to *Snyder*’s careful analysis of purported differences between a struck black juror and a seated white juror? What happened to *Snyder*’s insistence that everything the struck juror said had to be examined? Indeed, the Supreme Court failed to even *mention* in its recitation of the facts that the black male juror said he did not judge all law enforcement by the behavior of the officers who stopped him without cause, and that his experiences with those officers would not affect his ability to fairly judge the trial. Consequently, it also did not analyze the significance of those facts, facts that should have been reassuring to the race-neutral prosecutor.

Almost as disturbing as its cursory treatment of the issue is the opinion’s implied—and completely gratuitous—skepticism of the black juror’s experience of racial discrimination. The opinion not only repeats, verbatim and with apparent approval, the state court’s characterization of these experiences as his “perceived harassment,” but adds its own aporetic aside, “The prosecutor offered a race-neutral explanation for striking each juror: [The struck black male juror] had stated that from the ages of 16 to 30 years old, he was frequently stopped by California police officers because—in *his view*—of his race and age.”¹¹²

It might sound disrespectful, but at this point, anyone near the bottom of the well, or even willing to try to imagine that vantage point has to say: “*Seriously?*” It must be remembered that this is a juror without a single criminal conviction, and therefore a juror who was stopped numerous times *despite having done nothing wrong*; why should his interpretation of racial motivation be doubted? Surely not because it is inherently implausible; surely the Court has heard of racial profiling, and the harassment of African Americans in white neighborhoods, and high profile police shootings of innocent “suspects.” Surely. Seriously.

¹⁰⁹ *Id.* at 1307.

¹¹⁰ *Id.*

¹¹¹ *Miller-El II*, 545 U.S. 231, 247 n.6 (2005).

¹¹² *Felkner*, 131 S. Ct. at 1306–07 (emphasis added).

2. Incentive

When I have spoken to colleagues about this case, the response has often been: The dismissiveness is just because it is a Ninth Circuit opinion. This Court is not interested in error correction except where the Ninth Circuit is involved, and given the brevity of the Ninth Circuit opinion, a slap-down was to be expected.

That may be so, but in deciding to slap down the Ninth Circuit in this particular case, either the Court was blind to the incentives it was creating, or did not consider those incentives as weighty as its animosity toward the Ninth Circuit.

Looked at from the very bottom of the well—the black defendant—or even just the near-bottom—the black juror—what is the consequence of this decision? What is the take away lesson for the prosecutor with a mind to discriminate? Given how many black men have had negative experiences with police, a prosecutor today need merely ask about such experiences to trigger an answer that will justify a strike and insulate him from *Batson*. In fact, if he does not get the answer he expects to that question, all he has to do is ask the related question of whether the juror thinks that police are biased against African Americans; if the polls are to be believed, a very high proportion of African Americans—and a significant proportion of Latinos—will answer that question “yes.”¹¹³ Similarly, it would seem that Latinos can now be struck from all cases because they have been stopped and questioned about their citizenship. And for the trial judge presiding over such questioning, the choice seems clear, if decidedly weighted: either she denies the *Batson* motion on the authority of *Jackson*, or she must make the explicit credibility determination that the prosecutor is lying.

So if *Batson* is supposed to be real progress for the bottom—at least the black juror at the bottom, if not the black defendant at the very bottom—then it is indefensible that the Court did not *at least* engage in careful analysis of why, under the *particular* facts of this case, an inference of racial discrimination was not required.

3. Race Neutrality

The Court treated *Felkner* as a step three case, assuming that the prosecutor’s stated reason for striking the male juror was race neutral. Perhaps part of the problem is the unacknowledged interplay between steps two and three. If the reason for striking Juror Smith is his negative experiences with the police, then that reason was disparately applied to a white juror and a black juror; it led to the strike of the black juror, but not that of the white juror. The statement quoted by the Court, “[w]hether or not he still harbors any animosity is not something I wanted

¹¹³ This is not a new perception. See e.g., *Black and White: A Newsweek Poll*, NEWSWEEK, Mar. 7, 1988, at 23 (finding that 34% of whites and 66% of blacks believe the U.S. justice system treats black people charged with crimes more harshly than white people charged with crimes).

to roll the dice with,” is by its terms race neutral, but the prosecutor applied this standard differently when it came to the similarly situated white juror.

Allow me to go a step further. If the reason for the strike is that the juror had negative *race-based* experiences with the police—experiences that were not his fault—then *that* reason does not apply equally to both jurors—and it should not be deemed race-neutral. Being vulnerable to race discrimination is “because of,” not “in spite of” race, *and therefore, to say that striking black jurors because they have experienced race discrimination by the police is by definition race-dependent*. An analogy helps make this point: Would it have been race neutral to exclude Japanese Americans from California during World War II not because they were Japanese American, but because they had been the victims of discriminatory laws concerning land ownership and citizenship and therefore might be expected to harbor racial animosity toward the United States? The answer is no.

How is it that the experience of racial harassment is seen as so obviously race neutral that its neutrality need not be discussed?¹¹⁴ It is race neutral in the same way that pregnancy discrimination is gender neutral, as the Supreme Court held in *Geduldig v. Aiello*;¹¹⁵ that is to say, it is neutral with respect to the relevant classification only if viewed from the position of privilege. If men are the standard, then pregnancy is something that happens to some people, usually something they choose; but if viewed from a woman’s perspective, pregnancy is something that she may be in need of medical care for *because she is a woman*. Likewise, if viewed from a white perspective, some people experience race discrimination from police officers, often even risk it; if viewed from the perspective of a person of color, people of color are vulnerable to race discrimination.

Thus, *Batson* from the bottom of the well, or at least *Batson* in so far as *Jackson v. Felkner* is not aberrational, misses what “race neutral” has to mean if *Batson* is to mean much. It is worth noting that prior experiences of police discrimination are not the only instance where the perspective on race neutrality matters. Is it race neutral to strike a black juror because he attended a historically black college? Is it race neutral to strike a black juror because her hair is in braids? Is it race neutral to strike a juror for belonging to the NAACP? Is it race neutral to strike a juror for living in a particular (segregated) neighborhood? Is it, to return to *Hernandez*, race neutral to strike a juror for speaking Spanish? Viewed from the bottom, the answer to all of these questions should be “no.”

¹¹⁴ Might the obviously racial nature of the distinction between the two jurors’ negative experiences with the police have been the explanation for the Ninth Circuit’s short opinion? I am not defending the brevity of that opinion—more explanation would have been helpful—but, I do think the Ninth Circuit was right that the state court opinion was an unreasonable application of the Supreme Court precedents of *Miller-El* and *Snyder*, or in the alternative, of basic equal protection doctrine.

¹¹⁵ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

V. CONCLUSION

Should the Court not have been worried about the possibility that prosecutors would jump on the tool provided in *Jackson*? If there are significant numbers of prosecutors who consciously employ race in jury selection, any Court that cared about the black defendant at the very bottom of the well, or even the black juror near the bottom, should care about incentives to such prosecutors, and care about policing what counts as race neutrality. Of course, if there are very few prosecutors who discriminate at all, then we have to wonder just what all the fuss about *Batson* was for. And if lots of prosecutors discriminate, but most do so subconsciously, then Justice Marshall would seem to be right that the Court cannot police such discrimination without eliminating the peremptory challenge. Finally, I come back to the question that I started with before *Batson*, the question that I think any denizen of the very bottom of the well would ask: If discrimination—conscious or unconscious—by *prosecutors* was, and continues to be, a problem, why are we not worried about such discrimination when all-white juries are produced by chance or demographics?¹¹⁶

Looking up from the very bottom, it is hard to see how *Batson* is much of a rope. More than a quarter of a century of peremptory challenge jurisprudence suggests that most of the time, most of the Supreme Court is among those who “simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are.”¹¹⁷

¹¹⁶ Nothing I have seen in the quarter of a century has dissuaded me from the view that a real commitment to racial equality in the administration of criminal justice would compel the inclusion of minority race jurors in minority race defendant cases. See Johnson, *supra* note 30.

¹¹⁷ BELL, *supra* note 1, at v.