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RACE, RIGHTS, AND REMEDIES IN CRIMINAL ADJUDICATION

*Pamela S. Karlan**

Once upon a time, back before the Warren Court, criminal procedure and racial justice were adjacent hinterlands in constitutional law's empire. In 1954, the fifth edition of Dowling's constitutional law casebook contained one chapter on "procedural due process" in which six of the eight cases were about criminal justice,¹ and three of those — *Powell v. Alabama*,² *Moore v. Dempsey*,³ and *Bailey v. Alabama*⁴ — were as much about race as they were about crime. A few pages later, two slender chapters on the "national protection of civil rights" and "equal protection of the laws" contained seven and nine decisions, respectively, a substantial number of which were criminal cases.⁵ By 1965, the seventh edition of Dowling and Gunther contained a dramatically expanded chapter on "procedural rights in the administration of criminal justice."⁶ Questions of civil rights and equal protection now appeared, not only in the section on individual rights, but also in the earlier, more prominently placed discussion of governmental power.⁷ But by 1975, in the ninth edition of Gunther, while civil rights issues were at the forefront of the discussion of governmental power, criminal procedure had disappeared entirely. As the preface explained, "[w]hat was once the fate of administrative law . . . has now become

* Professor of Law, Stanford Law School. B.A. 1980, M.A. 1984, J.D. 1984, Yale. — Ed. I presented an earlier version of this paper at a conference on criminal law and procedure at the University of Virginia School of Law and benefited greatly from the comments of the other participants. As always with my work in criminal procedure, Bill Stuntz, David Sklansky, and Danny Richman were incredibly helpful and intellectually generous colleagues. Johanna Schneider and Bruce Itchkawitz provided valuable research assistance.

1. NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* 659-748 (5th ed. 1954).

2. 287 U.S. 45 (1932) ("Scottsboro Boys" case).

3. 261 U.S. 86 (1923) (aftermath of the Elaine, Arkansas, race riots).

4. 219 U.S. 219 (1911) (peonage case).

5. See DOWLING, *supra* note 1, at 1115-89 and 1189-1241. The criminal cases were *Screws v. United States*, 325 U.S. 91 (1945) (police brutality against a black citizen); *United States v. Classic*, 313 U.S. 299 (1941) (vote fraud); the *Civil Rights Cases*, 109 U.S. 3 (1883) (violation of public accommodation statutes); *Ex parte Virginia*, 100 U.S. 339 (1880) (jury discrimination); and *Strauder v. West Virginia*, 100 U.S. 303 (1880) (jury discrimination).

6. NOEL T. DOWLING & GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 761-832 (7th ed. 1965).

7. See *id.* at 303-31.

appropriate for the constitutional requirements of criminal procedure."⁸ Although *Powell*, *Moore*, and *Bailey* remain in the table of cases, their text is long gone.

The coincident expatriation of criminal procedure and apothecosis of equal protection tracked developments in the Court's jurisprudence. Today, the Court's segregation of criminal justice issues from more general racial issues plays out in the strikingly different equal protection claims the courts face in the civil and criminal arenas. The major noncriminal equal protection claims on the docket today center on affirmative action: how far can the political branches go in providing benefits to racial minorities?⁹ Claims of discrimination *against* minorities are usually raised under more plaintiff-friendly statutory standards.¹⁰ At the same time, the major equal protection claims in the criminal justice system concern whether the government continues to discriminate in the old-fashioned way *against* racial minorities: in police practices, charging decisions, sentencing, or the very definition and classification of criminal offenses.

Although the Supreme Court's initial forays into criminal procedure surely had been motivated in large part by concern with the racial unfairness of southern criminal justice, the Court developed a series of formally race-neutral rules for constraining police, prosecutors, and the courts. Even when the Court addressed racial questions directly, it deployed a set of analytic and regulatory techniques — such as the Sixth Amendment's fair-cross-section requirement or the exclusionary rule — that were distinctive to the criminal justice process rather than using the Equal Protection Clause.

Starting about ten years ago, however, after roughly a quarter century of autonomous development, the Supreme Court returned to the question of how the Equal Protection Clause regulates criminal justice. In *Batson v. Kentucky*,¹¹ the Court applied standard doctrinal analysis to the question whether prosecutors could use

8. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW at xx (9th ed. 1975).

9. See, e.g., *Shaw v. Hunt*, 517 U.S. 899 (1996) (redistricting); *Bush v. Vera*, 517 U.S. 952 (1996) (redistricting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (federal contracting).

10. Both Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2(k)(1)(A) (1994), which forbids discrimination in government employment, and § 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 (1994), which forbids discrimination in voting and redistricting, use disparate impact standards that relieve plaintiffs of the burden of proving a racially discriminatory purpose.

11. 476 U.S. 79 (1986).

their peremptory challenges to strike jurors on the basis of race. In *McCleskey v. Kemp*,¹² the Court applied standard doctrinal analysis to the question whether Georgia administered its death penalty in a racially discriminatory manner. Virtually no one (with the possible exception of Lewis Powell, who wrote the majority opinions) was satisfied with the results and reasoning in both cases.

In 1996, the Court confronted another pair of cases raising the question of how to deal with racial discrimination in the criminal justice process. In *Whren v. United States*,¹³ the Court addressed the question of police motivation under the Fourth Amendment. The Court held that as long as the police have probable cause to believe that a motorist has violated a minor traffic regulation, they can stop his car, even if their subjective motivation for the stop is to investigate a nonvehicular crime for which they lack the requisite probable cause or reasonable suspicion. The Court acknowledged that there might be a danger of racially discriminatory pretextual stops. And it agreed that if the police stopped only black motorists it would violate the Constitution: "But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹⁴

A month earlier, in *United States v. Armstrong*,¹⁵ the Court had illustrated exactly how slender a constitutional basis the Equal Protection Clause might provide. There, the Court held that a defendant is not entitled to any discovery regarding a claim of racially selective prosecution unless he first makes a threshold showing that the government has declined to prosecute similarly situated suspects of other races. The Court explained that "the requirements for a selective-prosecution claim draw on 'ordinary equal protection standards,'" including the "similarly situated" requirement.¹⁶ Buried in a footnote was a provocative question. Suppose a black defendant were to show that similarly situated white defendants had not been prosecuted. Suppose he were even able to show that this was because of a prosecutor's racist sentiments. What then? "We have never determined," the Court observed, "whether dismissal of the indictment, or some other sanction, is the proper remedy if a

12. 481 U.S. 279 (1987).

13. 517 U.S. 806 (1996).

14. 517 U.S. at 813.

15. 517 U.S. 456 (1996).

16. 517 U.S. at 465, 466.

court determines that a defendant has been the victim of prosecution on the basis of his race."¹⁷

This footnote captures the ambivalence of the Court in trying to articulate remedies for equal protection violations in the criminal procedure context. The four conventional remedies for violations of criminal procedure protections have been exclusion of evidence; reversal of convictions (which normally permits retrial); dismissal of indictments in egregious cases; and separate civil damages actions. *Whren* and *Armstrong* raise the possibility that the first and third of these remedies, exclusion and dismissal, will be unavailable for claims of racial discrimination. And the second, reversal, is often unavailing, at least for claims of racial discrimination in the selection of suspects or defendants, where the constitutional violations occur outside the trial process itself; in these cases, the problem is not with the defendant's trial, but with his being brought to trial in the first place. Moreover, our experience over the last decade with *Batson* claims — where reversal and retrial has been the standard remedy — suggests that here, too, traditional criminal procedure remedies do not translate easily into the equal protection context. Finally, the fourth remedy, damages, while theoretically available, is often foreclosed as a practical matter, given the fact that the victims of racial discrimination in the criminal process are often unsympathetic plaintiffs.

The goal of this article is to explore the complications that arise in the definition of rights and in the operation of remedies when the Equal Protection Clause is used in criminal adjudication. I begin by explaining why the apparently minor doctrinal move in *Whren* from the Fourth Amendment to the Equal Protection Clause has important consequences. In particular, it raises the question whether the exclusionary rule remains an available remedy for police misconduct. I argue that the exclusionary rule, a traditional criminal procedure remedy, may often be superior to traditional equal protection remedies for remedying equal protection violations in the criminal procedure context. Here, I apply well-developed arguments about the relative benefits of the exclusionary rule to the race-discrimination context. The most plausible alternative to using the exclusionary rule to influence police behavior is to use § 1983 lawsuits,¹⁸ either for damages or injunctive relief, but these may be

17. 517 U.S. at 461 n.2.

18. 42 U.S.C. § 1983 (1994). For a general overview of § 1983 litigation, see PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* (2d ed. 1994).

inadequate tools. I then turn to *Batson* claims. Here, my argument focuses on the converse problem: the remedies are *too* effective and courts have responded to the stringency of the remedial scheme by implicitly restricting the underlying right. General criminal procedure doctrine led the courts to a rule of per se reversal for *Batson* violations. Because this rule may be substantially overinclusive — requiring reversal in cases where the exclusion of particular jurors is unlikely to have affected the outcome — courts have strained not to find a violation in the first place. Finally, I consider the problem of selective prosecution. I suggest that *Armstrong* and *McCleskey* deploy what the Court calls “traditional equal protection principles” essentially to strip the concept of selective prosecution of virtually any real-world effect: they define away the right and the remedy simultaneously.

I. THE EXCLUSION OF EXCLUSION?

One of the arguments raised by the petitioners in *Whren* was that permitting the police “to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists” posed a serious threat of racial discrimination.¹⁹ *Whren*’s fear turns out to be well founded. There is a voluminous scholarly and popular literature on the phenomenon of “Driving While Black” — the propensity of police to stop a disproportionate number of minority motorists who are acting no differently than their white counterparts who are not pulled over.²⁰ The most widely discussed examples involve the too-aptly named “Selective Enforcement Team” of the Volusia County, Florida, sheriff’s office²¹ and the Maryland State Police.²² An *Orlando Sentinel* investigation found that although the vast majority of drivers on In-

19. *Whren v. United States*, 517 U.S. 806, 810 (1996).

20. See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546-47 (1997); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 551 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271.

21. For more detailed discussions of the Volusia County experience, see, for example, Harris, *supra* note 20, at 561-63; Hecker, *supra* note 20, at 559-60; and Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1.

22. For more detailed discussions of the Maryland State Police case, see, for example, Davis, *supra* note 20, at 431, 438-42; Harris, *supra* note 20, at 563-66; Hecker, *supra* note 20, at 561-63; Maclin, *supra* note 20, at 349-52; and Catherine M. Brennan, *Court Calls for Closer Look at Police Records: Case Illustrates Legal Difficulties Wrought by Use of Race Stereotypes*, BALTIMORE DAILY RECORD, Apr. 14, 1997, at 1A.

terstate 95 in Volusia County were white, almost seventy percent of the motorists stopped were black or Hispanic.²³ In light of the fact that only nine of the over one thousand drivers stopped were ever given traffic tickets, that only fifty-five drivers were arrested for some other offense,²⁴ and that only 15.1% of the drivers convicted of traffic offenses in Florida were black,²⁵ there is a strong argument that the traffic stops were pretextual in two distinct senses: first, the police were stopping the cars not for traffic violations but to investigate unrelated crime; second, they were choosing which cars to stop at least in part on the basis of race. Similarly, data from Maryland showed that 73% of drivers stopped by the State Police were black — indeed, two of the twelve officers patrolling the relevant stretch of Interstate 95 stopped *only* black motorists — despite the fact that only 17.5% of the motorists who appeared to have violated traffic laws were black.²⁶

Under circumstances like these, the inference that race plays *some* role in enforcement decisionmaking is overwhelming. First, there is substantial evidence that many departments use statistical profiles in which race is a factor,²⁷ even if there are a dozen other factors — including, of course, violation of some traffic law. Second, the fact that such a small proportion of drivers who violate the traffic laws are stopped, but that such a substantial proportion of the drivers who are stopped are black — and that the proportion of drivers stopped who are black greatly exceeds their presence among drivers generally — strongly suggests that similarly situated white drivers are being treated differently. Indeed, the nature of the substantive law virtually guarantees a level of discretion that fosters arbitrary, and perhaps discriminatory, enforcement. It is likely that virtually every driver is violating some aspect of the relevant motor vehicle code: one of the provisions of the relevant District of Columbia regulations mentioned in *Whren* requires, for example, that a driver “give full time and attention to the operation of the vehicle.”²⁸ Thus, the likelihood that virtually every driver is violating the law means both that the police have probable cause to

23. See Brazil & Berry, *supra* note 21, at A10.

24. See *id.*

25. See Harris, *supra* note 20, at 562.

26. See Brennan, *supra* note 22.

27. See Davis, *supra* note 20, at 429-30; Harris, *supra* note 20, at 568-69; Sklansky, *supra* note 20, at 278 n.38.

28. *Whren*, 517 U.S. at 810 (quoting D.C. MUN. REGS. tit. 18, § 2213.4 (1995)). See also Sklansky, *supra* note 20, at 298-99 (pointing out that “the police, if they are patient, can eventually pull over anyone they are interested in questioning”).

stop nearly everyone and that they won't engage in anything like full enforcement.

Under conventional equal protection doctrine, police practices like those I just described would stand a good chance of being held unconstitutional. A black driver who had been pulled over would stand a good chance of showing that race was “a motivating factor”²⁹ in the government's decision to stop him. Under the *Arlington Heights* test, that is all he would need to demonstrate in order to shift the burden to the government defendant to show that it would have acted identically “even had the impermissible purpose not been considered” at all.³⁰ He would not be required to prove that race was the “sole,” “primary,” or “dominant” factor in order to make out a prima facie case of unconstitutionality.³¹ Moreover, many police departments would be unable to meet their burden of rebuttal. Given the minuscule number of motorists — even motorists who are violating some traffic ordinance — that they stop, and the relatively slight risk white drivers face of being pulled over, it might be very difficult for the defendants to show that they would have pulled over any particular minority motorist had they ignored race entirely. And to the extent that one accepts the quite plausible idea that nonwhites are targeted for discriminatory enforcement at least in part because they have less political control over the police than the majority community enjoys,³² the problem may be even worse: if the police could not use race, or other indicia of political marginality in deciding whom to pull over for essentially innocuous offenses (and just as importantly, whom to question more extensively), they might either abandon pretext stops altogether or so reduce their use that the likelihood of any particular minority driver being stopped would be lower still.

Even under the arguably more stringent burden plaintiffs face in selective prosecution cases — a topic mentioned above and to which I return in Part III³³ — these types of claims might well survive. In an interesting twist, the very incentive *Whren* creates for

29. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (emphasis added).

30. 429 U.S. at 271 n.21.

31. See 429 U.S. at 265.

32. Cf. Sklansky, *supra* note 20, at 324 (suggesting that “victims of police abuse typically belong to groups with minimal political clout”); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992) (suggesting that the potential for political control over police discretion plays a large part in public willingness to permit expansive statutes).

33. See *infra* text accompanying notes 106-34.

the police to explain their stop in terms of low-level traffic violations makes it far more likely that minority motorists will be able to point to similarly situated white drivers who were not stopped.³⁴ Moreover, traffic enforcement is particularly amenable to the use of testers to conduct reverse sting operations,³⁵ as well as to direct observation of police response to black and white criminal behavior to establish a plaintiff's claim that blacks and whites are treated differently.³⁶ Even if the police *do* pull over a white tester with a non-working tail light, the chances of actually being ticketed are low, and the cost of a ticket not particularly prohibitive. By contrast, using testers in a case like *Armstrong*³⁷ — where the testers would presumably have to sell 124 grams of crack to federal informants while carrying firearms in order to be similarly situated to the defendants — is out of the question: no one in his right mind would run the risk of being a tester.

In light of the fact that the Equal Protection Clause seems capable of supporting claims of racially discriminatory law enforcement, why should we care that *Whren* has allocated these types of claims to the Fourteenth Amendment rather than to the Fourth? Indeed, there is a plausible argument to be made that, from a societal perspective, the Equal Protection Clause is a *better* doctrinal home for such claims. Under the rule the *Whren* petitioners sought, even defendants who have no plausible claim of having been the victims of invidious discrimination — for example, middle-class white drug smugglers — would be entitled to the suppression of evidence. All such a defendant would need to show is that the trooper stopped him, not because of his failure to signal continuously for at least one hundred feet before turning right on an empty road,³⁸ but because she suspected — correctly, as it turned out — that he was carrying drugs. For these people, a Fourth Amendment suppression would be the purest form of windfall: they would obtain the exclusion of evidence without actually having been denied any reasonable ex-

34. That is, minority motorists may find it quite easy to show that there were a substantial number of white drivers who fit the articulated criteria for being stopped.

35. For general discussions of sting operations and testers, see, for example, ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 32.2 (1997); Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 *FORDHAM URB. L.J.* 991, 997-98 (1996). For an example of a reverse sting involving traffic stops, see Harris, *supra* note 20, at 567-68.

36. For examples of such traffic laws, see Brennan, *supra* note 22; Harris, *supra* note 20, at 561-66, 568-69; Maclin, *supra* note 20, at 349-50.

37. *United States v. Armstrong*, 517 U.S. 456, 459 (1996).

38. See Harris, *supra* note 20, at 558 n.82 (collecting statutes with these sorts of requirements).

pectation of privacy, since there was concededly probable cause to stop them. A Fourteenth Amendment rule, by contrast, forbids only selectivity that uses *illegitimate* criteria for winnowing down the universe of potential detainees.

The problem with the move to the Fourteenth Amendment — and the unspoken question in *Whren* — is not about rights. Everyone agrees that “the Constitution prohibits selective enforcement of the law based on considerations such as race.”³⁹ The problem is about remedies: is there a Fourteenth Amendment exclusionary rule? Perhaps such a rule would be irrelevant. If, for example, the proper remedy for a discriminatory traffic stop is to dismiss outright all charges that are based on evidence acquired during such a stop, then exclusion would be at most a lesser included remedy of dismissal, and defendants would be indifferent as to its existence. But notice that such a position draws heavily on Fourth Amendment causation principles: it sees the evidence introduced as fruit of the poisonous tree,⁴⁰ namely, the unconstitutional stop. There is not, as far as I can tell, any directly analogous principle of general constitutional law or equal protection doctrine.⁴¹ To the extent that dismissal is the appropriate remedy for selective law enforcement, a point to which I return in Part III, the state would be barred from prosecuting James L. Brown (Whren’s codefendant, and the actual driver) for failure to give full time and attention to the operation of the vehicle, failure to signal before turning, or driving at a speed greater than is reasonable and prudent under the conditions — the offenses for which the police concededly had probable cause in *Whren*⁴² — if he could establish that the decision on whom to stop was based on race. But the link to the charges on which he was in fact prosecuted is a bit more tenuous.⁴³ Suppose, for example, that

39. *Whren*, 517 U.S. at 813.

40. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (discussing the fruit of the poisonous tree doctrine); *Segura v. United States*, 468 U.S. 796, 801-02 (1984) (same); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (same).

41. See Maclin, *supra* note 20, at 338 n.22 (stating that the “Court has shown no sign that it interprets the Equal Protection Clause to embody an exclusionary rule remedy”); cf. *Frisbie v. Collins*, 342 U.S. 519 (1952) (upholding a criminal conviction obtained after the defendant was forcibly kidnapped and brought into the jurisdiction since the actual trial was conducted fairly).

42. See *Whren*, 517 U.S. at 810.

43. And the link to the charges on which Michael Whren himself was prosecuted is also intricate. Whren’s arrest was the fruit of the pretextual stop of *someone else*. See *Whren*, 517 U.S. at 808-09. *Rakas v. Illinois*, 439 U.S. 128 (1978), and its progeny hold that Fourth Amendment rights cannot be asserted vicariously, that is, that evidence need not be suppressed unless the person against whom it is being used was the direct victim of the unreasonable search or seizure. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 4.04 (3d ed. 1993). Thus, evidence illegally seized from person A

the police can show that *every* time they observe individuals with the amount of crack that Whren and Brown possessed, they arrest them. Then the prosecution for *drug possession* does not itself involve “selective enforcement of the law based on considerations such as race.”⁴⁴ In the context of defending against a criminal prosecution, then, it may be very difficult to get away from Fourth Amendment concepts, even if they are limited to cases where there is an equal protection violation as well somewhere in the causal chain.

It is hard, of course, to know whether that limited point was all that *Whren* was suggesting: that exclusion of evidence (which will often be the practical equivalent of outright dismissal) will remain a remedy if defendants like Whren can show they were stopped at least in part because they were black. I worry, though, that what the Court was trying to do by recasting Whren’s claim was to eliminate the possibility of exclusion because exclusion is only a Fourth Amendment remedy. As far as I can tell, with the exception of two New Jersey state court cases that antedate *Whren*,⁴⁵ there are no reported cases in which suppression was the remedy for racially selective enforcement. And prior to *Whren*, the doctrinal handle for the suppression was the Fourth Amendment: the seizures were unreasonable because they were unconstitutional (under the Equal Protection Clause).⁴⁶

can be used against person *B*. By analogy, it is questionable whether an unconstitutional stop of driver *A* bars prosecution of passenger *B*. Suppose, for example, that driver *A* was stopped solely for an unconstitutional reason — say, because he had supported the sheriff’s opponent in a recent election. Suppose further that, as a result of that stop, *A* provided information to the police (or a search of his car revealed such information) without which they could not have arrested or prosecuted person *B*, not a passenger in the car. Surely *B* would be unable to suppress that evidence. On the other hand, suppose that one of the reasons the police stopped *A*’s car was because of *B*’s race. Cf. *Papachristou v. Jacksonville*, 405 U.S. 156, 158-59 (1972) (suggesting the police stopped a car because of the mixed race of its occupants). Then *B* would be the direct victim of an equal protection violation, since the police would have acted in part on the basis of *his* race. In *Whren*, the fact that the police officers’ “suspicions were aroused” when they passed a truck with “youthful occupants . . . the driver looking down into the lap of *the passenger*,” 517 U.S. at 808 (emphasis added), might therefore give Whren as well as Brown standing.

44. *Whren*, 517 U.S. at 813.

45. See *State v. Kennedy*, 588 A.2d 834, 838-39 (N.J. Super. Ct. App. Div. 1991) (suppressing evidence seized as result of discriminatory enforcement of the traffic laws by the New Jersey State Police under the Equal Protection and Due Process clauses of the Fourteenth Amendment); *Davis*, *supra* note 20, at 436 n.83 (describing *State v. Soto*, Superior Court of New Jersey (unpublished opinion, Mar. 4, 1996)); *Hecker*, *supra* note 20, at 563-64 (same); *Maclin*, *supra* note 20, at 346-49 (also discussing *Soto*).

46. Cf. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) (explaining that searches of bookstores might be unreasonable, and thus unconstitutional under the Fourth Amendment, if they rise to the level of unconstitutional prior restraints under the First Amendment).

My concern with eliminating suppression as a remedy for racially selective prosecution or law enforcement stems from the role suppression plays in fully vindicating individuals' rights against police misconduct.⁴⁷ Consider the differing incentives the victims of discriminatory police stops have to litigate. Most victims of discriminatory police stops or other investigative activity are "innocent victims" — individuals who were stopped but ultimately not convicted of any offense. They are unlikely to bring suit.⁴⁸ It may be that they are unaware of their rights when they are stopped and further, because they have no automatic access to lawyers, as criminal defendants would,⁴⁹ they may remain unaware. This will be especially true if they suffered dignitary injuries but not physical ones. It is hardly an accident that the most vigorously litigated challenge to discriminatory police enforcement has as its lead plaintiff a black D.C. public defender who was well aware of his rights and the possibility of legal action from the outset.⁵⁰ "Guilty victims" — individuals who were stopped and ultimately convicted — have varying incentives to litigate depending on the particular remedy afforded them. Civil damages and injunctive relief offer guilty victims little incentive to litigate their claims of racial discrimination, while suppression offers a powerful incentive.

Guilty victims are especially likely to find the civil damages process rough sledding. Juries are generally unsympathetic to § 1983 plaintiffs who complain about searches that in fact uncovered evidence used to convict them.⁵¹ This is particularly true if there was

47. For general discussions of the importance of exclusion and the inadequacy of civil damages remedies, see, e.g., Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591 (1990); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994) [hereinafter Steiker, *Second Thoughts*].

48. See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1482 (1996).

49. The Sixth Amendment right to appointed counsel applies only in criminal proceedings. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 25-27 (1981).

50. The Maryland State Police case is discussed *supra*, text accompanying notes 22 and 26, and *infra*, text accompanying notes 56-58.

51. See, e.g., Jonathan D. Casper et al., *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 L. & SOC. INQUIRY 279 (1988). The case study reviewed the empirical literature and concluded that police officers prevailed about three-quarters of the time and that, when plaintiffs won, the damages awarded were relatively minor (e.g., about a third of the plaintiffs who won received less than \$1000, and 85% received less than \$10,000). See *id.* at 283. A simulation showed that denying jurors information about the outcome of the search — i.e., not telling jurors whether the allegedly illegal search uncovered evidence of crime — was the factor most likely to increase both the incidence and the size of damages awards. See *id.* at 298-300; Dripps, *supra* note 47, at 629 (noting that between 1971 and 1986, plaintiffs filed 12,000 *Bivens* actions but in only five did the defendants actually pay damages and identifying "two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and

nothing wrong with the way the search itself was conducted. As William Stuntz explains, hindsight is always a problem in suppression cases,⁵² but it is likely to be exacerbated here by the different decisionmaker: in a suppression case, a judge decides whether there has been an equal protection violation; in a civil damages case, the finder of fact will be a jury. Precisely because the victims of discriminatory enforcement are members of racial minorities, often minorities who are physical outsiders to the community where they were stopped, juries may find empathy harder in these cases than in conventional § 1983 police misconduct cases.

Nor is it likely that equal protection can be vindicated through suits for injunctive relief. *City of Los Angeles v. Lyons*⁵³ held that a plaintiff who is seeking an injunction must show a likelihood that he will again be injured by the unconstitutional practice he challenges. The danger must be plaintiff-specific: it is not enough to show that *someone* will likely be injured by future conduct.⁵⁴ Moreover, *Lyons* demanded restraint in issuing injunctions against state law enforcement in the absence of a showing that there is a substantial risk of irreparable injury.⁵⁵ A lawsuit challenging discriminatory traffic stops might confront difficulties under each of these aspects of *Lyons*. It may be quite difficult for a particular plaintiff to show a likelihood that he personally will be stopped again for a discriminatory reason. And if no one plaintiff can show a likelihood of being unconstitutionally stopped again, then a class action is equally unavailing, since it does not permit inadequate individual claims to be aggregated to meet the imminent-injury requirement. At the same time, courts may also be unwilling to find that the injury from an illegal stop is irreparable even if it does involve a mostly intangible dignitary injury. One of the most interesting aspects of the accounts of the civil litigation challenging discriminatory enforcement activity is that *Lyons* never seems to have been considered.

not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates" (citing OFF. OF LEGAL POL., U.S. DEPT. OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SYSTEMS, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE 40-41 (1986)); Alison Patterson, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 767-802 (1993) (describing the variety of difficulties with using § 1983 as a method of deterring police misconduct).

52. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 912-13 (1991) [hereinafter Stuntz, *Fourth Amendment Remedies*]; see also Steiker, *Second Thoughts*, *supra* note 47, at 852-53 (discussing the hindsight problem).

53. 461 U.S. 95 (1983).

54. See 461 U.S. at 105-06.

55. See 461 U.S. at 111-12.

Moreover, precisely because much of the enforcement activity goes unrecorded and discretion in any event remains so prevalent in police enforcement decisions, injunctions may have little effect. In this regard, consider the Maryland experience. As a result of Robert Wilkens's suit against the Maryland State Police, the police agreed not to use race in setting policy "for stopping, detaining, or searching motorists traveling on Maryland roadways."⁵⁶ They also agreed to keep records including racial data regarding all cases in which drug-sniffing dogs were used or motorists consented to further searches. The results are not encouraging for the prospect of policing the police injunctively:

Of the 732 citizens detained and searched by the Maryland State Police [between January 1995 and June 1996], 75% were African-Americans, and 5% were Hispanics. The Maryland numbers are also broken down by officer; of the twelve officers involved, six stopped over 80% African-Americans, one stopped over 95% African-Americans, and two stopped only African-Americans.⁵⁷

Earlier this year, the judge who is monitoring the settlement required the police to start keeping data regarding all stops along Interstate 95. She held that the plaintiff "had made a 'reasonable showing' that a continuing pattern of discrimination exists."⁵⁸

But if injunctions are unavailable and damages are likely to be small, suppression is left as the only effective remedy. Suppression creates a powerful reason for a criminal defendant to litigate an equal protection challenge vigorously: the very cases in which such a violation is most likely to have occurred are also those in which suppression is most likely to lead to dismissal or acquittal.⁵⁹ Further, suppression not only alters the incentives of the victim to litigate, it also alters the incentives of the police to engage in the behavior in the first place.

Under the *Whren* "Fourth Amendment pretext" hypothesis, the only reason the police stop drivers for otherwise unenforced traffic violations is to seek information on unrelated crimes. Making it impossible to use such information only in cases where there is a Fourteenth Amendment pretext problem as well should eliminate the incentives to engage in dual-pretext stops. No evidence will be suppressed — even if it is the result of a Fourth Amendment

56. See Davis, *supra* note 20, at 440; Brennan, *supra* note 22, at 1.

57. Harris, *supra* note 20, at 566.

58. Brennan, *supra* note 22, at 18A.

59. That is, if the defendant gets seized evidence suppressed in those cases in which selective prosecution occurs — usually low-level offenses or victimless crimes — there is unlikely to be other evidence to support a conviction.

pretextual search — if the police engage in a nondiscriminatory pattern of pretextual searches. Thus, suppression becomes a pointed remedy for the equal protection violation. We should therefore be troubled if the major effect of the move from regulating the police under the Fourth Amendment to regulating them under the Equal Protection Clause is to exclude the exclusionary rule as a remedial strategy.

II. THE REVERSAL OF REVERSAL?

Jury selection offers another arena in which actors within the criminal justice system (here, attorneys) are tempted to use race as a shorthand for predicting the behavior of individuals (here, members of the venire) about whom they otherwise know very little. And here, too, the Court has ultimately turned to the Equal Protection Clause rather than a criminal procedure-specific provision — the fair cross-section requirement embodied in the Sixth Amendment's guarantee to "the accused" of an "impartial jury"⁶⁰ — to prevent discrimination on the basis of race.

As with the question of pretextual searches, one motive for the Court's initial resort in *Batson v. Kentucky*⁶¹ to the Equal Protection Clause might have been a desire to limit the degree of judicial intrusion into discretionary government decisionmaking. Had the Court relied on the criminal procedure-specific Sixth Amendment instead of the Fourteenth Amendment to police peremptory challenges, this might have expanded the number of criteria that were out of bounds. For example, daily wage earners⁶² and persons opposed to the death penalty⁶³ are cognizable classes under the fair cross-section requirement but are not suspect classes for equal protection purposes. In addition, although this ultimately turned out not to matter, defendants were permitted to bring Sixth Amendment challenges on behalf of groups of which they were not members,⁶⁴ while the Fourteenth Amendment right had been exercised

60. U.S. CONST. amend. VI. The Sixth Amendment fair cross-section and impartiality requirements apply to the states through the Due Process Clause of the Fourteenth Amendment. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

61. 476 U.S. 79 (1986).

62. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946).

63. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

64. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (involving male defendant who challenged exclusion of women from jury pool).

largely by defendants who were themselves members of the excluded groups.⁶⁵

The past decade's experience with the enforcement of *Batson*, however, reveals a problem similar to the one posed by *Whren*: namely, the difficulties that arise when we use the criminal adjudication process to vindicate equal protection rights that extend beyond those of criminal defendants. The suppression of evidence and a consequent dismissal of charges provides some defendants with a windfall — especially when the value for them of avoiding criminal punishment exceeds the value to them of the underlying legitimate privacy interest. So, too, the reversal of a conviction provides some defendants with a windfall — especially if they would have been convicted regardless of the composition of the jury. Courts responded to the windfall problem in the search and seizure context with what Carol Steiker calls “inclusionary” rules designed to calibrate more finely the remedial structure of Fourth Amendment law.⁶⁶ What *Batson* shows is that when courts cannot calibrate the remedy, they fudge on the right instead.

The *Batson* cases raised a question absent from the selective enforcement cases: who is the victim when a juror is peremptorily struck because of her race or sex? Here, the Court has been somewhat circumspect. Over the past decade, the Court has moved toward the view that the victim in *Batson* cases is the excluded juror.⁶⁷ If the state excludes someone from jury service on the basis of race or sex, it has denied her equal protection of the laws just as it would have done had it told her that she could not hold some other position within the state government or could not frequent some other public facility. And once *Batson* was extended to reach a defense counsel's use of peremptory challenges,⁶⁸ the juror, or the public at large, necessarily had to be seen as the victim since the exclusion was the defendant's act.

65. *But see* *Peters v. Kiff*, 407 U.S. 493, 498 (1972) (holding, in a habeas case brought by a white petitioner, that the exclusion of blacks from juries violated the petitioner's due process rights). *Peters v. Kiff* was decided before the incorporation of the Sixth Amendment.

66. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996) (explaining that inclusionary rules permit the use of unconstitutionally obtained evidence or uphold convictions based on improperly admitted evidence) [hereinafter Steiker, *Counter-Revolution*].

67. *See, e.g.*, Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725 (1992).

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

The movement toward a juror-centered view of the *Batson* right was tempting in part because it enabled the Court to finesse the question whether the race or sex of a jury's members affects trial outcomes.⁶⁹ The Court has always been extremely cagey about this issue. On the one hand, particularly in the fair cross-section cases, the Court has suggested that race and sex matter both because they might influence individual jurors' perspectives and because the behavior of a jury as a whole might be affected by its racial and sexual composition.⁷⁰ On the other hand, the Court has been equally insistent that stereotypical assumptions about jurors' attitudes are both unjustified and unjustifiable.⁷¹ It is wrong in both the descriptive and the prescriptive sense to assume that jurors will vote differently because of their race or sex. Jurors of all races and genders can be equally impartial and qualified.

If the injured party is the excluded juror, the Court does not need to resolve this issue. The injury occurs, and is complete, when the peremptory strike is exercised on an impermissible ground. It is irrelevant how, or even whether, it affects the outcome of the defendant's trial. But if the injured party is the defendant, then we really do need some theory of *how* he has been injured. The least complicated account, which works well enough for defendants who are of the same race as the excluded juror, focuses on stigmatic injury: striking members of the defendant's group sends the message that the state views the group as unworthy of participating fully in the criminal justice process.⁷² The defendant, in this view, is simply a particularly close observer of this "expressive harm."⁷³

But the stigmatic account is unsatisfying because it is incomplete. The apparent prevalence of race-based peremptory challenges suggests that a large number of experienced participants in criminal trials believe that the race of jurors *can* affect the outcome of a criminal trial, and that taking race into account improves, at least marginally, the ability to predict a juror's position. Especially

69. This question is discussed extensively in Muller, *supra* note 67, at 97-107.

70. See, e.g., *Taylor*, 419 U.S. at 531; *Peters*, 407 U.S. at 503; *Ballard v. United States*, 329 U.S. 187, 193 (1946).

71. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 138-40 & n.11 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

72. See, e.g., *Batson*, 476 U.S. at 86; *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

73. The view that racial classification perpetrates an expressive, or "non-instrumental," injury has recently emerged as a central piece of equal protection law, particularly in the area of voting rights. See, e.g., Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 65 (1996); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

when it comes to defendants who are of a different race than the excluded juror — and who therefore do not share directly in any group-based stigma that exclusion might express — it must be, as a pragmatic matter, that they are injured, if at all, because excluding members of a protected class somehow increases the likelihood of conviction. Why, after all, would most white defendants care whether any blacks served on their juries unless they believed that black and white jurors either would vote differently or that a racially mixed jury would be more pro-defendant? In either case, race matters. Those justices — like Justices Kennedy and O'Connor — who generally take a colorblind perspective in other areas of equal protection law like voting rights and affirmative action⁷⁴ are thus particularly hamstrung when it comes to *Batson* claims.

The switch toward a juror-centered understanding of the *Batson* right avoids having to answer one hard question only to raise another. Assuming that all of the jurors who actually served were impartial and thus that the defendant was convicted by an impartial jury,⁷⁵ what is the basis for allowing a defendant to challenge his conviction on the ground that some potential jurors were improperly removed?

One way of thinking about this question is to locate it in the broader debate in constitutional criminal procedure over which errors should be subject to harmless error analysis and which should require per se reversal.⁷⁶ In the Court's current taxonomy for thinking about this problem, there are two types of constitutional infirmities: trial errors and structural defects. Trial error involves mistakes — such as the admission of illegally obtained evidence — that occur during the presentation of a case to the jury.⁷⁷ Trial errors are subject to harmless error analysis. Because they are discrete, performing the harmless error inquiry involves an intelligible task: the reviewing court asks whether, in the context of the entire

74. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (racial gerrymandering); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (affirmative action); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (voting rights).

75. In *Lockhart v. McCree*, 476 U.S. 162, 183-84 (1986), the Court asserted that as long as each juror who serves is himself or herself impartial, the jury as a whole is impartial, regardless of its composition.

76. For a summary of recent developments, see Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1176-78 (1995); Muller, *supra* note 67, at 107-16.

77. See *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991).

record, the error might have made a difference.⁷⁸ For example, if the case against a defendant is overwhelming — say his fingerprints were found on the scene and he made incriminating statements after receiving *Miranda* warnings — then the introduction of an illegally seized piece of evidence might conceivably be viewed as harmless beyond a reasonable doubt. If, however, the case is closer — because there is no other physical evidence and the defendant's post arrest statements were quite ambiguous — then a reviewing court might be uncertain as to whether the illegally seized evidence might have tipped the balance toward conviction.

Structural defects, by contrast, require per se reversal.⁷⁹ These sorts of errors so taint the framework within which a trial proceeds that, in an important sense, there has been no trial. One way of thinking about the handful of errors the Court has identified as structural — the denial of counsel or the right of self-representation, the use of a biased judge, the exclusion of the public, and the “exclusion of members of the defendant's race from a grand jury”⁸⁰ — is to see that in each case, one of the indispensable actors in the criminal process is, at least constructively, missing. It requires too much imaginative reconstruction by an appellate court to ask whether, if the defendant had had a lawyer, the outcome would have been the same. Yale Kamisar's classic article about *Betts v. Brady*⁸¹ illustrates precisely how unjustifiable such a counterfactual inquiry would be.⁸²

Despite the recent spread of harmless error doctrine throughout constitutional criminal procedure, the federal courts that have considered the question have generally treated *Batson* violations as structural and thus subject to per se reversal.⁸³ As a doctrinal mat-

78. See *Sullivan*, 508 U.S. at 281; *Fulminante*, 499 U.S. at 307-08.

79. See *Sullivan*, 508 U.S. at 280; *Fulminante*, 499 U.S. at 309.

80. *Fulminante*, 499 U.S. at 310 (citing *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)); see also *Sullivan*, 508 U.S. at 281 (deficient reasonable-doubt instruction is never harmless); *Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (denial of right to public trial is never harmless); *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984) (denial of right to self-representation is never harmless); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (denial of counsel is never harmless); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (biased judge is never harmless).

81. 316 U.S. 455 (1942).

82. Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962).

83. See, e.g., *Ford v. Norris*, 67 F.3d 162, 170-71 (8th Cir. 1995); *Rosa v. Peters*, 36 F.3d 625, 634 n.17 (7th Cir. 1994); *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987).

For an argument that even per se reversal does not provide a sufficient deterrent to *Batson* violations, and that the correct remedy should be dismissal of the prosecution with prejudice, see Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1116-23 (1994).

ter, this makes a certain degree of sense. The closest analogues to *Batson* violations are the racial exclusion of potential grand jurors⁸⁴ and the exclusion of the public from a defendant's trial⁸⁵ — both of which are grounds for per se reversal. Moreover, the Supreme Court's unwillingness to hypothesize about how jurors' race and sex affect their deliberations makes it difficult to see how reviewing courts would perform the "quantitativ[e] assess[ment]"⁸⁶ harmless error review would demand. Performing harmless error in *Batson* cases would require asking whether the evidence was overwhelming; whether one could imagine jurors of different races or genders reacting to the evidence differently; what the racial composition of the jury actually seated was; and so on. These questions are precisely the ones the Supreme Court has repeatedly avoided answering.

The adoption of per se reversal, though, is obviously not socially costless: some defendants will have their convictions reversed despite the fact that we can be certain, beyond a reasonable doubt, that they would have been convicted even had there been no equal protection violation. Consider, for example, a white defendant, convicted on the basis of overwhelming evidence, by a racially mixed jury, for a crime that had no readily discernible racial angles. If the prosecutor struck a single black venire member on the basis of race, this would be an equal protection violation.⁸⁷ A reviewing court might be hard pressed to see how the exclusion of that particular juror conceivably affected the outcome. Of course, the court could point to the metaphysical strand of the jury selection cases — the juror's absence deprived the jury of some unknown and unknowable "flavor"⁸⁸ — but that seems a slender reed on which to be worried that "[t]he entire conduct of the trial from beginning to

84. See *Hillery*, 474 U.S. at 264.

85. See *Waller*, 467 U.S. at 46-47.

86. *Sullivan*, 508 U.S. at 281; *Fulminante*, 499 U.S. at 308.

87. See *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); cf. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 170-73 (1989) (discussing the varying positions courts have taken on this question). Indeed, some state courts that have treated some *Batson* violations as harmless have pointed to the presence of some blacks on the jury as a factor tending to make any violation harmless. See, e.g., *State v. Vincent*, 755 S.W.2d 400, 403-04 (Mo. Ct. App. 1988). The more common move, as the text suggests, is simply not to find a violation as long as the government has left some blacks in the pool. See Alschuler, *supra*, at 171 n.79 (collecting such cases).

88. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946) ("To insulate the courtroom from either [sex by excluding its members from the jury] may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.").

end [was] obviously affected,"⁸⁹ the explanation given for what constitutes a structural error.

If we focus on the rights of excluded jurors — who may be unaware that they were struck for invidious reasons — or the interest of the public at large in the overall racial fairness of the criminal justice process, we might view any windfall to the defendant as a necessary byproduct of fully vindicating these third parties' claims. The prospect of *per se* reversal might provide a necessary inducement for defendants to press every violation of an excluded juror's rights. Moreover, precisely because *per se* reversal lessens the "hindsight problem" — by precluding reviewing courts from relying unconsciously on the fact that the defendant was convicted in assessing his claim⁹⁰ — it is also more likely to deter *Batson* violations in the first place. Finally, if *Batson* is fundamentally about potential jurors' equal protection rights, there is no reason to ask whether exclusion affected the outcome of a defendant's trial. The injury was complete the moment the juror was struck. In this view, the error cannot be rendered harmless by the overwhelming guilt of the defendant.

But once we move toward viewing the right given to the defendant in these instrumental terms, the temptation arises to balance more finely the competing public interests in equal protection and in prosecution of crime. Consider how the Court has treated a similar problem in the Fourth Amendment context. In *Stone v. Powell*,⁹¹ the Court concluded that the interest in deterring illegal searches and seizures of innocent third parties could be adequately vindicated by allowing defendants to litigate Fourth Amendment claims only up to a point. Defendants can seek the suppression of evidence at trial and on direct appeal, but they cannot raise Fourth Amendment claims on collateral review.⁹²

Initially, the Supreme Court imposed a similar sort of limit on *Batson* claims: it refused to apply *Batson* retroactively to claims on habeas.⁹³ But the lower courts have been engaged in a more interesting, and less candid, response to the social costs posed by full enforcement of the Equal Protection Clause. Rather than limiting

89. *Fulminante*, 499 U.S. at 309-10.

90. For discussions of the hindsight problem, see Steiker, *Second Thoughts*, *supra* note 47, at 852-53; Stuntz, *Fourth Amendment Remedies*, *supra* note 52, at 912-15.

91. 428 U.S. 465 (1976).

92. *See* 428 U.S. at 492-94.

93. *See* *Allen v. Hardy*, 478 U.S. 255 (1986); *see also* Muller, *supra* note 67, at 128 (discussing how *Allen v. Hardy* illuminates the paradoxical question of what actually constitutes a *Batson* injury).

the remedy, they have surreptitiously redefined the right. In essence, they have responded to the fact that many *Batson* violations might be found harmless if harmless error analysis were performed by declining to find a violation in the first place.

Lower courts have accomplished this by combining a deferential standard of appellate review⁹⁴ with a sweeping scope of permissible neutral explanations for prosecutorial strikes.⁹⁵ The list of non-racial explanations that courts have found sufficient to negate an inference of racially selective strikes includes jurors' clothing (including, for example, wearing a Malcolm X hat),⁹⁶ membership in a non-mainstream religion, handwriting,⁹⁷ weight,⁹⁸ occupation,⁹⁹ parental and marital status,¹⁰⁰ "attitude,"¹⁰¹ and so on. The fact that there is no requirement that there be any discernible connection whatsoever between the neutral reason, which often is correlated to some degree with race, and some feature of the case¹⁰² gives prosecutors a virtually limitless inventory of reasons. More

94. See, e.g., *United States v. Valley*, 928 F.2d 130, 135 (5th Cir. 1991) (describing the deferential standard of review). One empirical study looked at 76 cases in which defendants had persuaded trial courts to require prosecutors to explain their peremptory strikes. In only three of the cases did the appeals court find that the proffered reasons were pretextual and reverse the convictions. See Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 358 (1993).

95. For three extensive empirical examinations of *Batson* challenges, see Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REF. 229 (1993); Swift, *supra* note 94. Melilli's data showed that prosecutors succeeded in providing an acceptable race-neutral explanation roughly 80% of the time that judges even required them to offer one. Melilli, *supra*, at 461. For a critical perspective on the entire enterprise of *Batson* enforcement, see Ogletree, *supra* note 83.

96. See *United States v. Hinton*, 94 F.3d 396, 396 (7th Cir. 1996).

97. See *Chambers v. State*, 724 S.W.2d 440, 442 (Tex. Ct. App. 1987) (finding neutral the decision to remove a juror because he belonged to the Church of Christ, "which [the prosecutor] regarded as a religious preference that was 'a little bit away from the main stream,'" and his handwriting was not very legible).

98. See, e.g., *Galbert v. Merkle*, No. C95-4065, 1997 WL 85012 (N.D. Cal. Feb. 24, 1997) (finding youth and obesity to be sufficiently race-neutral factors to justify the prosecutor's removal of all three black venire members).

99. See, e.g., *United States v. Alvarado-Sandoval*, 997 F.2d 491, 491-92 (8th Cir. 1993) (finding explanation sufficient when prosecutor struck juror because she was a "cosmetologist" and "I am going to get into an aiding and abetting type theory and just for whatever reason I did not want a cosmetologist"); Raphael & Ungvarsky, *supra* note 95, at 240-45 (collecting cases).

100. See, e.g., *United States v. Williams*, 934 F.2d 847, 849 (7th Cir. 1991) (finding explanation sufficient when excluded juror was a single mother who "might have other concerns"); Raphael & Ungvarsky, *supra* note 95, at 258-60 (collecting cases).

101. See, e.g., *United States v. Jenkins*, 52 F.3d 743, 747 (8th Cir. 1995); *Palmer v. Lares*, 42 F.3d 975, 980 (5th Cir. 1995); see also Raphael & Ungvarsky, *supra* note 95, at 246-49 (collecting cases).

102. See Raphael & Ungvarsky, *supra* note 95, at 273-74; Swift, *supra* note 94, at 364-65.

importantly, appellate courts give great deference to a trial judge's conclusion that the prosecutor's explanations sufficiently met his burden of going forward.

It is at least conceivable that appellate courts would be less credulous if they were asked in the abstract whether such reasons really seemed a more plausible explanation than the use of race for a series of racially correlated strikes. But they are not asked this question in the abstract: rather, it is presented to them in the posture of an appeal from a conviction.¹⁰³ While it is too massive a task to read and code all of the thousands of appellate cases making *Batson* claims — and virtually no *Batson* decisions at the trial court level are reported — I have a hunch that *Batson* operates on something rather like a sliding scale. In racially charged cases, trial judges are less likely to accept, and appellate courts are less likely to affirm, implausible explanations for racially correlated strikes.¹⁰⁴ By contrast, in cases without an obvious racial salience, trial judges may view *Batson* objections as attempts to set up grounds for per se reversal and thus may accept somewhat dubious prosecutorial explanations; similarly, if the evidence of guilt is overwhelming, a reviewing court is more likely to affirm the trial judge's decision on a *Batson* claim.

But this disingenuousness has its dangers. First, courts may underestimate, either systematically or in particular kinds of cases, the relevance of a juror's race to his or her assessment of the evidence. They may not think, for example, that cases where the credibility of police witnesses is at issue are racially charged regardless of the particular facts; it might, however, be the case that there is in fact a deep racial divide on this issue.¹⁰⁵ Ironically, then, there may be cases where the racial composition of the jury is outcome-determinative, or at least outcome-affective, that end up getting af-

103. The denial of a *Batson* challenge cannot be appealed interlocutorily. Thus, the only cases appellate courts see are those in which the defendant has been convicted on at least some count.

104. See, e.g., *Gamble v. State*, 357 S.E.2d 792 (Ga. 1987). *Gamble* involved a black-on-white capital murder case in which most of the state's witnesses were white and most of the defense witnesses were black. 357 S.E.2d at 795. The prosecutor used all his peremptory strikes to remove potential black jurors and he removed all the potential black jurors. The Georgia Supreme Court found that the prosecutor's reasons for striking various black venire persons were "suspect under *Batson*," even though these reasons — age, church membership, attitude, occupations — often seem to satisfy reviewing courts.

105. See Darryl K. Brown, *The Role of Race in Juror Impartiality and Venue Transfer*, 53 MD. L. REV. 107 (1994) (suggesting racial differences may well affect juror decisionmaking on a range of issues); Nancy J. King, *Post-Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 88 n.92 (1993) (collecting studies).

firmed. But the existing structure of *Batson* argumentation provides no occasion for making this sort of claim: it does not readily allow for the argument that, given the facts of this particular case, an otherwise-acceptable reason ought to be reviewed more carefully.

Second, the *Batson* rule is to a great extent hortatory in the same way that the ban on selective enforcement is: much of its effectiveness in the real world depends not on judicial enforcement but on its internalization by the relevant actors. When courts accept dubious justifications for racially correlated strikes, they may send a message to prosecutors and defense counsel that the exclusion of minority jurors is generally not going to be taken very seriously or scrutinized very carefully.

III. THE DISMISSAL OF DISMISSAL?

The problem of racially selective prosecution reveals why it is so difficult to “draw on ‘ordinary equal protection standards’”¹⁰⁶ in the context of criminal justice. The precise holding in *United States v. Armstrong* is that for a defendant to be given discovery on a claim that he is the victim of racially selective prosecution, he must make a threshold showing that the government has declined to prosecute similarly situated suspects of other races.¹⁰⁷ This requirement dovetails with the showing he will ultimately have to make with regard to discriminatory effect; in addition, of course, he will have to show a discriminatory purpose.¹⁰⁸

There are four aspects of *Armstrong* that distinguish it sharply from the ordinary equal protection case. The first, which is so obvious that it might easily be overlooked, is that the ordinary equal protection claim is raised in the course of *civil* litigation. This presupposes the existence of thorough discovery, precisely the process *Armstrong* pretermits. In *Hunter v. Underwood*,¹⁰⁹ for example, one of the cases on which *Armstrong* relied to illustrate how the similarly situated requirement operates,¹¹⁰ the court of appeals noted that although the plaintiffs had made “no showing of discriminatory impact” at a hearing on the defendants’ motion to dismiss, “the allegation, *if supported by facts developed in later proceedings*,

106. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

107. *See Armstrong*, 517 U.S. at 469-70.

108. *See Washington v. Davis*, 426 U.S. 229, 240 (1976).

109. 471 U.S. 222 (1985).

110. *See Armstrong*, 517 U.S. at 467.

states a claim upon which the plaintiffs could recover.”¹¹¹ The Court in *Underwood* therefore reversed the district court’s dismissal of the plaintiffs’ claim that the legislature of Alabama had specifically adopted the list of misdemeanors that result in disenfranchisement with the intent to bar blacks from voting. The imposition of what would be called in civil litigation a heightened pleading requirement for claims of racially selective prosecution¹¹² has no precursor in ordinary equal protection law. The effect of *Armstrong* is to immunize from full-scale litigation, at least in the context of a criminal trial, a claim to which the government would be required to respond more fully if it involved any state function other than criminal prosecution.

The second sharp divergence between *Armstrong* and the Court’s ordinary equal protection analysis involves the sense in which similarity is to be judged. When it comes to suspect classes, the Court generally rejects stereotypes whether or not they are true.¹¹³ The very act of stereotyping is constitutionally illegitimate. So, for example, in the area of legislative redistricting, currently one of the major equal protection issues on the Court’s docket, the Court has vehemently rejected the proposition that black voters “think alike, share the same political interests, and will prefer the same candidates at the polls” as offensive and demeaning,¹¹⁴ despite substantial statistical evidence that shows precisely this level of political cohesion and pervasive racial bloc voting.¹¹⁵ Similarly, in *United States v. Virginia*,¹¹⁶ the Court rejected as constitutionally irrelevant the argument that “most women” would not seek the adversative training that Virginia Military Institute offered.¹¹⁷ By contrast, when it came to “the presumption that people of *all* races commit *all* types of crimes,” and that no “type of crime is the exclusive province of any particular racial or ethnic group,”¹¹⁸ a perspec-

111. *Underwood v. Hunter*, 604 F.2d 367, 370 (5th Cir. 1979) (emphasis added).

112. See *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 164 (1993) (explaining that heightened pleading requirements demand plaintiffs allege with specificity, prior to discovery, facts that tend to prove their claim).

113. See, e.g., *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708-09 (1978).

114. *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

115. See, e.g., *Bush v. Vera*, 517 U.S. 952, 994-95 (1996) (O’Connor, J., concurring) (discussing the history of racial bloc voting in Dallas County, Texas); *Shaw v. Hunt*, 861 F. Supp. 408, 464-65 (E.D.N.C. 1994) (three-judge court) (discussing racial polarization in North Carolina), *revd. on other grounds*, 517 U.S. 899 (1996).

116. 518 U.S. 515 (1996).

117. 518 U.S. at 542.

118. *Armstrong*, 517 U.S. at 469.

tive that would at least suggest suspicion of a prosecutorial portfolio like the one in *Armstrong* composed entirely of black defendants, the Court took precisely the opposite tack. Relying on a somewhat circular set of statistics that showed that more than ninety percent of the defendants sentenced for crack-related offenses were black,¹¹⁹ it declared that “[p]resumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.”¹²⁰

I cannot think of a single other area of current equal protection doctrine in which the Court is prepared to assume, based on ambiguous statistics, that blacks and whites differ in a legally cognizable way. That the Court adopts such a position here illustrates a broader point that emerged from the highway stop and jury selection cases as well. Whatever the Court *says* about its commitment to ridding the criminal justice process of racial discrimination, it is in fact quite skeptical that this can be done, at least at an acceptable social cost. The very nature of the process, at the police and prosecutorial levels, requires a fair amount of discretion on the part of a large number of actors and the Court tacitly accepts the level of disparate impact that discretion seems to produce.¹²¹

Third, criminal procedure poses a special problem in thinking about whether defendants are similarly situated. What precisely does this mean? That individuals of different races violated identical provisions of the criminal code? That individuals of different races caused the same harms by violating a particular provision of the criminal code? That individuals of different races engaged in different forms of criminal conduct that are similarly morally culpable or socially harmful? As David Sklansky points out in his wonderful *Stanford Law Review* piece, these choices are shot through with “racially selective sympathy and indifference.”¹²² And as

119. See *Armstrong*, 517 U.S. at 469. The statistics are circular because they are exactly what one would expect if race were in fact the explanation for the pattern of prosecutorial decisions.

120. 517 U.S. at 469-70. Those statistics, of course, might also be used to support *Armstrong's* claim, unless the Court is wedded to the proposition that sentencing rates track exactly the incidence of crime. For reasons William Stuntz suggests, this seems unlikely: the far more plausible conclusion is that drug crime involving black sellers is prosecuted at a higher rate than similar crime involving whites. See William J. Stuntz, *Race, Class, and Drugs*, 99 COLUM. L. REV. (forthcoming Nov. 1998) (manuscript on file with author) [hereinafter Stuntz, *Race, Class, and Drugs*].

121. See *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) (accepting that the optimal level of discretion in the criminal justice system may necessarily produce some racial disparities).

122. David S. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1307 (1995) (quoting Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976)).

William Stuntz suggests in a forthcoming article, there are good reasons for choosing any of these definitions . . . and equally good reasons for worrying about them all.¹²³

Ordinary equal protection cases certainly do not pose these questions nearly as starkly. Indeed, sometimes they do not pose them at all. Consider again *Hunter v. Underwood*.¹²⁴ The provision at issue there, Article VIII, section 182 of the Alabama Constitution of 1901, disenfranchised, among other persons, individuals convicted of misdemeanors of moral turpitude.¹²⁵ Included within that category were crimes such as presenting a worthless check and petty larceny; excluded were such apparently more serious crimes as second-degree manslaughter, assault on a police officer, and mailing pornography. There was clear evidence that some of the crimes were included on the list precisely because its drafters thought they were almost entirely the province of blacks.¹²⁶ Then-Justice Rehnquist, in a unanimous opinion for the Court, concluded that section 182 had both a discriminatory purpose and a discriminatory effect.¹²⁷ According to *Armstrong*, the Court's holding in *Hunter*

was consistent with ordinary equal protection principles, including the similarly situated requirement. There was . . . indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites: Blacks were by even the most modest estimates at least 1.7 times as likely as whites to suffer disenfranchisement under the law in question.¹²⁸

In what way exactly were blacks and whites "similarly situated"? Everyone, black and white, who committed the enumerated crimes was removed from the voting rolls. The plaintiffs in the case, Victor Underwood (who was white) and Carmen Edwards (who was black) were each convicted of presenting worthless checks and were each disenfranchised. Everyone, black or white, who either committed an unlisted crime or who was law-abiding, was permitted to vote. If blacks who were disenfranchised and whites who were not disenfranchised were similarly situated, it must have been with respect to some metric other than the precise crimes with which they were charged, since they were charged with different crimes. But while the Court was willing in *Hunter v. Underwood* to treat blacks

123. See Stuntz, *Race, Class, and Drugs*, *supra* note 120.

124. 471 U.S. 222 (1985).

125. See *Hunter*, 471 U.S. at 223 n.* (reproducing constitutional provision).

126. See *Hunter*, 471 U.S. at 232.

127. See *Hunter*, 471 U.S. at 233.

128. *Armstrong*, 517 U.S. at 467 (internal quotation marks omitted).

and whites convicted of distinct misdemeanors as similarly situated for purposes of challenging their disenfranchisement, it is inconceivable that the Court would find a constitutionally sufficient discriminatory effect if Carmen Edwards had argued that she (and other blacks) had been prosecuted for passing worthless checks while the state had declined to prosecute white individuals who had mailed pornography.

The fourth and most critical difference between ordinary equal protection cases and selective-prosecution cases concerns the claimant's objective. With few exceptions, the plaintiffs in the typical equal protection case seek to acquire, rather than to avoid, something: the vote, a job, admission to particular schools. The government distributes benefits and plaintiffs seek to receive the same benefits that individuals of other races or the opposite sex receive. In a selective-prosecution claim, by contrast, the defendant seeks to avoid a burden the state dispenses.

The general assumption in contemporary equal protection law, which seems to play out most of the time, is that faced with a finding of unconstitutionality, the state will remedy the inequality by providing the benefit to the previously excluded group (that is, by "levelling up") rather than by depriving the previously included group ("levelling down"). The few examples in ordinary equal protection of levelling down — the closing of the schools in Prince Edward County, Virginia,¹²⁹ or the swimming pools in Jackson, Mississippi¹³⁰ — stand out precisely because of their rarity. The underlying assumption, which ties into Paul Brest's theory that the Equal Protection Clause is meant to address racially selective sympathy or indifference,¹³¹ is that the majority provided itself with the benefit largely because of the intrinsic value of the particular item, and not out of a desire simply to have something the minority lacks. The Equal Protection Clause forces the majority to treat the minority the same way it treats itself.

Seen in this light, the *Armstrong* Court's observation that "[w]e have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race"¹³² poses several interesting questions. Precisely because pros-

129. See *Griffin v. Prince Edward County School Board*, 377 U.S. 218 (1964).

130. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

131. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

132. *Armstrong*, 517 U.S. at 461 n.2.

ecution is the converse of most government goods, dismissal is the epitome of levelling down. As Randall Kennedy has suggested, one could imagine an equal protection remedy for selective law enforcement that levelled up: if the government wants to prosecute people like Armstrong, it must round up some white crack dealers (or otherwise similarly situated criminals) and prosecute them too.¹³³

The problem with foreclosing dismissal, and mandating levelling up as a remedy instead, is that then no one will seek to vindicate the right: it is hard to imagine the defendant who would bring a selective-prosecution claim if the only available remedy is that his trial goes forward but someone else of a different race goes to prison as well. Misery loves company, but not that much. More broadly, it is unclear what remedies other than dismissal *will* create an incentive for defendants to ferret out racial discrimination in the charging process. Sanctioning the prosecutor does not offer much to the defendant. Moreover, precisely because many of the victims of selective prosecution are in fact guilty of the crimes charged, it is hard to imagine a jury awarding significant damages in an independent § 1983 lawsuit. Here, the same problems emerge that I discussed earlier with respect to damages actions as an alternative to suppression of evidence.¹³⁴

Interestingly, dismissal may in fact be a relatively well-calibrated remedy for racially discriminatory prosecution precisely because of the insight offered by the empathy-forcing understanding of equal protection law. The normal assumption in most areas of criminal procedure is that dismissal provides a windfall for guilty defendants: they might still have been prosecuted and convicted even if the error had not occurred. That assumption is weaker in equal protection cases. It's not, of course, that the defendant didn't sell crack; he probably did. But if selling crack was a crime only because the majority believed this was something done mainly by blacks — in the same way that vagrancy was a disenfranchiseable offense in Alabama only because the majority thought this was an exclusively black status — then dismissal offers the defendant no windfall since in a society that complied with the Equal Protection Clause, there would not be a separate set of crack offenses. And notice that precisely to the extent that the majority is willing to apply its laws to itself, the defendant's windfall is quite small: given the existence of more general drug possession laws that *are* applied

133. See Randall L. Kennedy, *McCleskey v. Kemp, Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1436-38 (1988).

134. See *supra* text accompanying notes 47-52.

to white individuals as well, a defendant like Armstrong could be prosecuted for *those* offenses. In this sense, dismissal or levelling down is simply a more efficient way of accomplishing the equalization process that levelling up might produce in the long run. If the majority were forced to apply these laws to itself, political pressures might lead to the laws' modification. The only defendants for whom dismissal will offer a complete ability to escape prosecution are those whose acts correspond to no behavior for which the majority punishes its own members. And it is precisely in such circumstances that we should be most worried about the majority's decision to punish the minority.

CONCLUSION

Ultimately, the reabsorption of criminal procedure into general equal protection doctrine will turn out to be far more troubling than the Supreme Court's breezy statements about "ordinary equal protection standards" recognize.¹³⁵ It's not simply the failure of general equal protection doctrine to perceive racial discrimination in the criminal justice system, although, as David Sklansky has shown, courts have been especially "feeble-sighted" in finding constitutional violations because the "doctrinal discussion [is] carried out at too high a level of generality."¹³⁶ Sometimes — as my discussion of what applying the analysis from *Hunter v. Underwood* to the problem of racially selective prosecution might really mean¹³⁷ — it seems as if, far from being inadequate to the task, applying general equal protection principles might produce more, rather than fewer, findings of constitutional violations.

Our problems turn out to be as much about remedies as about rights. Criminal adjudication's distinctive remedial scheme capitalizes on the complicated relationships among innocent and guilty suspects, defendants, venire persons, and the public at large, as well as the complex incentives faced by law enforcement personnel and prosecutors. General equal protection law, by contrast, generally assumes enforcement only by individuals "directly" and "personally" injured by the government's use of race.¹³⁸ Moreover, the re-

135. This problem is not unique to criminal law. As I have argued with regard to another racially charged area of the law — legislative redistricting — some areas of governmental decisionmaking raise such distinctive problems that jamming them into standard doctrinal pigeonholes "is both misguided and incoherent." Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202 (1996).

136. Sklansky, *supra* note 122, at 1284.

137. See *supra* text accompanying notes 124-28.

138. *United States v. Hays*, 515 U.S. 737, 745 (1995).

medial focus of general equal protection law has been in providing minority citizens with *more* of some good that the government provides, while the demand in the criminal context is for *less* of a set of costs that the government imposes. Without understanding the distinctive set of remedial challenges posed in the context of criminal adjudication, it is simply impossible to confront, let alone to solve, the persistent problems of race and criminal justice.