ARTICLE

AN ENDURING (AND DISTURBING) LEGACY: "RACE-NEUTRALITY," JUDICIAL APATHY, AND THE CIVIC EXCLUSION OF AFRICAN–AMERICANS IN LOUISIANA

Bidish Sarma[*]

TABLE OF CONTENTS

I. INTRODUCTION

In Louisiana, Mr. Ernest Benjamin Kruttschnitt is fondly remembered as a lawyer who championed worthy causes. He long served as the President of the New Orleans School Board, and his leadership in the Louisiana State Bar remains the stuff of legend.[1] Indeed, his portrait adorns the atrium wall immediately outside of the Louisiana Supreme Court on the fourth floor of the stately court in the French Quarter.

---

* Bidish J. Sarma is a staff attorney at the Capital Appeals Project in New Orleans, Louisiana.

1. *See* AM. BAR ASS'N, REPORT OF THE TWENTY-NINTH ANNUAL MEETING 664 (1906) ("He had . . . quickness of intellect, marvelous memory, studious habits and enormous capacity for work. In addition to his enormous professional duties, Mr. Kruttschnitt's activity in political and civic life was very great. . . . Universally honored, admired and beloved, he died on April 17, 1906 . . . .").

But history has overlooked one central and irrefutable fact about Mr. Kruttschnitt: he was a white supremacist.[2] In fact, he led the state's effort to undermine the nation's Reconstruction Amendments,[3] seeking to disenfranchise and marginalize African–Americans and cleanse Louisiana of the folks he claimed "degraded our politics."[4] A key author of the constitutional provisions and policies designed to deny African–Americans a voice in government and civic life, he remains a revered legal luminary in Louisiana. Yet, at the time that he presided over Louisiana's Second Constitutional Convention, his followers and colleagues knew that his goal was "to perpetuate the supremacy of the Anglo–Saxon race in Louisiana."[5]

Today, we remember not. His inflammatory and racist rhetoric does not taint our memory because although E.B. Kruttschnitt made his wicked agenda clear to his like-minded friends, he circumvented legal scrutiny through the deployment of race-neutral language in the laws he drafted and the Constitution he helped create. Combined with pervasive judicial apathy, this tactic succeeded and represents his enduring, if unspoken, legacy. And it is a tactic that was not only effective then but continues to disenfranchise African–Americans today.

Although African–Americans are no longer denied access to the ballot box through discriminatory property requirements and arbitrarily enforced educational qualifications, state actors retain substantial discretion with which to discriminate in one significant aspect of public life: jury service. In all jury trials, prosecutors can use peremptory strikes to exclude otherwise qualified African–Americans from serving on a jury.[6] And,

---

2. *See infra* text accompanying note 50.

3. The Reconstruction Amendments are the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. The Thirteenth Amendment—ratified in 1865—abolished the institution of slavery; the Fourteenth Amendment—ratified in 1868—ensured due process and equal protection to all persons; and the Fifteenth Amendment—ratified in 1870—declared that men could not be denied the right to vote "on account of race, color, or previous condition of servitude."

4. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 9 (1898) [hereinafter Louisiana Constitutional Convention Journal].

5. *Id.* at 381. Another celebrated legal figure, Thomas J. Semmes—who is honored with a bust at the Louisiana Supreme Court—also played a critical role at the Constitutional Convention: "Judge Thomas J. Semmes, Chairman of the Judiciary Committee of the Convention and a former president of the American Bar Association, described the purpose of the Convention: 'We [meet] here to establish the supremacy of the white race.'" *Id.* at 374.

6. *See* John Terrence A. Rosenthal, Batson *Revisited in America's "New Era" of Multiracial Persons*, 33 SETON HALL L. REV. 67, 85–86 (2002) (stating that all jurisdictions allow peremptory challenges in which lawyers do not have to explain their

though the U.S. Constitution technically prohibits prosecutors from using peremptory strikes to purposely discriminate on the basis of race,[7] the State has discovered that E.B. Kruttschnitt's old trick still works in this context. Race-neutral language explaining peremptory strikes against African–Americans seems to carry the day in front of the Louisiana Supreme Court, even where overwhelming circumstantial evidence suggests that the real reason for such strikes is race. Judicial apathy, expressed as uncritical deference to race-neutral language, remains. Until it is invalidated, the State will continue to fulfill E.B. Kruttschnitt's desire to exclude African–Americans from civic life, at least insofar as jury participation is concerned.

II. BALLOT BOX EXCLUSION

The leaders of Louisiana's 1898 Constitutional Convention were still painfully unhappy with the result of the Civil War and its aftermath. They viewed the Reconstruction Amendments with disdain, but took a pragmatic (rather than ideological) approach to undermine them. One delegate opposed to the approach described it well: "The very reason of this Convention is, in morals, dishonest, for its purposes are to do in an indirect way what we cannot do directly."[8] Although this delegate complained about the Convention's "weak and transparent subterfuge and unmanly evasion of the Constitution of the United States," his concern did not carry the day.[9] Instead, the Convention embraced the following view:

> In view of the fact that these [Reconstruction] Amendments of the Federal Constitution were never constitutionally adopted, it is hard to understand what question of conscience is involved in the advocacy of measures by means of which the operation of these two amendments may be defeated. The sole question is what is the surest and most practicable way to bring about [that] defeat.[10]

In the end, the Convention adopted measures that would clearly devastate the franchise for African–Americans, but would simultaneously preserve the voting rights of most white men.

---

reasons for striking a juror to the judge).

7. U.S. CONST. amend. XIV, § 1; Batson v. Kentucky, 476 U.S. 79, 98–99 (1986).

8. United States v. Louisiana, 225 F. Supp. 353, 372 n.46 (E.D. La. 1963) (quoting a letter from Judge Coco to the *Times-Picayune*).

9. *Id.*; *see also* Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 289 (1899).

10. *Louisiana*, 225 F. Supp. at 372 n.46 (quoting ROBERT H. MARR, CONSTITUTION OF LOUISIANA OF 1913, at 20 (1917)).

These measures included educational tests and property tests that most African–Americans could not pass, along with a "grandfather clause" exception that shielded many illiterate white men from the reach of the newly created education and property requirements.[11]

Louisiana was not alone in its efforts, as "a movement . . . swept the post-Reconstruction South to disenfranchise blacks."[12] "[B]y the first decade of the twentieth century, virtually all black voters had been eliminated from the rolls across the South, through a combination of force and the imposition of restrictive (and often fraudulently administered) voting qualifications."[13] Ultimately, African–American registration in Louisiana dropped by 96% between 1897 and 1900, while white voter registration only fell about 24% in the same timeframe.[14] In fact:

> [T]here were 127,923 black voters and 126,884 white voters on the [Louisiana] registration rolls in 1888 . . . by 1910 only 730 blacks (less than 0.5 percent of the adult male population) were still registered. In 27 of the state's sixty parishes, no blacks were registered; in another nine, only one was registered.[15]

The Constitutional Convention succeeded in its goal, not only in disenfranchising nearly all African–Americans (the "surest and most practicable way"),[16] but also in evading a swift federal rebuke. The disenfranchisement provisions in the Louisiana Constitution remained unperturbed in part because their race-neutral text—though clearly suffused with racial motivations—provided sufficient cover to entities that may have been called upon to review them, and in part because the political

---

11. *See id.* at 373.

12. Hunter v. Underwood, 471 U.S. 222, 229 (1985) (citing SHELDON HACKNEY, POPULISM TO PROGRESSIVISM IN ALABAMA 147 (1969); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913, at 321–22 (1951)).

13. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY 90 (2d ed. 2001).

14. *Louisiana*, 225 F. Supp. at 374.

15. ISSACHAROFF, KARLAN & PILDES, *supra* note 13, at 90. It is remarkable to consider that African–Americans were not a voting minority at the time: "Through violence, fraud, and what under current understandings . . . were clearly unconstitutional acts engaged in, not by a white majority, but by a conservative minority, the African American majority was not merely subject to discrimination and segregation, but, far more importantly, was denied its rightful democratic authority." Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66 (2008).

16. *Louisiana*, 225 F. Supp. at 372 n.46 (quoting MARR, *supra* note 10, at 20).

will to combat racism lagged.[17] As Congress sat idle while Southern states took the right to vote from African–Americans,[18] the Supreme Court threw its hands up, perhaps reluctant to intervene because it did not want to risk institutional credibility or because it was not concerned with the issue.[19]

In the same year as Louisiana's Constitutional Convention, the U.S. Supreme Court decided *Williams v. Mississippi*. The case touched on both jury service and the right to vote, as the Mississippi Constitution of 1890 required that an individual must meet the qualifications to vote in order to serve on a jury. Although it acknowledged that the Mississippi "convention . . . [sought] to obstruct the exercise of suffrage by the negro race,"[20] the Court nonetheless held that the laws respecting voter and juror qualification "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."[21] Such head-turning constitutes at least apathy, if not complicity, in the cause of racial exclusion.

In fact, just five years after Kruttschnitt presided over the Louisiana Constitutional Convention, the Supreme Court all but conceded evil administration and endorsed States' efforts to disenfranchise African–Americans. In a disgraceful but sometimes forgotten opinion in *Giles v. Harris* (a case out of Alabama), the Court declared itself powerless to counter racist state activity, and it deserted the cause of justice:

> If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must

---

17. The relevant articles of the Louisiana Constitution of 1898 make no explicit references to race. *See* LA. CONST. arts. 197–200 (1898).

18. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 13, at 90 (describing how "Congress' inability or unwillingness to enforce the Reconstruction Amendments' guarantees" contributed to the decline in African–American suffrage).

19. Indeed, the Court may have contributed to the hostility against African-American voters. *See id.* at 90–91 ("The Supreme Court also played a pivotal role in invalidating national efforts to insure full citizenship to black citizens. The Court both struck down and eviscerated various federal protections of black voting rights while upholding various state efforts to deny other aspects of citizenship to blacks, most centrally, the right to participate on juries." (citations omitted)).

20. Williams v. Mississippi, 170 U.S. 213, 222 (1898) (quoting Ratcliff v. Beale, 20 So. 865, 868 (Miss. 1896)).

21. *Id.* at 225.

> be given by them or the legislative and political department of the government of the United States.[22]

Absent political progress on the issue or a change of heart in the judiciary, African–American voters were wiped off the political map.

Although a time eventually came when courageous judges and elected officials began to identify, condemn, and deconstruct the racial architecture that Kruttschnitt and his friends and colleagues erected in the late 1800s,[23] there is no doubt that the leaders of Louisiana's 1898 Constitutional Convention would have been satisfied with their work's lasting impact. In a matter of years, they reduced African–American voter registration by 99.5%.[24] And, they achieved their goal *with* the law, rather than against it. Even though it has become much more difficult to disenfranchise a large percentage of minority voters across an entire state, racial exclusion is not yet a relic of our State's past. Today, Kruttschnitt would give a nod of approval to the success the State enjoys in disproportionately excluding African–Americans from another realm of civic life: jury service.

III. JURY BOX EXCLUSION

One might assume that Kruttschnitt's formula for race discrimination (race-neutral language *plus* unresponsive judicial and legislative bodies *equals* exclusion) expired when Jim Crow collapsed. Unfortunately, it did not. It remains a potent means to exclude racial minorities in the context of jury selection.

In *Batson v. Kentucky*, the Supreme Court held that intentional discrimination against prospective jurors on the basis of their race is unconstitutional.[25] The *Batson* holding is clear

---

22. Giles v. Harris, 189 U.S. 475, 488 (1903).

23. Courts eventually recognized that the command of equal justice sometimes required them to look beyond the text of a statute or constitutional provision because "[a] court may find that a law non-discriminatory on its face is discriminatorily administered" and "[t]he legislative purpose and inevitable effect of a law non-discriminatory on its face may be decisive in determining the unconstitutionality of the law." United States v. Louisiana, 225 F. Supp. 353, 362 (E.D. La. 1963).

24. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303 (2000) (observing that total African–American voter registration in Louisiana declined from more than 130,000 in 1896 to fewer than 1,000 in 1910).

25. Batson v. Kentucky, 476 U.S. 79, 85, 89 (1986) ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.").

enough, and the three-step framework it set forth to identify and remedy claims of discrimination necessarily vested trial courts with substantial discretion. At step one, the party alleging discrimination must make a prima facie case to support the claim.[26] At step two, if the trial court finds that a prima facie case exists, the party who has sought to exclude jurors must provide race-neutral reasons for the strike.[27] Finally, if the reasons the excluding party provides are race neutral, the trial court must determine at step three whether the reasons are credible and whether the party alleging discrimination has carried its burden of persuasion.

Although the Supreme Court has made clear that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination" at step three of the *Batson* analysis, Louisiana courts—under the Louisiana Supreme Court's direction—routinely terminate the inquiry after step two.[28] In other words, if the party whose strikes are in question simply provides a race-neutral justification, the court will permit the strike. The State's neutral reasons are rubber-stamped, even when they are clearly suspicious, "implausible," or "fantastic." The judiciary's cursory review process has enabled prosecutors to disproportionately strike prospective African–American jurors from service. The results are startling. In several parishes in Louisiana, the statistical evidence leaves little doubt that state officials have intentionally excluded African–Americans because of their race. And, when these statistics are supplemented with case-specific

---

26. *See* Johnson v. California, 545 U.S. 162, 170 (2005) ("[A] defendant satisfies the . . . first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."). If the party fails to meet its burden to produce evidence of discrimination, the inquiry ends. However, the objecting party's burden at step one is not onerous. *See id.* ("We did not intend the first step to be so onerous that a defendant would have to persuade the judge . . . that the challenge was more likely than not the product of purposeful discrimination.").

27. Nearly any race-neutral reason will suffice at step two, although non-neutral reasons will result in a finding of discrimination, and the peremptory strike will fail. *See* Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam) ("The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step . . . [u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (first alteration in original) (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion))).

28. *Id.* at 768; *see, e.g.*, State v. Williams, 45,755 (La. App. 2 Cir. 11/3/10); 2010 WL 4344556, at *5, *7 (affirming trial court's finding that "the prosecution had valid race-neutral reasons for dismissing [an African–American juror]" as part of *Batson's* second step); State v. Zeno, 2001-1340 (La. App. 3 Cir. 3/13/02); 811 So. 2d 1222, 1231 ("The reasons given by the State [for excluding potential jurors] indicate logical, non-discriminatory reasons for the exclusion of each potential juror . . . .").

examples, the question is no longer whether discrimination still occurs, but instead, how to deconstruct a racist legacy that has seeped over from the ballot box into the jury box.

It would be difficult to imagine government officials purposely preventing 80% of African–American voters in a particular jurisdiction from casting a ballot in an election without triggering a major public backlash and severe legal repercussions. But a 2003 study in Jefferson Parish, Louisiana revealed that prosecutors had silenced the voices of African–Americans in approximately 80% of criminal trials, even though African–Americans represent approximately a quarter of the parish's population.[29] According to the Black Strikes study, which involved a sample size of over 390 criminal trials, prosecutors in Jefferson Parish used peremptory strikes to exclude qualified African–American jurors at more than three times the rate of qualified white jurors. The numbers from St. Tammany Parish appear comparable. In a review of first-degree and second-degree murder cases from a recent fifteen-year span, defense attorneys found that the prosecutors in that jurisdiction had peremptorily struck 68% of qualified African–American jurors compared to 19% of qualified white jurors.[30] Moreover, the records from two recent death-penalty cases in Caddo Parish show that the trend may also occur there: the State struck 73% (11 of 15) of qualified African–Americans from those two jury pools.[31]

The statistics compiled from these parishes do not prove discrimination against any one particular excused African–American juror but provide compelling circumstantial evidence.[32] The statistics also provide a unique

---

29. *See* Press Release, Louisiana Crisis Assistance Center, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* (Sept. 23, 2003), http://www.blackstrikes.com/resources/media_releases/media_background.doc (complaining that "there are not enough African–Americans to effect the outcome of trials on 80% of juries in the parish," even though 23% of all parish residents are African–American); RICHARD BOURKE, JOE HINGSTON & JOEL DEVINE, LA. CRISIS ASSISTANCE CTR., BLACK STRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE JEFFERSON PARISH DISTRICT ATTORNEY'S OFFICE (2003), *available at* http://www.blackstrikes.com/resources/report/black_strikes_report_september_2003.doc.

30. *See* Petition for Writ of Habeas Corpus at 214, Hoffman v. Cain, 2007-1913 (La. 12/12/08); 997 So. 2d 554, *appeal docketed*, No. 09-cv-3041 (E.D. La. 3/10/09) (on file with the Eastern District of Louisiana and with Author).

31. *See* State v. Coleman, 2006-0518 (La. 11/2/07); 970 So. 2d 511, 513 ("[T]he defendant based his *Batson* challenge on the fact that the prosecution used six of its eight peremptory challenges to strike African–American prospective jurors."); Brief on Appeal at 39, State v. Dorsey, *appeal docketed*, No. 2010-0216 (La. 9/14/10) (on file with Louisiana Supreme Court and with Author) ("[F]ive of the seven African–Americans available were struck by the State.").

32. *See, e.g.*, Miller–El v. Cockrell, 537 U.S. 322, 342 (2003) ("[T]he statistical

advantage[33] over claim-specific forms of evidence because "while the prosecutors can come up with a plausible explanation in individual cases, these explanations are exposed by proof of a pattern of excluding blacks at a much greater rate than whites."[34] Nevertheless, recent Louisiana jurisprudence provides more than just statistical evidence of intentional discrimination.

In the 2003 trial of Ron Crawford, the State used peremptory strikes to exclude nine prospective African–American jurors. In response to the defendant's *Batson* objection, the prosecutor explained that she struck one African–American because he had the "look of a drug dealer."[35] The prosecutor further commented that "[t]his system is a joke."[36] Despite the statistical and circumstantial evidence of discrimination, the trial court and appellate court affirmed the State's reasons and permitted the peremptory strikes. The Louisiana Fifth Circuit Court of Appeal based its ruling in part on the observation that "[i]n the instant case, the evidence does not support defendant's contention that the state's comments indicated a racial intent. The record reflects that the state did not make any racial comments [during trial]."[37] Thus, without a prosecutorial confession of racist intent, the court found the State's explanations unproblematic.[38]

The Louisiana Supreme Court has fared no better than the intermediate appellate courts in making proper step three determinations. In fact, the U.S. Supreme Court corrected the Louisiana Supreme Court's begrudging approach to *Batson* as recently as 2008. In its original decision in Allen Snyder's direct

---

evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors.").

33. The Supreme Court has noted that "numbers describing the prosecution's use of peremptories" can be used to demonstrate disparities that "[h]appenstance is unlikely to produce." Miller–El v. Dretke, 545 U.S. 231, 240–41 (2005) (quoting *Cockrell*, 537 U.S. at 342).

34. *Jury Selection*, http://www.blackstrikes.com/pages/jury_selection.htm (last visited Apr. 8, 2011).

35. State v. Crawford, 03-1494 (La. App. 5 Cir. 4/27/04); 873 So. 2d 768, 776 (quoting the prosecutor during voir dire).

36. *Id.* (alteration in original) (quoting the prosecutor during voir dire).

37. *Id.* at 783.

38. Trial courts continue to falter. In the 2009 murder trial of rap artist Corey Miller, the State questioned only prospective African–American jurors about whether they liked rap music. Then, when making a peremptory strike that triggered a *Batson* objection, the prosecutor provided as a "race-neutral" explanation that the stricken juror was not removed because of her race but because of her enjoyment of rap music. The trial court permitted the State's peremptory strike. Bidish Sarma, *When Will Race No Longer Matter in Jury Selection?*, 109 MICH. L. REV. 69, 71 (2011).

appeal, the Louisiana Supreme Court rejected the *Batson* claim in a 4–2 opinion.[39] In 2006, the U.S. Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Louisiana Supreme Court for "further consideration in light of *Miller–El v. Dretke*."[40] On remand, the Louisiana Supreme Court again rejected the *Batson* claim, this time by a 4–3 vote.[41] In 2008, the U.S. Supreme Court granted certiorari again, and reversed Mr. Snyder's capital conviction in a 7–2 opinion. It held that the State's explanation of a peremptory strike against an African–American juror was implausible and thus provided structural relief.[42] Despite the lessons taught in the *Snyder* saga, the Louisiana Supreme Court has shown little interest in enforcing *Batson*.

In *State v. Jacobs*, the Louisiana Fifth Circuit Court of Appeal—the same court that issued the dismissive opinion in *Crawford*—endeavored to show that it had taken the lessons elucidated in *Miller–El* and *Snyder* to heart. In a thorough and well-reasoned analysis, the court analyzed the State's proffered race-neutral justifications for striking 87% of the qualified nonwhite jurors.[43] Considering the statistical evidence persuasive, the court went on to evaluate the State's explanation for striking particular minorities. The court found that the State's reason for striking one of these jurors—his medical condition—appeared suspicious, and "[a]fter reviewing the voluminous record as a whole," it concluded: "we seriously doubt the sincerity and validity of the proffered race-neutral reason where, as here, the prosecutor failed to further inquire, . . . failed to ask any other jurors about relevant medical conditions, and accepted [a similarly situated white juror], for jury service, without questioning."[44] The Fifth Circuit thus granted relief and ordered a new trial. The State appealed the ruling, and the Louisiana Supreme Court—which had recently been compelled to comply with the U.S. Supreme

---

39. *See* State v. Snyder, 98-1078 (La. 4/14/99); 750 So. 2d 832, 842.

40. Snyder v. Louisiana, 545 U.S. 1137, 1137 (2005).

41. State v. Snyder, 1998-1078 (La. 9/6/06); 942 So. 2d 484, 500.

42. Snyder v. Louisiana, 552 U.S. 472, 483, 485–86 (2008) (reversing and remanding for further proceedings due to a lack of proof in the record that "the prosecution would have pre-emptively challenged [the African–American juror at issue] based on his nervousness alone").

43. *See* State v. Jacobs, 07-887 (La. App. 5 Cir. 5/12/09); 13 So. 3d 677, 688–89 ("From a purely statistical perspective, the State used seven of eight, or 87%, of its peremptory strikes to challenge non-white prospective jurors, where non-whites comprised less than 19% of the prospective jurors.").

44. *Id.* at 691.

Court's order in *Snyder*[45]—promptly reversed the Fifth Circuit.

In a bold opinion, the Louisiana Supreme Court castigated the Fifth Circuit. Confronted with a record devoid of prosecutorial questioning on prospective jurors' medical conditions, the court made out of whole cloth an apparently universally known distinction between a white juror's diabetes and a Hispanic juror's undefined muscular issues:

> As any experienced litigator or trial judge would know, a prospective juror who indicates a diabetic condition may be maintained for jury service simply by making available sufficient types of food and reasonable breaks to ensure that appropriate food is consumed. This condition is unlike someone with a muscular problem in their back or neck which would prevent them from sitting or paying attention during jury service.[46]

The Louisiana Supreme Court could not have based this ruling on any information contained in the record because no such information exists. Instead, it drew its own conclusion. The opinion in *Jacobs* thus sent a strong signal to the lower courts: do not disturb criminal convictions and do not second-guess prosecutors. In other words, so long as the State musters some race-neutral reason, the Louisiana Supreme Court effectively holds that the court must approve it, no matter how "fantastic" or "implausible." This message is one that has been effectively reiterated again and again in its *Batson* jurisprudence.[47]

The Louisiana Supreme Court's rubber-stamping approach, which trickles down through the lower courts,[48] enables

---

45. State v. Snyder, 1998-1078 (La. 4/30/08); 982 So. 2d 763, 763 (per curiam) ("[I]n light of the Supreme Court's holding that the trial judge committed clear error in rejecting defendant's [*Batson*] claim . . . we remand this case [for a new trial].").

46. State v. Jacobs, 2009-1304 (La. 4/5/10); 32 So. 3d 227, 230 (per curiam).

47. With respect to steps two and three of *Batson*, in the past ten years the Louisiana Supreme Court has granted relief in two cases in which the prosecutor failed to provide race-neutral explanations. *See* State v. Coleman, 2006-0518 (La. 11/2/07); 970 So. 2d 511, 516–17 ("By specifically referencing the race of the defendant and the victim, the prosecutor clearly and unmistakably indicated that the decision to strike Miller was motivated by this prospective juror's race."); State v. Harris, 2001-0408 (La. 6/21/02); 820 So. 2d 471, 477 (finding that the prosecutor's explanation that she struck a juror because he was a single black male with no children "explicitly places the defendant's race at issue, and is thus not race neutral"). Rarely in this period has it found the State's reasons insufficient at step three.

48. *See, e.g.*, State v. Sarpy, 10-700 (La. App. 3 Cir. 12/8/10); 2010 WL 4965577, at *11 (holding that "the trial court's determination of credibility should not be disturbed on appeal without any evidence or suggestion in the record that the State's exercise of its peremptory challenges were racially motivated" even though the record was incomplete and did not note the race of the jurors); State v. Williams, 45,755 (La. App. 2 Cir. 11/3/10); 2010 WL 4344556, at *7 (upholding trial court's decisions where it initially disallowed a

prosecutors across the State to exercise their peremptory strikes without regard for *Batson*. The ever-deferential approach to *Batson*'s third step means that the judiciary has ceded its duty to identify discrimination to the State, whose discretion to discriminate now reigns unbridled. The Louisiana judiciary's collective failure to meaningfully enforce *Batson* undermines the rights of African–Americans across the state. And the problem is not merely theoretical. It is real.

Prosecutors are now in a position to do what Mr. Kruttschnitt did so effectively so many years ago: deploy race-neutral language to ensure the civic exclusion of African–American citizens in Louisiana. Any prosecutor savvy enough to come up with a race-neutral explanation—*any* race-neutral explanation—for a peremptory strike can exclude African–Americans at will. If anyone is naïve enough to believe that Louisiana has become a "post-racial" society,[49] the overwhelming statistics detailing the State's strike rates in Jefferson, St. Tammany, and Caddo Parishes should dispel that notion. The struggle for inclusion and equality is not over yet. It has just moved from the ballot box to the jury box. Unless, and until, the courts in Louisiana recognize (or are compelled by the U.S. Supreme Court to recognize) that *Batson*'s third step entails a serious determination of prosecutorial credibility, African–Americans in Louisiana will remain what Mr. Kruttschnitt hoped: second-class citizens.

IV. CONCLUSION

Kruttschnitt closed the 1898 Constitutional Convention with a message meant to comfort the white supremacists in Louisiana:

> I say to you that we can appeal to the conscience of the nation, both judicial and legislative, and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box, and to perpetuate the supremacy of the

---

peremptory strike against an African–American but then allowed a strike the following day when the State produced a new reason); State v. Bess, 45,358 (La. App. 2 Cir. 8/11/10); 47 So. 3d 524, 532 (noting that "the State did not refer to race of the jurors as a basis for the challenge" and upholding strikes against African–Americans, including one against a juror on the basis that he would want to hear the defendant testify at trial).

49. *See* Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1177 (2008) ("While the Jena 6 incident was a disturbing and highly visible reminder of the continued prevalence of racism in America, the equally troubling reality is that far less visible forms of racism and discrimination occur everyday and go largely unchallenged.").

> Anglo-Saxon race in Louisiana.[50]

Kruttschnitt presciently exploited the lack of political will and judicial will in the post-Reconstruction era to disenfranchise almost every single African–American citizen in Louisiana. For decades, white supremacists ran the State with little interference.

Today, whites disproportionately dominate Louisiana's jury boxes. Mr. Kruttschnitt, proudly guarding the Louisiana Supreme Courtroom, stares out and seems to ask every day: Who will take the responsibility of "striking down the system"? And when?

---

50. LOUISIANA CONSTITUTIONAL CONVENTION JOURNAL, *supra* note 4, at 381.