and modern Confrontation Clause might be better served by first determining how the clause should be applied today, and then fashioning opinions to reach those ends.

As the Court continues to define the metes and bounds of the Confrontation Clause, it should craft a doctrine that combines modern-day mores with fidelity to the values and rights the doctrine is meant to protect. At the same time, it should also be mindful of the need to provide clear guidance to the lower courts. In *Giles*, the Court appears to have done neither, and thus will protect neither the victims of abuse nor the constitutional rights of their abusers.

C. Equal Protection

1. Jury Selection — Batson *Challenges. — Batson v. Kentucky*[1] provides a three-step test designed to ferret out racially motivated peremptory strikes. The test's third step asks a trial judge to determine whether she believes a strike is racially motivated, or whether she is convinced by a litigant's asserted race-neutral explanation.[2] In this scheme, trial judges receive special deference, particularly when they base their rulings on the demeanor of particular attorneys or potential jurors.[3] But how reviewing courts should treat a *Batson* ruling where the trial judge considered multiple explanations, some pretextual and others based on demeanor, is an open question. Indeed, some of the biggest questions surrounding *Batson* are unsettled, including precisely what constitutional interests *Batson* protects,[4] and how courts should confront mixed and unconscious motivations.[5] Last Term, in *Snyder v. Louisiana*,[6] the Supreme Court had an opportunity to clarify these and other questions. Instead, the Court *presumed* that a trial judge was impermissibly convinced by pretext rather than by demeanor, holding that the strike of a potential juror was racially motivated. Consistent with the Chief Justice's goal of narrow decisions for greater consensus,[7] the presumption in *Snyder* allowed the Court to avoid the

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

[2] *See id.* at 98 ("The trial court [has] the duty to determine if the defendant has established purposeful discrimination.").

[3] *See* Hernandez v. New York, 500 U.S. 352, 365 (1991) (plurality opinion) ("[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985))).

[4] *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992).

[5] For an introduction to the problem of "unconscious racism" in the equal protection domain, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[6] 128 S. Ct. 1203 (2008).

[7] *See* Cass R. Sunstein, *The Minimalist: Chief Justice Roberts Favors Narrow Court Rulings That Create Consensus and Tolerate Diversity*, L.A. TIMES, May 25, 2006, at B11. In his confirmation hearings, the Chief Justice said that "one of the things that the Chief Justice should have

most difficult questions implicated by the case. In practice, the presumption will encourage trial judges to produce a clearer record for appellate review, where demeanor-based strikes will continue to enjoy an almost talismanic immunity.

Allen Snyder killed his estranged wife's date in 1995.[8] At voir dire for his capital murder trial, eighty-five potential jurors were questioned in panels of thirteen.[9] Challenges for cause reduced the pool to thirty-six, and each side had the opportunity to use twelve peremptory strikes.[10] The prosecutor, who would become famous for telling the jury that Snyder — an African-American — should not "[get] away with" murder as O.J. Simpson had,[11] used his peremptory strikes to remove all five black potential jurors from the venire.[12] Snyder's trial counsel argued that three of the strikes were based on race in violation of *Batson*,[13] but the court accepted the prosecutor's race-neutral explanations. An all-white jury found Snyder guilty of first-degree murder and recommended the death penalty.[14]

Snyder appealed directly to the Supreme Court of Louisiana,[15] arguing that the trial court improperly permitted the prosecutor's race-based peremptory challenges.[16] The court evaluated the prosecutor's race-neutral explanations for striking three of the black venirepersons — Jeffrey Brooks, Elaine Scott, and Loretta Walker.[17] The prosecutor had explained that Brooks expressed concern about missing teaching time as a student teacher and appeared nervous; that Scott seemed "very weak" on the death penalty; and that Walker could not consider the death penalty in this case.[18] Citing the principles that the prosecutor's reasons need not be "persuasive, or even plausible,"[19] and that a trial judge's credibility determinations in evaluating purposeful dis-

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as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the Court." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 371 (2005).

8 *Snyder*, 128 S. Ct. at 1206.

9 *Id.* at 1206–07.

10 *Id.* at 1207.

11 State v. Snyder, 750 So. 2d 832, 866–67 (La. 1999) (Johnson, J., dissenting); *see also* James Oliphant, *Court to Review Racial Element in Picking Jury*, CHI. TRIB., Dec. 2, 2007, at 1.

12 *Snyder*, 128 S. Ct. at 1207.

13 *See Snyder*, 750 So. 2d at 840.

14 *Snyder*, 128 S. Ct. at 1207.

15 *See* LA. CONST. art. V, § 5(D); *see also* State v. Snyder, 942 So. 2d 484, 486 (La. 2006).

16 *Snyder*, 750 So. 2d at 839. Snyder's appeal also argued four other assignments of error. *See id.* at 836.

17 *See id.* at 840–41.

18 *See id.*

19 *Id.* at 839 (quoting Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam)).

crimination enjoy "great deference,"[20] the Supreme Court of Louisiana affirmed the trial court's *Batson* rulings.[21]

The U.S. Supreme Court granted Snyder's petition for certiorari,[22] vacating the Louisiana Supreme Court's judgment and remanding the case for further consideration in light of *Miller-El v. Dretke*.[23] In *Miller-El*, the Court had stressed the need to consider a *Batson* challenge "in light of all evidence with a bearing on it"[24] and engaged in side-by-side comparisons of prospective jurors.[25] On remand, the Louisiana court focused on "the most recent admonition by the Supreme Court" — *Rice v. Collins*,[26] not *Miller-El* — which emphasized "the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor."[27] The court reaffirmed its prior analysis,[28] supplemented with side-by-side comparisons,[29] and reinstated its judgment affirming Snyder's conviction.[30]

The Supreme Court reversed and remanded. Writing for the Court, Justice Alito[31] emphasized the trial court's "pivotal role in evaluating *Batson* claims"[32] but concluded that the court committed clear error in allowing the prosecution to strike Brooks.[33] The prosecutor had offered two explanations for the strike: first, that Brooks appeared nervous, and second, that Brooks might return with a lesser verdict so he could more quickly get back to serving as a student teacher.[34] But the trial judge ruled for the prosecution without expla-

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[20] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 98 n.21 (1986)).

[21] *See id.* at 842. The court conditionally affirmed Snyder's conviction, since it found that the trial court failed to investigate Snyder's claims of incompetency. *See id.* at 854. The court remanded the case to the district court to determine whether competency could be determined after the fact and, if so, whether Snyder was competent to stand trial. *See id.* at 863. The district court thereafter determined that Snyder had been competent, and the Supreme Court of Louisiana unconditionally affirmed Snyder's conviction. *See* State v. Snyder, 874 So. 2d 739 (La. 2004).

[22] Snyder v. Louisiana, 125 S. Ct. 2956 (2005).

[23] 125 S. Ct. 2317 (2005).

[24] *Id.* at 2331.

[25] *See id.* at 2325–32.

[26] 126 S. Ct. 969 (2006).

[27] State v. Snyder, 942 So. 2d 484, 492 (La. 2006).

[28] *See id.* at 495.

[29] *See id.* at 496.

[30] *See id.* at 500. The Louisiana Supreme Court attracted criticism for its ruling as some believed that it ignored the Supreme Court's direction in *Miller-El*. *See, e.g.*, Sheri Lynn Johnson, *Race and Recalcitrance: The* Miller-El *Remands*, 5 OHIO ST. J. CRIM. L. 131, 148–54 (2007) (describing the Louisiana Supreme Court's decision on remand after the Supreme Court vacated the original judgment as "thinly veiled defiance").

[31] Chief Justice Roberts and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer joined the majority opinion.

[32] *Snyder*, 128 S. Ct. at 1208.

[33] *See id.*

[34] *Id.*

nation.[35] Had the judge credited the prosecution's nervousness explanation, the Court would have given that determination special deference, since "nervousness cannot be shown from a cold transcript."[36] Because the judge may *not* have relied on Brooks's demeanor, however, the Court could not "presume that the trial judge credited the prosecutor's assertion that Brooks was nervous."[37]

Justice Alito explained that the prosecutor's second explanation for striking Brooks — that his student teaching obligations might force him to seek a quick resolution — was pretext and failed even under *Batson*'s highly deferential standard of review.[38] Considering all the circumstances under *Miller-El*,[39] the Court provided four reasons to doubt the prosecutor's explanation. First, a quick resolution is not necessarily a pro-defendant resolution, particularly if most of the jurors favor first-degree murder.[40] Second, the prosecutor anticipated on the record that Snyder's trial would be brief, so Brooks would miss very little teaching time.[41] Third, because his dean promised to "work with" him, and because the trial happened so early in the semester, Brooks could easily have made up missed time.[42]

Fourth, as in *Miller-El*,[43] the Court engaged in side-by-side juror comparisons, finding the prosecution's proffered justification for striking Brooks implausible in light of its acceptance of similarly situated white jurors.[44] For example, whereas Brooks had mere student teaching obligations and a flexible dean, Roland Laws was a general contractor with houses nearing completion and increased responsibility for his children while his wife recovered from surgery.[45] Despite Laws's "substantially more pressing" obligations,[46] the prosecution did not strike him. The prosecution similarly declined to strike a white juror named John Donnes, who also had more pressing concerns than Brooks did.[47] Considering all the circumstances, the Court found that the prosecution's explanation for striking Brooks was pretext and held

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[35] Specifically, the trial judge responded to Snyder's objection and the prosecutor's response by saying, "All right. I'm going to allow the challenge. I'm going to allow the challenge." *Id.* (quoting Joint Appendix at 445, *Snyder*, 128 S. Ct. 1203 (No. 06–10119), 2007 WL 2685159).

[36] *Id.* at 1209 (quoting State v. Snyder, 942 So. 2d 484, 496 (La. 2006)) (internal citation mark omitted).

[37] *Id.*

[38] *See id.*; *see also id.* at 1212 (describing the explanation as "pretextual").

[39] *See id.* at 1208 (citing Miller-El v. Dretke, 125 S. Ct. 2317, 2324–25 (2005)).

[40] *See id.* at 1210.

[41] *See id.*

[42] *See id.* at 1210–11.

[43] *See Miller-El*, 125 S. Ct. at 2325–32.

[44] *See Snyder*, 128 S. Ct. at 1211.

[45] *Id.*

[46] *Id.*

[47] *See id.* at 1212.

that the strike was motivated by discriminatory intent in violation of *Batson*.[48]

Justice Thomas dissented.[49] Arguing that the Court merely "[paid] lipservice to the pivotal role of the trial court,"[50] he questioned why the Court could not "presume that the trial court credited the prosecutor's assertion that Mr. Brooks was nervous,"[51] but could presume that the trial court impermissibly relied on the prosecution's pretextual explanation.[52] Justice Thomas believed that the record suggested, if anything, that the trial court relied on Brooks's nervousness.[53] Consistent with his *Miller-El* dissent,[54] Justice Thomas also chastised the majority for basing its decision on comparisons to other jurors that were not made at trial or in any of three trips to the Louisiana Supreme Court.[55]

Faced with two explanations for a challenged strike, the Court presumed that the trial judge was persuaded by pretext and not by an evaluation of Brooks's demeanor — what this comment refers to as the "*Snyder* presumption." By adopting this presumption, the Court was able to avoid the most difficult questions presented by the case, including the appropriate way to balance a pretextual justification against a demeanor-based one, the broader problem of mixed and unconscious motivations, and the utility of peremptory strikes in general. Had the Court reached these issues, it would likely have produced a fractured set of opinions rather than a unified, seven-Justice majority. The *Snyder* presumption thus represents Chief Justice Roberts's philosophy in action: narrow holdings for greater consensus. In practice, it also increases a judge's incentives to produce a clear trial record, since a judge can insure against reversal by acknowledging that he or she is persuaded by demeanor-based justifications for a strike.

Snyder presented a rare opportunity to clarify the Court's *Batson* jurisprudence, since, unlike most *Batson* cases, it came to the Court on

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[48] *Id.*

[49] Justice Thomas was joined by Justice Scalia.

[50] *Snyder*, 128 S. Ct. at 1213 (Thomas, J., dissenting).

[51] *See id.* at 1214 (quoting *id.* at 1209 (majority opinion)) (internal quotation mark omitted).

[52] *Id.*

[53] *See id.* (arguing that the timing of the trial judge's ruling suggests that he credited the demeanor-based explanation). Because he found no clear error with respect to Brooks, Justice Thomas also addressed and rejected Snyder's challenge with respect to Scott. *Id.* at 1215.

[54] *See* Miller-El v. Dretke, 125 S. Ct. 2317, 2349–50 (2005) (Thomas, J., dissenting).

[55] *See Snyder*, 128 S. Ct. at 1214 (Thomas, J., dissenting). It is worth noting, though Justice Thomas did not, that unlike *Miller-El*, *Snyder* came to the Court on direct review and was therefore not subject to the same statutory limitation to "evidence presented in the State court proceeding." Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 104, Pub. L. No. 104-132, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d)(2) (2006)).

direct review.[56] It also presented the novel problem of how to deal with two proffered justifications for a strike where one is pretextual and the other is based on demeanor. In general, demeanor-based challenges enjoy exceptional deference on appellate review,[57] but perhaps the inference of discrimination from pretext should outweigh demeanor-based deference. Indeed, a totality of the circumstances approach might have led to the same result that obtained under the *Snyder* presumption. Once the prosecution provides its race-neutral basis for a peremptory strike, *Batson* requires that the trial court "determine whether the defendant has shown [that the strike was motivated by] purposeful discrimination."[58] This determination tests the prosecutor's credibility:[59] so long as the prosecutor's reason is credible, the strike will be permitted. But if the Court properly concluded that one of two asserted explanations in *Snyder* was *pretext*, then it should have been able to infer discriminatory intent regardless of the second explanation.[60] After all, the conclusion that a prosecutor misled a trial court as to one of his or her justifications reflects on the prosecutor who provided it, and a prosecutor who hides behind pretext should not be saved by a "plan B" explanation. The Court need not have inferred discriminatory intent from one pretextual explanation,[61] but such a conclusion was available in *Snyder* under a totality of the circumstances approach.

Had the Court dealt seriously with the problem of partial pretext, it would have had the opportunity to consider a much more difficult question: what to do about mixed and unconscious motivations for peremptory strikes. Experimental research suggests that even where a decision is at least partially race-based, decisionmakers tend to have little difficulty providing plausible race-neutral explanations.[62] And even those who consciously believe in their race-neutral explanations

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[56] Most *Batson* cases are habeas cases, in which the scope of review is sharply limited by AEDPA. *See* Johnson, *supra* note 30, at 159.

[57] *Snyder*, 128 S. Ct. at 1208 (quoting Hernandez v. New York, 500 U.S. 352, 366 (1991) (plurality opinion)).

[58] *Miller-El*, 125 S. Ct. at 2346 (Thomas, J., dissenting) (quoting Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003)) (internal quotation mark omitted). The judge's determination is often called *Batson* step three, *see, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 834 (1997), coming after the defendant makes a prima facie showing that a challenge was based on race and after the prosecution offers a race-neutral basis.

[59] *Snyder*, 128 S. Ct. at 1208.

[60] The Court noted that the "prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent." *Id.* at 1212 (citing cases).

[61] *Cf.* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("[R]ejection of [] proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .").

[62] *See* Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 267–78 (2007).

may unconsciously make decisions based on race.[63] Indeed, Justice Marshall recognized even in *Batson* that "[a] prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."[64]

In the *Batson* domain, the Court has been doubly blind to unconscious bias. In addition to glossing over the problem of a prosecutor's unconscious bias, the Court has struggled with the possibility that race and gender might in fact shape jury outcomes.[65] But these two forms of blindness are not of equal significance. The Court's refusal to countenance evidence that jurors of different races might come to different conclusions protects a juror's equal protection interest in equal participation in the administration of law,[66] whereas ignoring a prosecutor's unconscious bias serves no similar constitutional interest. The prosecutor's bias might be hard to identify[67] or remedy,[68] and the value of peremptory challenges with occasional unconscious bias might outweigh the costs of ferreting out such bias, but the Court's blindness here, if willful, is hard to justify on constitutional grounds.

The Court's blindness to mixed and unconscious racial motivations is different in kind from the standard willful blindness that has a long history in the Court's equal protection jurisprudence. In cases like

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[63] *See generally* Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005); *see also* Lawrence, *supra* note 5.

[64] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[65] For example, in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Court said, "We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'" *Id.* at 138 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)). This is true "even when some statistical support can be conjured up for the generalization." *Id.* at 139 n.11. The Court has struggled with this tension insofar as those who support *Batson* are willfully blind to the potential truth of race-based generalizations about jurors, whereas those who oppose *Batson* accept the "undeniable reality . . . that all groups tend to have particular sympathies and hostilities." *Powers*, 499 U.S. at 424 (Scalia, J., dissenting); *see also* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 102–05 (1996). That race may shape outcomes, *see* Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 AM. J. TRIAL ADVOC. 285 (1995), presents interesting problems for a summary judgment standard based on "no reasonable jury," since the kinds of juries deemed "reasonable" may vary based on demographics. *See* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming Jan. 2009).

[66] *See* Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

[67] Unconscious bias is perhaps most easily measured by implicit association tests, which at least some would import into constitutional adjudication. *See* Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395 (2003).

[68] For one account of the appropriate remedies for "unthinking discrimination," see Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299 (1995).

Palmore v. Sidoti,[69] *J.E.B. v. Alabama*,[70] and *Frontiero v. Richardson*,[71] the Court refused to allow racial and gender-based differences to influence its decisions because doing so would stigmatize individuals with "state-mandated racial label[s]."[72] In short, this blindness keeps the Court from making race or gender the most salient aspect of an individual's identity — a noble pursuit, even if it were not constitutionally mandated. But blindness to a prosecutor's partial pretext or unconscious bias primarily protects the prosecutors who act on pretext or bias, and there is no reason to think prosecutors deserve such protection.

The *Snyder* presumption kept the Court off this partial pretext path to unconscious bias, which would likely have further divided the Court for a variety of reasons. First, the proper use of social science research is a matter of controversy and has been since the famous footnote eleven in *Brown v. Board of Education*.[73] Second, when one confronts the possibility that prosecutors may be consistently and successfully challenging jurors based on race, consciously or not, it is hard to avoid questioning the utility of peremptory challenges in general. Indeed, had the Court considered the psychological complexities of race-based motivations, Justice Breyer would likely have used *Snyder* as a platform for questioning once again the need for peremptory challenges,[74] invoking Justice Marshall's arguments from *Batson* itself.[75] For a Court seeking consensus, the *Snyder* presumption helped obviate the need to rehash the debate over the continued utility of peremptory challenges.

Such an inquiry into the utility of peremptories would depend on the constitutional interests that *Batson* protects, which the Court could have clarified in *Snyder*. At this point, it is not clear what those interests are, or to whom they belong.[76] *Batson* may protect a defendant's

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[69] 466 U.S. 429 (1984).

[70] 511 U.S. 127.

[71] 411 U.S. 677 (1973).

[72] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[73] 347 U.S. 483, 494 n.11 (1954) (citing social science literature). For commentary on *Brown*'s famous footnote, see Michael Heise, Brown v. Board of Education*, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005). For criticism of the use of social science research in the Court, see, for example, David M. O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8 (1980).

[74] *See* Rice v. Collins, 126 S. Ct. 969, 976–77 (2006) (Breyer, J., concurring); Miller-El v. Dretke, 125 S. Ct. 2317, 2340 (2005) (Breyer, J., concurring); *see also* Johnson v. California, 125 S. Ct. 2410, 2419 (2005) (Breyer, J., concurring) (reaffirming his position in *Miller-El*).

[75] Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

[76] *See* Underwood, *supra* note 4, at 725 (examining the "constitutionally significant harm" of race-based exclusion of jurors).

right to equal protection,[77] because race-based challenges may make for juries more biased against (or less biased in favor of) defendants,[78] or because defendants who are members of a racial minority ought to have the same formal chance of having jurors of their race that whites do.[79] At the same time, *Batson* may protect the equal protection rights of excluded jurors, who are denied the "right to participate in the administration of the law, as jurors, because of their color."[80] It may even bear on a defendant's Sixth Amendment right to an impartial jury.[81]

Each of the complicated inquiries above — partial pretext, unconscious motivation, the utility of peremptories, and the constitutional interests protected by *Batson* — presents an opportunity for disagreement. Seven Justices agreed on the proper remedy in *Snyder*, but it is very unlikely that those seven Justices would have produced only one opinion on the issues that the *Snyder* presumption allowed them to avoid. The *Snyder* presumption thus produced greater consensus by narrowing the scope of the Court's opinion. Whether good or bad, this is the Chief Justice's stated philosophy in action — a philosophy the Court has arguably failed to live up to in some of its more high-profile cases.[82]

In practice, the *Snyder* presumption encourages trial judges to produce a clearer record for appellate review. Where judges are persuaded by explanations concerning a potential juror's demeanor — such as the prosecutor's claim that Brooks seemed nervous — their rulings enjoy an almost talismanic immunity: "in the absence of exceptional circumstances," reviewing courts defer to the trial judge.[83] Judges who wish to insure against reversal should state for the record when they are persuaded by a juror's demeanor. Had the trial judge in *Snyder* done so, the Court could not have presumed that he impermissibly relied on the prosecution's pretextual explanation. The *Snyder* presumption's effect on *Batson* review may even have been strategic: in order to best implement whatever constitutional norm *Batson*

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[77] *See Batson*, 476 U.S. at 85 ("[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.").

[78] *See* Underwood, *supra* note 4, at 728–33.

[79] *See id.* at 733–36.

[80] Strauder v. West Virginia, 100 U.S. 303, 308 (1880). This was the Court's focus in the 1990s, and the two relevant cases were both decided in the 1990 term. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) (holding that race-based exclusion violates the equal protection rights of prospective jurors); Powers v. Ohio, 499 U.S. 400, 410–11 (1991) (holding that criminal defendants have third party standing to raise the equal protection rights of excluded jurors).

[81] *See* Muller, *supra* note 65, at 97.

[82] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

[83] *Snyder*, 128 S. Ct. at 1208 (quoting Hernandez v. New York, 500 U.S. 352, 366 (1991) (plurality opinion)) (internal quotation mark omitted).

protects while still speaking "effectively as an institution,"[84] the Court forced trial judges to develop a more detailed trial record, and the most straightforward way to develop a record is to conduct a more thorough inquiry. A more thorough inquiry is more likely to protect, perhaps even overprotect,[85] the constitutional interests in play.

Trial judges may respond to the *Snyder* presumption in a way less likely to protect the constitutional interests in *Batson*, however. The presumption does not teach judges to develop richer records in general; it teaches them to credit demeanor-based challenges more clearly. Since *Snyder* did nothing to upset the Court's general rule that a trial judge's rulings based on demeanor deserve special deference, judges may be more apt in the wake of *Snyder* to insure against reversal by crediting demeanor. Where a judge is equally persuaded by multiple justifications for a strike, some fit for appellate review and others (like demeanor) less so, she would best protect her ruling by stating that she is allowing a peremptory challenge because she is persuaded by the prosecutor's characterization of a potential juror's demeanor. If this is the legacy of *Snyder*, then the underlying constitutional norm in *Batson* is subject to less protection than before.

Snyder presented an opportunity for greater clarity in the Court's *Batson* jurisprudence, but it also presented an opportunity for a deep division in the Court. The Court avoided the problem of weighing pretext against demeanor — which could have led to a discussion of unconscious bias, the utility of peremptory challenges generally, and thus the constitutional interests protected by *Batson* — by assuming it away. The *Snyder* presumption helped put Chief Justice Roberts's philosophy to work, creating a narrower opinion joined by a unified, seven-Justice majority. In *Snyder*'s wake, trial judges are likely to develop a clearer record at the peremptory stage. This may lead to a more thorough examination of prosecutors' proffered reasons and thus to more expansive *Batson* protection, or it may lead to judges defaulting to demeanor-based justifications and thus simply to narrower appellate review.

2. Photo Identification Requirement for In-Person Voting. — When the Supreme Court assesses a burden on voting that is not facially discriminatory, it applies a balancing test that considers the state's interest in imposing the regulation, the degree to which the regulation advances that justification, and the burden imposed on vot-

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[84] Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 59 (1997).

[85] *Cf.* Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693, 1709 (2008) (explaining that "the core of the strongest case *for* judicial review" is that "errors that result in the underenforcement of rights are more troubling than errors that result in their overenforcement").