

NOTES

BATSON VERSUS STRICKLAND: EVALUATING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS RESULTING FROM THE FAILURE TO OBJECT TO RACE- BASED PEREMPTORY CHALLENGES

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This Note evaluates the convergence of the standards articulated in Batson v. Kentucky and those of Strickland v. Washington. Specifically, how can a defendant demonstrate actual prejudice as a result of defense counsel's failure to challenge the prosecutor's discriminatory use of peremptory strikes? Lower courts have differed over whether the test should be outcome-based—a demonstration of actual prejudice in the outcome or verdict of the trial—or composition-based—a showing that the result of the jury selection process would have been different. I argue that the latter test is preferable to the former for several reasons. First, the composition-based test will ensure fuller protection of the rights contemplated in Batson and Strickland. Second, the necessary evaluation under the outcome-based test would dramatically shift the Supreme Court's current colorblind approach in equal protection jurisprudence. Rather than shifting the current equal protection doctrine, the composition-based test allows for incorporation of the doctrine through the use of the diversity rationale. Third, a properly administered outcome-based test would require the exploration of the impact of race and background on the relevant evidence and on perceptions of the criminal justice system, including its principal setting (the courtroom) and primary actors, as contrasted with the much more concrete—if not necessarily simpler—task of determining only whether the composition of the jury itself would have differed.

INTRODUCTION	1007
I. THE <i>BATSON</i> AND <i>STRICKLAND</i> STANDARDS	1014
A. <i>Batson v. Kentucky and the Incomplete Demise of the Discriminatory Use of Peremptory Challenges</i> ...	1015
B. <i>Strickland v. Washington and the Legal Fiction of the Right to Counsel</i>	1020
II. THE INTERSECTION OF <i>BATSON</i> AND <i>STRICKLAND</i>	1023
A. <i>Batson Meets Strickland</i>	1024

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- B. *Batson-Related Strickland Claims in the Lower Federal Courts* 1026
- III. THE STANDARD FOR EVALUATING PREJUDICE IN *BATSON-RELATED STRICKLAND CLAIMS* 1028
 - A. *The Outcome-Based Test*..... 1029
 - 1. *The Outcome-Based Test Inadequately Protects the Constitutional Rights of Potential Jurors and Criminal Defendants* 1030
 - 2. *Using the Outcome-Based Test Would Contradict the Supreme Court’s Equal Protection Jurisprudence* 1033
 - 3. *The Outcome-Based Test Requires an Intensive Inquiry that Courts Are Ill-Equipped to Undertake* 1035
 - B. *The Composition-Based Test* 1036
 - 1. *The Use of the Composition-Based Test Will Ensure that the Defendant’s Constitutional Right to a Fair Trial Is Not Rendered Illusory* 1037
 - 2. *The Composition-Based Test Allows for Incorporation of the Court’s Equal Protection Doctrine Through the Use of the Diversity Rationale*..... 1038
 - 3. *The Composition-Based Test Requires an Inquiry that Is Easier to Administer than the Outcome-Based Test* 1042
- CONCLUSION 1044

INTRODUCTION

*John Smith*¹ watches as the jury enters the room. There are twelve jurors and one alternate, all White. He watches as they sit down.

¹ John Smith is a completely fictitious character. Throughout this Note, I employ legal storytelling, a method born out of critical race theory, to help illustrate the issues at the intersection of *Batson* and *Strickland*. Critical race theory seeks to explore the complex relationships between race, power, and the law (it has also expanded to other disciplines). See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 1–12 (2d ed. 2012) (describing critical race theory). Critical race scholars seek to change the traditional dialogue that further marginalizes people of color by minimizing, ignoring, or delegitimizing the role that race plays in our society and in our legal system. See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1345 (2002) (describing Derrick Bell’s contributions to critical race theory as “satisfy[ing] [the] quest for new ways of framing the complex relationships between law and our everyday experiences of race in America”). Legal storytelling is used by critical race theorists to illustrate how the construction of race is experienced in legal settings, more practically conveying how the law is able to—paradoxically—both include and exclude individuals and groups, ostensibly

None of them look at him, the Black defendant whose fate they will decide. He looks over at his attorney, a White public defender, nice enough, who seems to adequately know about the law. The attorney looks over and gives Smith a reassuring pat. Even now, with the jury not looking at either of them, he still appears confident that they will not find his client guilty on the maximum count of first-degree armed robbery. There is a clear and articulable reasonable doubt based on the purely circumstantial evidence presented, and surely the jury will see it.

John Smith is not confident. He lost confidence when the prosecutor somehow excused every single person of color originally called for service in his trial. Some of them he excused for no reason at all. It happened over and over, at least seven times, and no one even asked the prosecutor for a reason for the excusals: not the judge, not the veniremen, and certainly not the defense attorney. Smith thought that something was wrong with this, and his suspicions were further aroused when he compared the look of confusion and relief on the veniremen's faces with the smirk on the prosecutor's, but what did he know about the law and what prosecutors could do? It didn't seem fair that his life hung in the hands of people who seemed so different from him, whom he doubted could understand, or would try to understand, him or his situation. All he knew was that he had a right to a trial by a jury of his peers, and these twelve White jurors who no longer looked him in his face didn't seem much like his peers.

In 1986, when the Supreme Court decided *Batson v. Kentucky*,² scholars heralded it as a landmark decision for ensuring fairness in jury selection and the right to a fair trial for all accused.³ *Batson*, by

granting rights while covertly denying them. I chose to use this method of legal writing in order to further illustrate the points and arguments I advance below. Because the cases relevant to this Note provide limited background information to explore, I believe this narrative will be helpful in understanding how these errors might occur and interact in a court setting. Though the story and characters are fictional and, of course, limited by my own voice and perspective, they provide an alternative and valuable way of understanding my thesis. For other examples of legal storytelling, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (using first-person narratives in a series of essays); Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989) (employing legal storytelling to describe fictional disaster at Harvard); Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637 (2007) (using first-person narrative to analyze affirmative action); Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201 (2003) (using an alter-ego to provide civil rights analysis).

² 476 U.S. 79 (1986).

³ See, e.g., David F. Breck, *Peremptory Strikes After Batson v. Kentucky*, 74 A.B.A. J. 54, 54 (1988) (noting that the *Batson* decision "will forever change for the better the jury selection process in criminal, and possibly civil, trials" and that "*Batson* may also foreshadow the death knell of the peremptory challenge generally"); Michael E. Starr, Comment, *Race Discrimination and the Use of Peremptory Challenges: Is Batson v. Kentucky the Sole Motivating Factor for Texas Law?*, 41 BAYLOR L. REV. 161, 161 (1989)

prohibiting the prosecutorial use of race in peremptory strikes and allowing defendants to challenge the basis of these strikes using only the facts and circumstances of their own case,⁴ placed a check on the discriminatory use of an extremely discretionary trial tool. Peremptory challenges (as contrasted with challenges for cause, which require a reason and are subject to acceptance by the court) allow counsel—both defense and prosecution—to strike potential jurors without providing a reason to the court.⁵ When the Court expanded the decision in *Batson* to later include other groups, the promise of the decision was renewed.⁶ In practice, however, the decision has failed to live up to its promise. As the Court continued to articulate the standard for *Batson*, it became clear that while explicitly race-based peremptory challenges were not allowed, implicitly race-based challenges were, as attorneys need only proffer any race-neutral reason for the strike.⁷ Under this low standard, courts have often accepted dubious and thinly-veiled racially-motivated reasons for the striking of people of color from juries.⁸

Previously, in *Strickland v. Washington*,⁹ the Court had created a standard for evaluating whether legal counsel, including the counsel

(describing *Batson* as “another step forward in its continuing effort to prevent racial discrimination during jury selection”).

⁴ For a description of *Batson*’s holding and its implications, see *infra* Part I.A.

⁵ For a history of the peremptory challenge, see Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 812–30 (1997) (describing the historical underpinnings of the peremptory challenge and its modern development). For a discussion of challenges for cause, see *infra* note 37.

⁶ See *infra* notes 39–41 and accompanying text (describing the expansion of the *Batson* doctrine).

⁷ See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 120–22 (1999) (arguing that by making it easy for attorneys to give race-neutral reasons and because of deference to trial judges, *Batson* has “done relatively little to eliminate the use of race-based peremptory strikes”).

⁸ See *id.* at 120 (noting that courts have accepted reasons relating to physical attributes, demeanor, and other factors that could correlate to race); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1092–93 (2011) (surveying 269 federal decisions and finding that “prosecutors regularly respond to a defendant’s prima facie case of racially motivated jury selection with tepid, almost laughable ‘race-neutral’ reasons, as well as purportedly ‘race-neutral’ reasons that strongly correlate with race”); cf. Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 726 (1998) (discussing a study conducted from 1986 to 1993 which found that neutral explanations were accepted almost seventy-eight percent of the time and that “[t]he general lack of success by parties seeking to invalidate the exercise of peremptory challenges further illustrates the permissiveness of the neutral criteria standard”).

⁹ 466 U.S. 668 (1984).

guaranteed by *Gideon v. Wainwright*,¹⁰ was effective. The *Strickland* test involves two prongs: (1) whether counsel performed outside the realm of reasonable practice, and (2) whether that performance prejudiced the outcome of the proceeding.¹¹ Though some viewed *Strickland* with less optimism than *Batson* and *Gideon*,¹² others hoped that having some standard would ensure more effective representation for indigent defendants who could not afford to choose their counsel.¹³ However, the standard articulated in *Strickland* sets the bar for effectiveness extremely low: Almost any conduct, short of practicing without a bar admission or a law degree, has been deemed “effective.”¹⁴

This Note attempts to evaluate what happens, or rather what should happen, when the standards articulated in *Batson* meet those of *Strickland*. Specifically, how does one demonstrate a prejudiced outcome—and thus ineffective assistance of counsel—as a result of defense counsel’s failure at trial to challenge the prosecutor’s discriminatory use of peremptory strikes? Unfortunately, cases like John Smith’s are probably all too common in today’s courts, where defense lawyers are ignorant of the law, cognizant of *Batson*’s limitations, or simply too naïve to think a claim necessary.¹⁵ Whatever the reason for an attorney’s failure to make *Batson* challenges, there should be a clear method for evaluating claims of ineffective assistance of counsel

¹⁰ 372 U.S. 335, 344 (1963). This landmark Supreme Court case guaranteed legal counsel to all criminally accused.

¹¹ *Strickland*, 466 U.S. at 687.

¹² See, e.g., William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (“In 1984, *Strickland v. Washington* effectively discarded *Gideon*’s . . . call to justice Directly contrary to its rhetoric in *Strickland*, the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial.” (footnotes omitted)).

¹³ See Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 451 (2011) (“At the risk of belaboring a fairly obvious point, the Court needed to set some kind of floor for attorney performance in criminal defense cases because it recognized that ‘the right to counsel is the right to the effective assistance of counsel.’”) (quoting *Strickland*, 466 U.S. at 686)).

¹⁴ See COLE, *supra* note 7, at 76 (“For all practical purposes, [the indigent defendant] has only the right to be represented by an individual admitted to the bar.”); Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin’s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 830–31 (2003) (noting that IAC claims failed in situations where counsel “was silent during the entire trial; shared his delusions about his involvement in a murder conspiracy with the jury; and was arrested on his way to the courthouse for driving with a 0.27 blood-alcohol content” (footnotes omitted)).

¹⁵ See *infra* note 49 (explaining some reasons that defense counsel may fail to raise a *Batson* objection).

(IAC) based on the failure to make a *Batson* challenge.¹⁶ To be clear, the question is not how one might prevail on such a claim—which, given the standards, is a complex, jurisdiction-specific inquiry—but rather what test should be used. There is discord among the lower courts as to whether the test should be the demonstration of actual prejudice in the trial’s outcome (verdict) or a showing that the result of the jury selection process—the actual seated jury—would have been different with *Batson* challenges.¹⁷ This Note refers to these tests as the “outcome-based test” and the “composition-based test,” respectively.

I argue that the composition-based test is preferable to the outcome-based test because it is better able to satisfy the goals of *Batson* and *Strickland*, is more aligned with the constitutional protections invoked under *Batson* and *Strickland*, and is easier to administer. First, the composition-based test ensures the protection of all of the rights contemplated by the *Batson* and *Strickland* Courts. Because discrimination in jury selection is a structural error that undermines the guarantee of a fair trial, the less complicated composition-based test is sufficient to determine whether a defendant received a fair trial.¹⁸ Second, the evaluation required by the outcome-based test would dramatically shift the Supreme Court’s current colorblind approach in equal protection jurisprudence. Because the Court has explicitly shied away from accepting or “legalizing” the idea of continued racial inequality,¹⁹ to encourage the evaluation of the effect of

¹⁶ This intersection will be referred to as a “*Batson*-related *Strickland* claim” or “*Batson*-related IAC claim” throughout this Note.

¹⁷ See *infra* Part II.B for a discussion of the division on this issue.

¹⁸ See, e.g., *Rivera v. Illinois*, 556 U.S. 148, 161 (2009) (explaining that the constitutional error found in *Batson* required reversal because it “‘violates a defendant’s right to equal protection,’ ‘unconstitutionally discriminate[s] against the excluded juror,’ and ‘undermine[s] public confidence in the fairness of our system of justice’” (quoting *Batson v. Kentucky*, 476 U.S. 79, 87 (1986))); *Winston v. Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011) (“[I]ntentional discrimination on the basis of race in jury selection is a structural error. . . . [S]tructural errors ‘require automatic reversal’ because they affect the ‘framework in which the trial proceeds, as opposed to errors in the trial process itself’” (quoting *United States v. Harbin*, 250 F.3d 532, 542 (7th Cir. 2001))), *cert. denied sub nom. Winston v. Tegels*, 132 S. Ct. 2101 (2012).

¹⁹ See, e.g., Keith R. Walsh, Book Note, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 444 (2004) (reviewing EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF THE RACIAL INEQUALITY IN THE UNITED STATES* (2003)) (describing the Court’s colorblind ideology and asserting that “[t]he Court’s recent undervaluation of the persistence of racial inequality in higher education should raise concern about the continuation of racial progress in the United States”). While I do not subscribe to the Court’s colorblind ideology, and see incredible value and importance in continuing to discuss and attempt to understand the impact of race in society and on our criminal justice system, I acknowledge that the current doctrine precludes this approach.

those differences on a trial would require the Court to backtrack on much of its settled doctrine. Further, the composition-based test actually aligns with current doctrine by allowing for the incorporation of the diversity rationale used in affirmative action higher education cases.²⁰ Third, a properly administered outcome-based test requires consideration of the impact of race and background on the jury's view of the evidence and their perceptions of the criminal justice system, in contrast to the much more concrete task of determining only whether the composition of the jury itself would have differed. This is a complex and onerous, if not impossible, task, as it will heavily rely on racialized assumptions.²¹ The composition-based test, on the other hand, offers the much more concrete, though not necessarily simpler, task of determining only whether the composition of the jury itself would have differed.

Though there are a number of identity-based peremptory challenges prohibited under the Constitution,²² this Note will focus primarily on the racially discriminatory use of peremptory challenges and is confined to exploring standards of evaluation used in federal rather than state courts.²³ A review of the standards used in state courts would demand greater space, and the federal standards are valuable at both levels by virtue of the federal appellate role in reviewing state court decisions through federal habeas corpus proceedings. Also, though the *Batson* doctrine now prohibits race-based peremptory strikes by defense counsel,²⁴ I focus here only on

²⁰ Though the idea that juries should be diverse is not new, reimagining juror selection in this way—using an existing rationale that has been condoned by the Court in higher education—is a unique idea further illustrated in Part III.

²¹ To understand whether the seating of the struck juror(s) would have changed the outcome of the trial would require courts to determine how each juror would have evaluated the case tried before him. For a discussion of how race may affect the jury deliberation process, see *infra* notes 113–17.

²² See *infra* notes 39–41 (describing the expansion of *Batson*).

²³ An exhaustive review and analysis of all *Batson*-protected identities would be impractical. Further, focusing on race is intuitive, as race sparked the initial *Batson* doctrine and much of equal protection doctrine more generally. The prevalence of racial stereotypes in our society is still substantial, and studies have evaluated the differences in trial outcome by race. See, e.g., Patrick Bayer, Shamena Anwar & Randi Hjalmarrsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1035 (2012) (studying felony trials in Florida from 2000 to 2010 and finding that statistically significant differences exist: “[A] large (16 percentage point) gap in conviction rates for black versus white defendants [exists] when there are no blacks in the jury pool. . . . [versus a] significantly lower [gap] when there is at least one black member of the jury pool”). Ultimately, there is no reason that the rationale I argue for cannot be applied to non-race based *Batson*-related challenges.

²⁴ See *infra* note 41 and accompanying text (noting this extension of *Batson*).

potential challenges by defense counsel to the prosecutorial *Batson* violations.²⁵

Part I describes the standards articulated in *Batson* and *Strickland*. It also illustrates the functions of these standards in practice. Part II explores the convergence of the *Batson* and *Strickland* standards and how courts have evaluated claims at this intersection. Part III explores the advantages and disadvantages of evaluating *Batson*-related ineffective assistance of counsel claims under an outcome-based test and a composition-based test. This Note concludes by arguing for the adoption of the composition-based test as a means of reinforcing the commitments of the *Batson* Court and further enhancing the right to a fair trial. In wedding the two standards, this Note will illustrate the problems with those standards and offer an approach that will compel the courts to make the *Batson* and *Strickland* protections more meaningful.²⁶ While prevailing on a *Batson*-related *Strickland* claim is an uphill battle even under a composition-based test, reconciling these doctrines can encourage non-judicially sponsored improvements to defense and prosecution practices.

²⁵ Practically speaking, this focus makes sense because prosecutors are not subject to IAC claims. As they represent “the people,” and not a concrete client who can petition or question their performance, prosecutorial conduct falls under a different type of violation and sanction regime. For a discussion of the various sanctions for prosecutorial misconduct, see generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2002). Beyond these practical limitations, the adversarial nature of our trial system and the differing roles of defense counsel and prosecutors support the notion that prosecutors, as those charged with doing justice, have a greater obligation to not deviate from the standards of *Batson*. See *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011) (“Prosecutors have a special ‘duty to seek justice, not merely to convict.’” (quoting LA. STATE BAR ASS’N, Articles of Incorporation, art. 16, EC 7–13 (1971))); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor] is the representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); ABA STANDARDS FOR CRIMINAL JUSTICE 3-1.1(c) (2d ed. 1980) (“The duty of the prosecutor is to seek justice, not merely to convict.”). Meanwhile, defense counsel are urged to be advocates who give their clients the highest level of representation. See Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 89–91 (2003) (“[Z]eal and confidentiality trump most other rules, principles, or values. . . . Although a defender must act within the bounds of the law, he or she should engage in advocacy that is as close to the line as possible . . .” (footnote omitted)). Ethics rules even permit defense counsel special latitude during representation. See MODEL RULES OF PROF’L CONDUCT R. 3.1 (2011) (giving wide boundaries for defense lawyers in criminal proceedings). These differences and performance metrics underscore the arguments in this Note.

²⁶ For a detailed discussion of the problems in the application of *Batson* and *Strickland*, see *infra* Part I.

I

THE BATSON AND STRICKLAND STANDARDS

He had been a prosecutor for three years, and in those three years he had learned a lot—not only about the law but about people, trials, and juries. He was beginning to understand what really mattered in that exalted, volatile space known as “the courtroom.” It was an unspoken rule in his office that you wanted as few “people of color” on a jury as possible. The reasons behind this rule were clear, even if he wondered about its soundness and morality at times. In his experience, minorities were usually more pro-defense than non-minorities, and though they didn’t always acquit, they would often need more convincing. According to his superiors, minorities were more often biased against the government and in favor of poor people and other minorities—groups that constituted the predominant populations prosecuted by his office. So you did your best to keep them off your jury, by challenging them for cause if possible but also using the peremptory challenge—that convenient tool for every lawyer who understood that manipulating the composition of the jury usually meant manipulating the verdict. And even though Batson had attempted to limit the use of peremptory challenges, there were ways around it. You just had to have a back-up reason in case someone questioned your challenge. And almost any reason would work—though most defense attorneys never bothered to challenge prosecutorial strikes anyway. But just in case, you had to be prepared to come up with a reason that could be deemed “race-neutral.” That reason could be almost anything. He ticked off his pre-formed reasons in his head: the juror glanced at the defendant, the juror seemed aggressive towards him, et cetera. In his current trial, the defense attorney hadn’t even flinched as he struck seven potential minority jurors. He thought the veniremen looked confused and relieved as he summarily excused them no sooner than they had stated their name, occupation, and their belief that they could serve impartially. He had his doubts about that.

The prosecutor smirked inside as he thought of his circumstantial evidence and the plea agreement the defendant had turned down, asserting his innocence (like they all did at some point, usually before they took a plea as he advised them) and preferring to take his chance at trial. He looked at the jury he had successfully engineered; in his mind, John Smith was guilty, and he should have taken that plea because he was going to prison anyway. Now, on to opening statements . . .

John Smith’s defense counsel was overworked. This was his first of three trials this month, and he had over eighty cases still pending. It was also only his third real trial since most of his cases thus far had been postponed, dropped, or pled out. Though he had advised his

client to take the plea deal the prosecutor had offered, John Smith had refused because he was “innocent.” The client wanted a trial, and he would give him a trial. He psyched himself up: It wasn’t the worst case he’d ever seen brought against a client. It was mostly circumstantial evidence, and he optimistically believed that they had a moderate chance of winning. If they got a good jury, he opened and closed well, and the witnesses were cooperative, his client could win. He had been a public defender for less than two years, but his limited experience still told him that this was definitely a winnable case.

The prosecutor appeared pretty confident and seemed to know exactly what kind of jury he wanted; he was using up the peremptory challenges pretty quickly. And he just used one of his few remaining peremptory challenges to strike the last minority venireman. The defense attorney started to pay a little more attention, wondering why all of a sudden there were no minority venireman left. He went back over the dismissals in his head, trying to gauge what might have sparked each challenge and wondering if he should object. As he considered whether it was even worth it, glancing at the self-assured prosecutor and the seemingly bored judge, the “objectionable moment” passed. He needed to focus on the next juror and not on the few people who had probably already left the courthouse. He knew that diverse juries were usually more favorable to his clients, and he knew that in theory *Batson* protected against this sort of thing. But he wasn’t really sure if he was right about the sort of thing it was, and he certainly didn’t want to annoy the judge or make himself look silly and inexperienced. So he went back to being optimistic, assured that he would be able to find twelve jurors capable of viewing this evidence without bias. It wouldn’t be the ideal jury, but he knew that *voir dire* is a two-sided process. What mattered was how he presented his case and how the jury connected with him (and his client). He didn’t look at his client, and he never stopped to imagine how it felt to be sitting in that seat, facing that jury. He thought about the things he could control, those that really mattered. Yes, it was definitely a case he could win.

In this Part, I describe the legal and practical import and limitations of *Batson v. Kentucky* and *Strickland v. Washington*. Further, this Part will provide necessary context for understanding how *Batson* and *Strickland* can and should intersect.

A. *Batson v. Kentucky and the Incomplete Demise of the Discriminatory Use of Peremptory Challenges*

In 1986, the Supreme Court decided *Batson* and overruled the high evidentiary burden articulated in *Swain v. Alabama*.²⁷ In *Swain*,

²⁷ 380 U.S. 202 (1965).

the Court was faced with the appeal of the capital murder conviction of a Black man who had been tried by an all-White jury. Though all potential Black jurors had been struck by the prosecutor, the Court held that a violation of the Fourteenth Amendment required evidence that peremptory challenges were used by prosecutors to systematically exclude Black jurors case after case, such that Black jurors *never* served on juries in that jurisdiction.²⁸ The Court's decision in *Batson* found the prosecution's use of peremptory challenges on the basis of race to violate the Equal Protection Clause, and further found that evidence from the defendant's own case was sufficient to create a *prima facie* case of such a violation.²⁹ Though the petitioner had not attempted to overturn *Swain*, arguing instead for reversal on Sixth Amendment grounds, the Court took the opportunity to address the violations of the constitutional rights of the defendant and the excluded jurors, both of whom were entitled to equal protection under the law.³⁰ Thus, the *Batson* Court rooted its decision in the Equal Protection Clause of the Fourteenth Amendment.³¹ The constitutional violation did not just implicate the rights of the accused, but also those of the excluded jurors. The Court reasoned that because a person's race "is unrelated to his fitness as a juror,"³² both the defendant and the juror suffered from such exclusion, and the subsequent lack of confidence would harm the entire community.³³

Under the rule established by *Batson*, the defendant must create the inference that the strikes were utilized based on race, establishing this inference with the removal of the veniremen, the fact that peremptories are susceptible to discriminatory use, and any other relevant circumstances.³⁴ If the court finds, under the totality of the circumstances, that a *prima facie* case has been established, the

²⁸ *Id.* at 223–24.

²⁹ *Batson v. Kentucky*, 476 U.S. 79, 95 (1986).

³⁰ *Id.* at 88.

³¹ *See id.* at 85 ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.")

³² *Id.* at 87 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

³³ *See id.* ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror . . . [and] undermine[s] public confidence in the fairness of our [justice] system . . .").

³⁴ A petitioner can make a *prima facie* showing of purposeful discrimination by demonstrating that he is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove veniremen of the petitioner's race. The petitioner may also rely on the fact that the highly discretionary nature of peremptory challenges often provides an opportunity for discrimination. *Id.* at 96.

burden shifts to the prosecution to refute the inference.³⁵ The prosecutor can then articulate any race-neutral reason for the strike;³⁶ such a reason need not be of the nature required to challenge jurors for cause.³⁷ The court then decides if the inference of discrimination is sustained.³⁸

Batson was later expanded to include race-based peremptory strikes even where defendants are not members of the excluded racial group,³⁹ gender-based strikes,⁴⁰ and use of such strikes by defense counsel.⁴¹ However, while the reach of *Batson* was extended, its practical import was undermined by later cases. Though the Court did not require that defendants show a probable inference of discrimination,⁴² it allowed the prosecution to proffer any race-neutral justification to meet its obligation under *Batson*'s second step—even if that reason

³⁵ *Id.* at 97.

³⁶ *Id.* at 98.

³⁷ *Id.* at 97. Bases for raising challenges for cause vary, but generally include having some connection to a party involved in the case or the case itself, failing to meet the legal qualifications for service in that jurisdiction, or raising some concern as to whether the juror would be impartial in deciding the case. *See, e.g.,* 47 AM. JUR. 2D *Jury* § 200 (2006) (“A defendant has the statutory right to challenge for cause any juror harboring actual bias or the inability to remain fair and impartial. . . . [They may object] to a prospective juror on the ground that he or she does not have the qualifications required by the statute governing jury service.”). For instance, in capital punishment cases, prospective jurors can be challenged for cause when they are found to be categorically unable or unwilling to sentence the defendant to death if found guilty. *Lockhart v. McCree*, 476 U.S. 162, 165 (1986). While peremptory challenges are limited in number but not scope, challenges for cause are permitted under narrow grounds but have no limit in number. *See Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981) (“The challenge for cause is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror. The peremptory challenge . . . serves to remove jurors who, in the opinion of counsel, have unacknowledged or unconscious bias.”). Together, challenges for cause and peremptory challenges are supposed to ensure that the accused has a fair and impartial jury. *See id.* (describing twofold objectives of peremptory challenge and challenges for cause as ensuring that “when a jury is finally chosen it will perform its duties in a fair and unbiased manner [and] that the parties and the public will have confidence in the impartiality and integrity of the jury”).

³⁸ *See infra* note 54 and accompanying text (explaining that defendant could prevail even where the prosecutor has offered a race-neutral reason by showing that the reason is pretextual).

³⁹ *See Powers v. Ohio*, 499 U.S. 400, 415 (1991) (extending *Batson* to all petitioners, regardless of race).

⁴⁰ *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 129 (1994) (extending *Batson* to gender-based strikes).

⁴¹ *See Georgia v. McCollum*, 505 U.S. 42, 48–59 (1992) (extending *Batson* to violations by defense counsel).

⁴² *See Johnson v. California*, 545 U.S. 162, 168 (2005) (overruling a California rule requiring petitioners to prove that strike was “more likely than not” based on impermissible reason).

was minimally persuasive.⁴³ Thus, the Court gave trial courts license to accept even those reasons that were not compelling.⁴⁴ Later, however, the Court indicated that reviewing courts should conduct fact-intensive reviews of the circumstances surrounding challenged *Batson* strikes⁴⁵ and consider evidence beyond the four corners of the case.⁴⁶

In actuality, *Batson* and its progeny have done little to substantially decrease the discriminatory use of peremptory challenges.⁴⁷ Because parties can assert almost any reason, even those that are thinly veiled proxies for race that are facially neutral,⁴⁸ discrimination has not been curtailed. Even *Batson*'s low standard is often not effectively challenged by defense counsel,⁴⁹ a pattern that is at least partially due to the poorly resourced indigent criminal defense system.⁵⁰ Indeed, when the Supreme Court, in *Gideon v. Wainwright*, extended the right to counsel to all criminal defendants—regardless of their

⁴³ See, e.g., *Purkett v. Elem*, 514 U.S. 765, 769 (1995) (per curiam) (upholding challenge based on juror's "long, unkempt hair").

⁴⁴ See *id.* at 767–68 ("The second step of this process does not demand an explanation that is persuasive, or even plausible."); see also Bellin & Semitsu, *supra* note 8, at 1097–99 ("[M]any of the race-neutral criteria upheld in [the authors'] survey played into racial stereotypes and might reflect subconscious bias.").

⁴⁵ See *Snyder v. Louisiana*, 552 U.S. 472, 479–84 (2008) (finding the trial court had erred in rejecting a *Batson* challenge given all relevant circumstances, including the fact that one of the proffered reasons applied to other jurors who had not been struck).

⁴⁶ See *Miller-El v. Dretke*, 545 U.S. 231, 264–66 (2005) (relying on, among other relevant factors, the prosecutor's use of a jury selection manual that emphasized race and the State's practice of differential questioning of prospective Black jurors, to find the *Batson* challenge should have been upheld).

⁴⁷ See EQUAL JUSTICE INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 5 (Aug. 2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf> ("Racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases."); see also Bellin & Semitsu, *supra* note 8, at 1093 (concluding that *Batson* has neither achieved its goal of eliminating race-based peremptory challenges nor is capable of doing so).

⁴⁸ For a discussion of this problem, see *supra* notes 7–8 and accompanying text.

⁴⁹ See EQUAL JUSTICE INITIATIVE, *supra* note 47, at 6 ("Many defense lawyers fail to adequately challenge racially discriminatory jury selection because they are uncomfortable, unwilling, unprepared, or not trained to assert claims of racial bias.").

⁵⁰ See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627 (1986) (explaining the severity of underfunding of indigent defense); Penny J. White, *Mourning and Celebrating Gideon's Fortieth*, 72 UMKC L. REV. 515, 517 (2003) (describing the crisis in indigent defense in the country's criminal defense systems). This problem is compounded because most criminal defendants are indigent. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, *SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES* 1 (2000) ("At the end of their case approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel."). Thus, the crisis in indigent defense implies a system-wide criminal justice crisis.

ability to afford it⁵¹—it unleashed an enormous requirement with little to ensure that the counsel provided would be effective in their duties.⁵² In some cases, defense counsel may even strategically abstain from making the objection because they do not want to draw attention to their own use of peremptory challenges in violation of *Batson*.⁵³

Despite *Batson*'s practical limitations, it provides an important basis for finding and sanctioning discrimination during jury selection. For instance, creative lawyers can attempt to show pretext in the prosecution's proffered reason by making analogies between the struck juror and another juror who was not challenged.⁵⁴ Further, questioning the challenge, even if the objection fails, may put the prosecutor on notice of the defense counsel's awareness or catch them off guard, prompting them to consider the implications of their actions. Consequently, when trial counsel fails to make the objection altogether, defendants lose even the slight protection that *Batson* does provide.

⁵¹ 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

⁵² See Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, 533 (2007) (asserting that “[o]ur public defense systems are slowly rotting away” and “grossly insufficient funding is the most fundamental factor keeping indigent defense in shambles”); Smith, *supra* note 25, at 92–93 (arguing that *Gideon*'s promise “that ‘every [person] charged with a crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense,’ remains unfulfilled.” (citation omitted) (quoting ANTHONY LEWIS, *GIDEON'S TRUMPET* 205 (1964))).

⁵³ See, e.g., Johnson v. Luebbers, No. 4:07CV690 CDP, 2009 WL 415539, at *7 (E.D. Mo. Feb. 18, 2009) (“In this case, the motion court noted that every peremptory strike utilized by trial counsel was against white veniremen. Thus, if trial counsel persisted in the *Batson* challenge, the State may have initiated a retaliatory challenge, so trial counsel chose not to press the issue.”); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 954 (2000) (“There is nothing unethical about using racial, gender, ethnic, or sexual stereotypes in criminal defense. It is simply an aspect of zealous advocacy.”); cf. Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 296 (2003) (challenging the belief that “a lawyer is duty-bound to do whatever it takes to obtain the best result for his or her client, even if that means overtly or covertly taking race into account in selecting jurors”).

⁵⁴ For instance, a lawyer may take the prosecutor's facially “valid” reason of a lack of secondary education for a potential juror of color and show that the prosecutor took no issue with the similar educational background of a White venireman. See, e.g., Bellin & Semitsu, *supra* note 8, at 1099 (“Of the eighteen successful posttrial *Batson* challenges we encountered, ten involved undeniable evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races.”).

B. *Strickland v. Washington and the Legal Fiction of the Right to Counsel*

The Sixth Amendment entitles defendants to effective assistance of counsel.⁵⁵ In 1984, the Supreme Court elucidated its standard for judging what “effective” actually means. *Strickland* created a two-prong test that must be satisfied to prevail on a claim that trial counsel was constitutionally ineffective.⁵⁶ First, under the “deficiency prong,” the defendant must show that his counsel acted outside the norm of “a reasonably competent attorney.”⁵⁷ Second, under the “prejudice prong,” he must show that his counsel’s actions were prejudicial and that there was a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁵⁸

The first prong is objective and, in practice, only satisfied if counsel’s actions are found to be outside “the range of competence demanded of attorneys in criminal cases.”⁵⁹ The *Strickland* Court noted that many lawyers operate using individualized strategies and tactics, and to second-guess these tactics ex-post would undermine the adversarial system.⁶⁰ The Court thus declared a prong so flexible and deferential that it provided little guidance for lower courts and little protection for claimants: While the Court announced that various professional standards and common practices would serve as a measuring stick for performance, it essentially placed the reasonableness inquiry in the hands of the profession at-large rather than making it a fact-based inquiry.⁶¹ Scholars criticize the *Strickland* standard for this broad definition of “reasonable” performance and its inability to combat the realities of indigent defense.⁶² Many critics argue for more

⁵⁵ See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“For that reason, the Court has recognized that ‘the right to counsel is the right to the effective assistance of counsel.’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970))).

⁵⁶ *Id.* at 687.

⁵⁷ *Id.* (quoting *McMann*, 397 U.S. at 770). *Strickland* claims are made on appeal, by petitioners who have obtained or been appointed post-conviction counsel, or by pro se litigants.

⁵⁸ *Id.* at 669.

⁵⁹ *Id.* at 687 (quoting *McMann*, 397 U.S. at 771).

⁶⁰ See *id.* at 688–89 (stating that detailed rules for counsel’s conduct would interfere with constitutionally protected independence of counsel and restrict latitude given to counsel to make tactical decisions).

⁶¹ See Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 23–24 (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. This says nothing more than that lawyer conduct is to be evaluated by what lawyers do. As such, it is not helpful.” (footnote omitted)).

⁶² See *supra* note 50 (describing the inadequacy of indigent defense). For a comprehensive discussion of the current state of indigent defense in this country, see

formalized metrics of performance and mechanisms for ensuring that lawyers perform accordingly.⁶³ Outside the realm of those claims with which this Note is concerned, attorneys' actions that courts have deemed strategic and reasonable have ranged from questionable decisions, like choosing not to call witnesses, to outrageous behaviors, like sleeping during the trial.⁶⁴ Actions that have not been found to be a reasonable strategy include the failure to investigate⁶⁵ or to inform the defendant of the immigration consequences of a plea decision.⁶⁶ Finally, ignorance of the law, including controlling constitutional and evidentiary standards, is usually considered outside the bounds of reasonableness.⁶⁷

The second prong requires a "reasonable probability" that the attorney's actions affected the outcome of the trial. This "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome."⁶⁸ This heavy burden rests in the defendant's hands,⁶⁹ often the person least equipped to carry it because doing so requires proof that is not readily available in the trial record. In fact, Justice Marshall, in his dissent in *Strickland*, argued that the prejudice prong was antithetical to the fair trial guarantee.⁷⁰ Often, poor law-

generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

⁶³ See, e.g., Backus & Marcus, *supra* note 62, at 1129 (arguing that state and local bars should take an active role in leading and advocating for indigent defense reform); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1466 (2003) (arguing that public defenders must begin the process of formulating standards for quality defense practice).

⁶⁴ For a description of conduct that has been found reasonable under *Strickland*, see *supra* note 14 and accompanying text.

⁶⁵ *Wiggins v. Smith*, 539 U.S. 510, 533–34 (2003) (concluding that counsel's incomplete investigation of petitioner's background for potential mitigating evidence to be presented at sentencing was unreasonable and failed to satisfy performance prong of *Strickland*).

⁶⁶ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485–86 (2010) (holding that the failure to inform the client of the potential risk of deportation as the result of a plea deal constitutes deficient performance under *Strickland*).

⁶⁷ See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (finding counsel's failure to conduct pretrial discovery unreasonable where counsel mistakenly believed that the State was required to turn over inculpatory evidence).

⁶⁸ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

⁶⁹ See *COLE*, *supra* note 7, at 78 (noting that the burden of demonstrating prejudice rests on the defendant, in contrast to showings of other constitutional violations where the government ultimately bears the burden to prove harmless error).

⁷⁰ See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (arguing that it is "[s]enseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice"); see also Kelly Green, Note, "There's Less in This than Meets the Eye": *Why Wiggins Doesn't Fix Strickland and What the Court Should Do Instead*, 29 VT. L. REV. 647, 647–48 (2005) ("[Justice] Marshall thought that having ineffective counsel—without an additional showing of prejudice—was enough to constitute a violation of the Sixth Amendment.").

ying will not show up in the record.⁷¹ Furthermore, there is no guarantee that the defendant will have counsel on appeal, or that any provided appellate counsel will be able to ferret out ineffective trial counsel.⁷² Finally, as this prong is also analyzed under a highly deferential standard, appellants making a *Strickland* claim are even more hard-pressed to find reviewers of fact who will see and validate the merits of their claim.

The two prongs of *Strickland* often work together to ensure that a wide range of faulty lawyering may be found reasonable and effective. Both prongs must be satisfied, and the reviewing court need not analyze the prongs in order; it can dispose of a case by moving directly to the prejudice prong and finding the claim meritless on that basis without considering whether the attorney's actions were reasonable.⁷³ Despite this obstacle, *Strickland*'s bleak outlook has been improved by developments in its application to plea-bargaining, immigration, and capital cases.⁷⁴ This gives some hope that the right to effective assistance of counsel may become increasingly more meaningful.

Having discussed the background, basis, and unmet promises of *Batson* and *Strickland*, I turn now to their intersection. Though it is at the juncture of these two standards that we see the limitations of the decisions placed in stark relief, an assessment of the possible standards for evaluating *Batson*-related IAC claims provides an opportunity to reemphasize their goals.

⁷¹ See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (“The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.”).

⁷² Just as good lawyering will not appear in the record, bad lawyering will also not be apparent when transcripts only note what was actually said on the record and not everything that was perceived or occurred in the courtroom. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 689 (2007) (“[Most] jurisdictions do not allow defendants to open or supplement the trial court record to support [direct appeal] claims Quite often, ineffective assistance of counsel claims are based on what the trial attorney failed to do. Therefore, information outside of the record is essential to support the claim” (footnotes omitted)).

⁷³ See *Strickland*, 466 U.S. at 697 (“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court . . . to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.”).

⁷⁴ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (finding a valid IAC claim where defense counsel failed to inform client of the possible deportation consequences of a guilty plea); Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 526–32 (2009) (noting the Supreme Court's different reception of IAC claims in the recent death penalty cases of *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000)).

II

THE INTERSECTION OF *BATSON* AND *STRICKLAND*

He probably had a good reason, the judge thought. The prosecutor probably had a good reason for each of the peremptories he used against the six prospective Black veniremen and the one Hispanic venireman. And as far as the judge could tell, the evidence against the Black defendant was substantial enough that this entire voir dire was just another procedural step on the road to sentencing. He briefly thought about asking the prosecutor about his challenges, but then again, it wasn't his job to require such an explanation sua sponte. Besides, he had known this particular prosecutor for years, and he was confident that the prosecutor would never dismiss veniremen based on race. The prosecutor wasn't a racist, so he must have a perfectly legitimate reason. Now that he thought about it, most of the people the prosecutor had dismissed had a twinge of something like defiance or sympathy in their voice or posture. They just didn't seem impartial. He looked over at the defense counsel and waited to see an objection to the prosecutor's actions. There was none. Well, if the defense counsel didn't raise a problem, then he would assume there was no problem. He never looked at the Black defendant to gauge his reaction to this process, to see if the Black man was frustrated, resigned, or indifferent. After all, the evidence was obviously substantial, and any jury would find him guilty anyway . . .

As Venireman Number Twenty-one exited the courtroom, he felt a mix of relief, confusion, and anger. He had not been looking forward to jury duty; it sounded incredibly boring and would require him to miss work. But it was a civic duty, part and parcel of being a United States citizen. Having been dismissed, he felt as if he had missed out on a sort of rite of passage. He had answered three questions before being told he could leave, with the judge smiling at him and the prosecutor waving him off. He didn't know why he had been dismissed, but his gut told him it had nothing to do with his occupation (store manager) or age (thirty-three) and everything to do with his skin color: Black. Three other prospective jurors had been excluded before him: another Black man (a substitute teacher), a Hispanic woman (a graduate student), and a White woman (a retired police officer). The Black man and the Hispanic woman had been dismissed by the prosecutor and the White woman by the defense counsel. But at least five jurors had stayed on, all White, including another store manager that he knew. It didn't make sense to him. Finally, he put all of these facts together, and though he couldn't be certain, one thing stood out as a possibility—he and the other two jurors excluded by the prosecutor had been dismissed because of their race. Venireman Number Twenty-one was angry and disappointed: He hadn't even

wanted to serve on the jury, but it was more than his civic duty. It was his right—or so he had thought.

A. *Batson Meets Strickland*

As mentioned above, though the *Strickland* test has two prongs, it does not matter which is considered first, as both must be satisfied for the defendant to prevail.⁷⁵ This Note concerns itself only with the prejudice prong, and as such, operates under the assumption that the deficiency prong is satisfied. Though I operate under the assumption, it is by no means certain that this prong will always be satisfied where *Batson*-related challenges are concerned.⁷⁶

Batson, as a procedural and substantive restriction in criminal cases, operates similarly to the exclusionary rule in Fourth Amendment jurisprudence.⁷⁷ Similar to the *Batson* doctrine, the standards of the exclusionary rule have been lowered so far in practice that they are often rendered useless.⁷⁸ However, countless defense lawyers

⁷⁵ *Supra* note 73 and accompanying text.

⁷⁶ Satisfaction of the deficiency prong could result from the fact that *Batson* is a controlling and well-known legal standard. Though *Batson* is widely known and a critical legal principle, it is not certain that all courts would believe that the failure to make such an objection is outside the wide range of reasonable trial strategy. However, there is a chance that satisfaction of this prong in the case of *Batson*-related *Strickland* claims may be more easily met. As courts look to the prejudice prong and find that a claim based on an unmade *Batson* objection is not so easily disposed of under either test, courts may be more inclined or even forced to give the deficiency prong a closer and more expansive look as well. For a discussion of the difficulties involved in the two tests, see *infra* Subparts III.A and III.B.

⁷⁷ The exclusionary rule was created to prevent the government from using evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments. See *Miranda v. Arizona*, 384 U.S. 436, 465 n.35, 478–79 (1966) (holding that evidence obtained from a defendant who is in custody, unless he has waived his Fifth Amendment rights, must be excluded, and also noting that any evidence obtained while a defendant is prevented from consulting with his lawyer violates the Sixth Amendment and must be excluded); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule for evidence obtained in violation of the Fourth Amendment to the States through the Due Process Clause of the Fourteenth Amendment); *Weeks v. United States*, 232 U.S. 383 (1914) (creating the rule for federal trials). The exclusionary rule has both its proponents and its critics. See, e.g., Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 751 (2000) (defending the rule because of its ability “to compel respect for the judiciary’s warrant-issuing prerogative”); L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 672 (1998) (“The unsavoriness of a rule that excludes highly probative evidence of a criminal defendant’s guilt has long been recognized.”).

⁷⁸ See, e.g., Gerald G. Ashdown, *Drugs, Ideology, and the Deconstitutionalization of Criminal Procedure*, 95 W. VA. L. REV. 1, 42 (1992) (stating that “[a]s the Supreme Court repeatedly limits the exclusionary rule and restricts the substantive scope of Fourth Amendment protection, whatever institutional mechanism the Fourth Amendment formerly served as a control on police investigatory practices is lost,” but noting that some states are providing greater protections than those required by the Court); Tonja Jacobi,

continue to make objections and file motions based on Fourth Amendment violations even in the face of this reality.⁷⁹ In fact, such motions are often considered standard practice in some “progressive” defender offices.⁸⁰ *Batson* objections, even when only remotely necessary, should also become standard practice.⁸¹

As *Batson* objections become more commonplace, the failure to make a challenge under *Batson* will be less easily construed as a strategic trial method, and the question of whether a *Batson*-related IAC claim will meet *Strickland*'s deficiency prong will be less debatable. Even now, some lawyers believe that cases are won and lost during voir dire; the failure to ensure that the jury has a diverse voice should be a central concern to any defense attorney regardless of his trial strategy later on.⁸² Furthermore, the inquiry for our purposes may turn on whether counsel can proffer a strategic reason for the decision

The Law and Economics of the Exclusionary Rule, 87 NOTRE DAME L. REV. 585, 587 (2011) (“[T]he Supreme Court has gradually narrowed the [exclusionary] rule through . . . a number of exceptions, including exempting knock-and-announce violations, creating a good-faith exception for court administrators, and extending that exception to police officers in certain circumstances.” (footnotes omitted)); Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 180–81 (2009) (arguing that “[a]s the justifications for the exclusionary rule became more deterrence oriented, limitations and exceptions were imposed on the rule’s application,” including the standing doctrine, which limits the exclusionary rule’s application; the restriction of the rule’s application to criminal trials; the impeachment exception; the harmless error doctrine; and the good-faith exception—“[t]he most far-reaching exception, which could eventually swallow the exclusionary rule”).

⁷⁹ In several public defender offices, there are standard motions based on the Fourth Amendment that are individually tailored and filed in almost every case, even given the trend towards inclusion. See, e.g., Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 422, 426 (2012) (finding that from 2005 to 2009, the government prevailed in ninety percent of Fourth Amendment claims involving federal appeals of the results of suppression hearings).

⁸⁰ Many offices have now created motions banks for use by their office and for training purposes for others. For example, the Public Defender for the District of Columbia has a brief bank. See, e.g., *FPD-DC Brief Bank*, FED. PUB. DEFENDER FOR D.C., <http://dc.fd.org/briefbank.htm> (last visited Mar. 31, 2014). The Florida Association of Criminal Defense Lawyers also has a bank available to members. See *Motions Added to the Motions Bank*, FLA. ASS’N CRIM. DEF. LAW., <http://www.facd.org/index.php/component/content/article?id=68:new-motions-added-motions-bank> (last visited Mar. 31, 2014).

⁸¹ Even a failed *Batson* objection can increase the defendant’s confidence in his lawyer and put the prosecutor on notice. The act of objection thus instills fairness into the process, at least in the eyes of observers and the most central participant in the proceeding: the defendant.

⁸² See, e.g., Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 948 (1998) (noting that prosecutors and defense attorneys alike realize that jury selection has “an important, even decisive, impact on trials, regardless of the strength of the evidence” and that “it is only a slight exaggeration to say that the battle over who sits on juries is a battle over the content of the criminal justice dispensed in this country”).

not to act (i.e., not to challenge a strike), which may be more difficult to justify than other trial strategies.

Insofar as the deficiency prong appears hard to meet, the prejudice prong should be viewed as an equally, if not more, stringent requirement. In plain terms, the inquiry is whether the defense counsel's ineffectiveness actually mattered at trial—not to the defendant, but to the trier of fact who must determine the verdict. *Strickland* is a standard that usually evaluates the effect on the trial outcome, as articulated in a finding of guilt or a decision to acquit. However, lower courts that have wrestled with *Batson*-related *Strickland* claims have used two competing standards: one composition-based and one outcome-based.⁸³

B. *Batson-Related Strickland Claims in the Lower Federal Courts*

Various courts have addressed *Batson*-related *Strickland* claims. Though some courts found the claims non-meritorious on other grounds, such as procedural default, many courts at least discussed the issue of how to adjudicate such a claim in dicta. Several courts indicated that evaluation of a *Batson*-related *Strickland* claim would look to whether the actual outcome of the trial was prejudiced.⁸⁴ For instance, one court found that the “unasserted *Batson* claim” had no bearing on the defendant’s guilt or innocence.⁸⁵ Another court, while acknowledging that it would “have more confidence in the verdict had it been delivered by a constitutionally composed jury,” denied the claim because the verdict was “substantially supported by the evi-

⁸³ See *infra* Part II.B (discussing these two competing standards).

⁸⁴ See, e.g., *Young v. Bowersox*, 161 F.3d 1159, 1161 (8th Cir. 1998) (“[Petitioner] has not shown a reasonable probability that the result of the proceeding would have been different, and his ineffective-assistance-of-counsel claim must fail.”); *Murray v. Groose*, 106 F.3d 812, 815 (8th Cir. 1997) (“Even assuming, *arguendo*, that Murray could demonstrate that his trial counsel was deficient in failing to attempt to rebut the prosecution’s race-neutral explanations for its peremptory strikes, he has not alleged that the outcome of his trial would have been different had his counsel done so.”); *Lara v. United States*, No. 11-5090-CV-SW-ODS, 2012 WL 1067693, at *3 (W.D. Mo. Mar. 29, 2012) (holding that the movant’s claim “that the selection of the jury was not ‘race-neutral’ and that counsel should have objected to it” failed since he did not show “how the outcome of his trial would have been different if counsel would have objected”); *Gipson v. Hubbard*, No. C 06-5463 SI (pr), 2009 WL 426215, at *9 (N.D. Cal. Feb. 20, 2009) (“[A] petitioner faulting counsel for failing to raise a *Batson* objection at trial must show a reasonable probability that a different jury would have decided the case differently.”).

⁸⁵ *Morales v. Greiner*, 273 F. Supp. 2d 236, 253 (E.D.N.Y. 2003). In their petition for habeas corpus, claimants were not entitled to relief for IAC based on trial counsel’s failure to make a *Batson* challenge, as this would not satisfy *Strickland*’s prejudice prong. *Id.*

dence” and the crime lacked “racial dimensions.”⁸⁶ These courts looked to the weight of the evidence presented at trial in determining whether a challenge would have had an effect and assumed that any jury would have found the defendant guilty based on the sheer weight of the evidence.⁸⁷

Other courts have indicated that the prejudice prong would be satisfied based on a showing that a different jury would have been seated.⁸⁸ These courts found that prevailing on a claim under this standard would require showing not just that a *Batson* claim should have been made but that it would have been meritorious.⁸⁹ In *Davidson v. Gengler*, for instance, the court found that even “if a *Batson* objection had been made it would have been properly overruled.”⁹⁰ The court in *Davidson* was careful to note that it would be improper to assume prejudice from the unmade objection because doing so “would create the unwarranted assumption that all *Batson* objections have merit.”⁹¹ In this case, the district court determined that the *Batson* objection at trial would have failed based on the record of a post-conviction

⁸⁶ *Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir. 1995); *see also Baldwin v. Johnson*, 152 F.3d 1304, 1315–16 (11th Cir. 1998) (quoting *Jackson* and failing to find prejudice where evidence of guilt was overwhelming).

⁸⁷ Indeed, courts using the outcome-based test often find the evidence compelling. *See, e.g., Johnson v. Yates*, No. CIV S-06-554 MCE CHS P, 2009 WL 2705877, at *12 (E.D. Cal. Aug. 25, 2009) (“While the overall evidence perhaps fell short of being ‘overwhelming’ with regard to petitioner’s guilt, . . . [i]n light of the strength of the prosecution’s case, it is difficult to see how another jury could have reached a different result.”); *Johnson v. Luebbers*, No. 4:07CV690 CDP, 2009 WL 415539, at *7 (E.D. Mo. Feb. 18, 2009) (finding that no evidence had been shown that the trial outcome would have been different given the “substantial evidence of Movant’s guilt”).

⁸⁸ *See, e.g., Guillen v. Scribner*, No. CV 05-4519 VBF(JC), 2010 WL 2509416, at *42 (C.D. Cal. Mar. 23, 2010) (finding that petitioner’s IAC claim failed because counsel’s failure to bring meritless motion was neither unreasonable nor prejudicial under *Strickland*); *Davidson v. Gengler*, 852 F. Supp. 782, 787 (W.D. Wis. 1994) (reconciling *Batson* and *Strickland* by applying *Strickland*’s prejudice prong to the outcome of a hypothetical *Batson* challenge); *see also Rivers v. Quarterman*, 661 F. Supp. 2d 675, 702 (S.D. Tex. 2009) (finding that petitioner could not meet *Strickland*’s prejudice prong without showing that the trial court would have dismissed the selected jury under *Batson*), *aff’d sub nom. Rivers v. Thaler*, 389 F. App’x 360 (5th Cir. 2010); *Williams v. Calderon*, 48 F. Supp. 2d 979, 998 (C.D. Cal. 1998) (rejecting petitioner’s IAC claim because he failed to show the unmade *Batson* challenge would have been successful, resulting in a different seated jury), *aff’d sub nom. Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002), *amended by* 384 F.3d 567 (9th Cir. 2004).

⁸⁹ *See, e.g., United States v. Chandler*, 950 F. Supp. 1545, 1557 (N.D. Ala. 1996) (“[T]he government’s use of strikes did not show racial discrimination. [Petitioner]’s potential *Batson* claims were without merit, and so his trial counsel’s failure to make them cannot serve as the basis for a claim of ineffective assistance.”), *aff’d*, 218 F.3d 1305 (11th Cir. 2000).

⁹⁰ *See Davidson*, 852 F. Supp. at 783 (concluding that a composition-based test was appropriate but still finding petitioner’s claim meritless).

⁹¹ *Id.* at 787.

hearing in which a *Batson* claim had been brought and evaluated before the appellate court.⁹²

This inquiry is even more difficult when the IAC claim is based on the failure to make a *Batson* claim where there is no hearing record to review. In such instances, the connection between the counsel's failure to seek a properly constructed and constitutionally valid jury by making a *Batson* challenge and the evidence available in the trial record will not be as clear-cut, as I will consider in the next Part. Below, I assess each of these approaches and argue that the composition-based test allows courts to focus not just on the rights of potentially excluded jurors but also on the right of the accused to a fair trial.⁹³ As further reason for the composition-based test, the outcome-based test would also require courts to shift from the Supreme Court's colorblind approach to the Equal Protection Clause.⁹⁴ Finally, the composition-based test is preferable to the outcome-based test because it enables reviewing courts to avoid the difficult task of determining whether a jury with a different racial makeup would have returned a different verdict.

III

THE STANDARD FOR EVALUATING PREJUDICE IN BATSON-RELATED STRICKLAND CLAIMS

The initial vote was 10 to 2. Ten jurors voted to convict, and two voted to acquit. The two holdouts—with the standard for reasonable doubt still ringing in their heads—were still not convinced. Four of the jurors had not doubted John Smith's guilt from the moment the trial had begun. They had overwhelming faith in the justice system, and they just didn't believe that police officers would arrest someone who was innocent, let alone that prosecutors would indict an innocent man. And, to them, the defendant looked guilty. John Smith looked like a criminal, and criminals had to go to jail. They had listened to all of the evidence, but it all pointed to a conviction. Even when the defense attorney had attempted to discredit almost every witness and every piece of evidence, they weren't persuaded. Why bother to ques-

⁹² The prosecutor used the "race-neutral" reason that the sole Black juror shared the surname of other Black persons from the community who were known to be criminals by his office. He did not question the juror about a possible familial relationship. The court relied on several cases to find that this was a permissible reason under *Batson*. It also relied on the clear error standard for appellate review. *Id.* at 789. The race neutrality of this strike is arguable. For a discussion of other reasons that have been found to be race neutral, see *supra* notes 7–8 and accompanying text.

⁹³ See *infra* Part III.B.1 (describing how the composition-based test ensures the protection of these rights).

⁹⁴ See *infra* notes 121–23 and accompanying text (describing this required shift and its effects).

tion the prosecutor's theory or version of the events? Four other jurors had entered the trial thinking that the defendant was probably guilty; still, they took their jobs as jurors seriously and knew that they had to listen to all of the evidence. They tried to open their minds, to carefully and critically examine the prosecutor's theory and case. But during the course of the trial, "probably" progressively became "beyond a reasonable doubt." It didn't help that they couldn't seem to connect with the defendant. There seemed to be an invisible wall between their experiences and his, and even when he took the stand, they just didn't find him as credible as all of the other (White, educated, or uniformed) witnesses that testified.

The last four jurors had attempted to clear their minds of preconceptions, and two of them initially voted to acquit. They took the presumption-of-innocence command seriously, and they constantly returned to it throughout the trial. With every piece of information that was introduced as an indication of guilt, they attempted to disregard or even force it to fit a theory of innocence. Whenever the defense counsel made a point, they filed it away and applied it when they could. They questioned and wondered as best as they could, but it was undeniable that they still leaned toward the prosecution's version of the events. They caught themselves often agreeing with him or being unsatisfied with the defense counsel's response or cross-examination. Though they thought about the presumption of innocence, they couldn't fully apply it. Still, in their minds they had done the best that they could—maybe the real problem was simply their common sense. Eventually, the ten convinced the other two, and the next day the foreman sent the judge a notice that they had indeed reached a unanimous verdict.

I now assess the outcome-based and composition-based approaches and argue that the composition-based test is preferable. I begin by evaluating the outcome-based test.

A. *The Outcome-Based Test*

The outcome-based test, which asks whether an unmade *Batson* challenge would have changed the trial verdict, is unsuitable for testing *Strickland*'s prejudice prong for at least three reasons: (1) It circumvents the protections envisioned by *Batson* and *Strickland*—to protect both the rights of potential jurors and the right of the accused to a fair trial;⁹⁵ (2) an analysis that seeks to fully evaluate the effects of

⁹⁵ These protections are at risk for circumvention even when courts acknowledge that a *Batson* error is a structural error. See *Gipson v. Hubbard*, No. C 06-5463 SI (pr), 2009 WL 426215, at *9 (N.D. Cal. Feb. 20, 2009) ("Even where the underlying problem is a structural error like a *Batson* error, a petitioner claiming that his attorney was ineffective for not making the objection must show prejudice under *Strickland* [A] petitioner . . . must

the unchallenged claim on the trial's outcome ignores the Supreme Court's colorblind approach to other equal protection claims;⁹⁶ and (3) while most courts using this method have simply looked at the weight of the evidence indicating guilt to determine the prejudicial effect,⁹⁷ faithful application of the outcome-based approach would require a deeper examination into the implications of race on jury deliberations and verdicts.⁹⁸ I will discuss each of these issues in turn.

1. *The Outcome-Based Test Inadequately Protects the Constitutional Rights of Potential Jurors and Criminal Defendants*

In *Batson*, the Court expressly set out to protect not just the rights of the defendant but also the equal protection rights of potential jurors who were excluded.⁹⁹ An outcome-based test ignores this second consideration and makes no mention of the rights of the potential jurors, therefore undermining *Batson*. The outcome-based test also weakens the *Strickland* protections. The *Strickland* Court noted that the requirement of effective assistance of counsel was in part an assurance of a fair trial for the accused.¹⁰⁰ A fair trial has been held to include being tried by a fair, impartial, and constitutionally-selected jury.¹⁰¹ Thus, when the defendant is deprived of effective assistance of counsel, and that ineffectiveness results in the seating of a jury that is not constitutionally selected, his right to a fair trial is doubly compromised.

show a reasonable probability that a different jury would have decided the case differently.”).

⁹⁶ For a discussion of the advent and use of the Court's colorblind approach, see generally Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007).

⁹⁷ See *supra* Part II.B (discussing cases that have used this rationale).

⁹⁸ This is particularly true in capital cases, where there are two phases of the trial—guilt and sentencing—and the jury must not just determine guilt but whether the defendant should be sentenced to death.

⁹⁹ For a discussion of the rights protected by *Batson*, see *supra* notes 30–33 and accompanying text.

¹⁰⁰ See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“In giving meaning to the requirement [of effective assistance of counsel] we must take its purpose—to ensure a fair trial—as the guide.”).

¹⁰¹ See *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (“[A] fair-cross-section venire requirement is imposed by the Sixth Amendment The fair-cross-section venire requirement is . . . derived from the traditional understanding of how an ‘impartial jury’ is assembled . . . [and] includes a representative venire . . . [that is] ‘drawn from a fair cross section of the community.’” (quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975))); *cf.* *United States v. Sampson*, 820 F. Supp. 2d 151, 168 (D. Mass. 2011) (“At the same time, with regard to decisions being made during the jury selection process, ‘an impartial jury is so fundamental to the Sixth Amendment right to a fair trial, [that] [d]oubts regarding bias must be resolved against the juror.’” (alterations in original) (quoting *United States v. Mitchell*, 568 F.3d 1147, 1154 (9th Cir. 2009) (Thomas, J., dissenting))).

The right to a trial by jury, and its role in the fair trial guarantee, is an essential part of our adversarial system of justice.¹⁰² The ultimate protection against oppression in the justice system is the right to be judged by a jury of one's peers.¹⁰³ The jury's importance stems from its role as fact-finder and fault-finder. While it is the judge who makes decisions about the law, it is the jury who decides what happened within the context of the law and social norms, and ultimately, in the case of a criminal trial, whether what happened constitutes a crime that should be punished.¹⁰⁴ Juries are imbued with the power to determine *who* is to be punished, even though it is the State, by virtue of its laws, that determines *what* is to be punished. We need look no further for the importance and power of juries in our criminal justice system than the phenomenon of jury nullification.¹⁰⁵ This power cannot be overestimated—juries are charged with deciding questions regarding vast sums of money, human liberty, and even whether a citizen will live or die. Juries are also afforded considerable discretion as they determine the merits of a case through private deliberation.¹⁰⁶ Their deliberations are forever secret—unless they choose to disclose them after the fact—and it is the jury, alone in a room with only the evidence, which decides and renders the verdict.

¹⁰² See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“[W]e believe that trial by jury in criminal cases is fundamental to the American scheme of justice . . .”).

¹⁰³ See *Taylor*, 419 U.S. at 530 (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”); see also Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 54 (2003) (“The right to jury trial . . . was a key concern of Revolutionary America. The jury was seen as much more than a factfinder; it was a valuable check on government action—including duly enacted criminal laws.”).

¹⁰⁴ See *Lockhart v. McCree*, 476 U.S. 162, 200 (1986) (Marshall, J., dissenting) (“The role of a jury in criminal cases . . . is not limited to [fact-finding]. The task of ascertaining the level of a defendant's culpability requires a jury to decide not only whether the accused committed the acts alleged . . . but also the extent to which he is morally blameworthy.”); Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1388 (1994) (noting the importance of a jury as fact-finder in criminal cases as articulated in *Duncan*).

¹⁰⁵ See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 142 (1988) (describing a jury's power to nullify when “the law under which a defendant is prosecuted conflicts with deep-seated contemporary values”). See generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (describing jury nullification, its history, and its rationale in the context of race).

¹⁰⁶ See Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1055–56 (1995) (“The jury is . . . independent, and because members . . . come together for only one case, they are able to approach the issue with a fresh eye. The jury . . . also engages in a dialogue, although it does not give reasons for its decisions, at least not to those outside the jury room.”).

Importantly, Supreme Court jury jurisprudence is grounded in both the Fourteenth¹⁰⁷ and Sixth Amendments.¹⁰⁸ The former guarantees the right to participate in a jury through the Equal Protection Clause while the latter guarantees the right to be tried by a jury.¹⁰⁹ In this respect, the jury is both a protected entity and an entity that protects.¹¹⁰ This dual nature thus compounds the protection of the right to serve as a juror, the right to be tried by an impartial jury, and, by way of the Sixth Amendment, the right to effective assistance of counsel. The full protection of all of these rights necessarily relies on the existence of a jury that is fairly and constitutionally selected. In many cases, having effective counsel is what safeguards the other protections underlying the right to a fair trial, as it is the defendant's counsel who often must recognize and assert the fact that the right is at risk. This is true of *Batson* objections, and of having effective counsel at jury selection in general, as it is the attorney who must be cognizant of the protections granted under *Batson* and assert them on behalf of the client, especially when that client is unaware of the law. Conversely, the right to counsel also relies on the jury because the counsel's effectiveness is necessarily intertwined with the jury's role of fairly and impartially deliberating on the evidence and arguments, which counsel must present and make in a manner most favorable to his client. Because the outcome-based test fails to recognize the crucial connection between these two components of the fair trial guarantee and thus undermines that right, the outcome-based test fails to satisfy and protect all of the rights discussed in *Batson* and *Strickland*.

¹⁰⁷ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87–89 (1986) (using the Equal Protection Clause to support the right of the accused to a jury that was seated free from racially-motivated peremptory strikes and to support stricken jurors' right to jury service).

¹⁰⁸ The Sixth Amendment guarantees criminal defendants a trial by jury. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). This amendment was extended to the States through the Fourteenth Amendment, and the Court has construed this guarantee in many cases. See, e.g., *Williams v. Florida*, 399 U.S. 78, 86 (1970) (holding that the Sixth Amendment was not violated by empanelling a six-person jury in a robbery trial); *Duncan v. Louisiana*, 391 U.S. 145, 159–62 (1968) (requiring jury trials for all nonpetty offenses).

¹⁰⁹ See U.S. CONST. amend. VI (granting the right to a jury trial in criminal cases); U.S. CONST. amend. XIV (granting to all persons "the equal protection of the laws"); see also *Batson*, 476 U.S. at 85 ("Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.").

¹¹⁰ See *Marder*, *supra* note 106, at 1046 (describing the Supreme Court's competing conceptions of the jury as a public institution that should be accessible and as an institution that protects the rights of the parties).

2. *Using the Outcome-Based Test Would Contradict the Supreme Court's Equal Protection Jurisprudence*

Lower courts following the outcome-based test have used a weight-of-the-evidence inquiry to determine whether a missed *Batson* objection is prejudicial under *Strickland*,¹¹¹ but this inquiry is wholly insufficient to determine whether the outcome of the trial would have been different had the juror not been excluded. The overwhelming evidence of guilt, as may be apparent to an appellate court, may not have been as clear to a juror sitting at the trial. Confined to the trial record, appellate courts cannot discern the demeanor, credibility, or tone of witnesses, and they cannot evaluate firsthand the compelling nature or lack thereof of any physical evidence.¹¹² Beyond the lack of firsthand knowledge of the trial, the appellate court also cannot adequately account for the individual biases and ideas, including those stemming from the racialized experiences of an excluded juror of color, in its review.

Juries are expected to be completely unbiased and impartial, but every juror enters the courtroom with a particular background, set of experiences, and preconceived notions.¹¹³ As such, due to the social construction of race and the unique life experiences it creates, jurors and jury deliberations are susceptible to the effects of race and racially motivated decision-making. Many scholars argue that societal and individual perceptions of differences between races persist.¹¹⁴ Further-

¹¹¹ For a discussion of lower federal court cases that applied the outcome-based test to *Batson*-related IAC claims, see *supra* notes 84–87.

¹¹² See *supra* note 72 and accompanying text (describing the difficulties of using cold records on appeal); see also COLE, *supra* note 7, at 122 (“It is notoriously difficult for an appellate court to second-guess a trial judge’s determination on [a prosecutor’s] credibility . . . , as the appellate court lacks the benefit of first-hand observation of the prosecutor’s demeanor.”).

¹¹³ See, e.g., Stephanie Domitrovich, *Jury Source Lists and the Community’s Need to Achieve Racial Balance on the Jury*, 33 DUQ. L. REV. 39, 39 (1994) (“Jurors read, analyze and interpret trial evidence and testimony through the language of their life experiences, knowledge and perception of cases. Jurors hear and see various versions of stories in the courtroom from witnesses, litigants and lawyers.”); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 700–01 (2002) (recognizing through an empirical study that “people’s backgrounds, life experiences, and perspectives shape the way they perceive cases”). This understanding of juror psychology implies that race, as a social construct, has significant and particularized effects on juror participation and deliberation. Thus, to speak of an impartial jury denotes a jury that can be impartial within the context of a society that has socialized them in particular ways.

¹¹⁴ See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 61 (1994) (“Races are . . . not biological groupings, but social constructions. . . . Walking down the street, our minds consistently rely on pervasive social mythologies to assign races to the other pedestrians. . . . Race has its genesis and maintains its vigorous strength in the realm of social beliefs.”).

more, people of color continue to be more impoverished, less educated, and more likely to be incarcerated as compared to their White counterparts.¹¹⁵ Under these circumstances, and equipped with the knowledge and history of inequity and inequality in this country, it is accepted, and even expected, that people from diverse backgrounds will perceive the world differently.¹¹⁶ More importantly, people with different racial backgrounds will view the closed universe of a trial differently and may make different decisions because of their distinct perspectives.¹¹⁷ A court using the outcome-based test misses this reality entirely.¹¹⁸

Under the Equal Protection Clause, the Supreme Court has explicitly prohibited race-conscious considerations in any governmental decision-making outside of narrow, compelling circumstances.¹¹⁹ Though the Court has accepted achieving diversity at public higher education institutions as one such compelling circumstance, it has rejected race-based considerations elsewhere or required irrefutable evidence of inequity before these considerations can be made.¹²⁰ Given the Court's current colorblind approach to the Equal

¹¹⁵ See, e.g., *Report Sees 'Sobering Statistics' on Racial Inequality*, CNN (Mar. 25, 2009, 12:25 PM), <http://www.cnn.com/2009/US/03/25/black.america.report/index.html> (describing the findings of a report by the National Urban League that "Blacks remain twice as likely to be unemployed, three times more likely to live in poverty and more than six times as likely to be imprisoned compared with whites").

¹¹⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

¹¹⁷ See Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 351-52 (1994) (citing evidence of "in-group bias" as seen in jury outcomes based on racial makeup of jury, race of victim, and race of defendant).

¹¹⁸ Though gaining a better understanding of how race affects jury deliberations and trial outcomes is an extremely valuable and important endeavor that would do much to improve our criminal justice system and society as a whole, the outcome-based test will still fail to achieve all of the benefits of the composition-based test.

¹¹⁹ See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). While protecting a defendant's constitutional right to a trial by jury should also be considered a compelling state interest, it is unnecessary to rely on this argument. The composition-based test limits the strain on both courts and defendants alike while still protecting the rights of the accused and another compelling state interest: a diverse jury. See *infra* Part III.B.1-2 (explaining these protections).

¹²⁰ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (finding unconstitutional a city fire department's decision not to certify an exam because they believed it would have a disparate impact on people of color where they did not have strong evidence to support the belief); K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89, 90 (1999) (noting a "colorblind" approach by the Court has "systematically

Protection Clause,¹²¹ it is unlikely that the Court would accept the race-intensive considerations necessitated by the outcome-based standard. Because *Batson* is motivated by the Equal Protection Clause, such a departure from this doctrine is unlikely and could have far-reaching implications.¹²² The Court, by implementing a race-conscious standard even in this limited sense, would also have to take a hard look at other areas where it has avoided race-consciousness in favor of colorblindness.¹²³ In contrast, a composition-based standard, which does not require an intensive inquiry into race and its effect on the jury, not only allows courts to avoid a standard that relies on methodology currently considered constitutionally suspect, but is also aligned with the Supreme Court's preferred rationale for higher public education affirmative action: the attainment of diversity.¹²⁴

3. *The Outcome-Based Test Requires an Intensive Inquiry that Courts Are Ill-Equipped to Undertake*

Even if not deemed constitutionally problematic, a complete and careful evaluation of the effect of a potential juror's race on the trial outcome, as required under a properly administered outcome-based test, would have to be multilayered, incorporating both qualitative and quantitative measures and the use of statistics and speculative sociological theories about race, crime, punishment, and our justice system.¹²⁵ It is unclear whether such an analysis could be reliably conducted. There are currently no appropriate statistics regarding race

outlawed race-based affirmative action programs in the public arena" because of the difficulty of justifying their policies under a strict-scrutiny standard).

¹²¹ See Haney López, *supra* note 96, at 987 ("[T]he Supreme Court . . . has moved ever closer to a . . . colorblind conception of the Equal Protection Clause . . . demand[ing] the highest level of justification whenever the state employs a racial distinction, irrespective of whether such race-conscious means are advanced to enforce or to ameliorate racial inequality."); Pillai, *supra* note 120, at 89 (explaining how the United States now "depends exclusively" on a colorblind approach, which "mandates absolute government impartiality" on race and gender issues).

¹²² For a discussion of the equal protection basis for the *Batson* decision, see *supra* Part I.A.

¹²³ See *supra* notes 120–22 and accompanying text (describing these areas).

¹²⁴ The Supreme Court has deemed diversity to be a compelling state interest in its affirmative action higher education cases, beginning with *Regents of the University of California v. Bakke*, 438 U.S. 265, 314 (1978). For a broader discussion of the use of the diversity rationale in higher education, see *infra* Part III.B.2.

¹²⁵ See, e.g., Abbe Smith, "Nice Work if You Can Get It": "Ethical" Jury Selection in *Criminal Defense*, 67 *FORDHAM L. REV.* 523, 552–53 (1998) (noting that "ingroup bias" would suggest that African Americans empathize with each other and that this might be reflected in jury deliberations). Even then, the approach could be critiqued. Though race matters, it is not the sole determinant of any individual's ideas or perspective, but only an aspect that interacts with other background factors and identities that work together to create an individual's viewpoint.

and its effect on the role of the juror.¹²⁶ Certainly, there are indicators that could be useful in evaluating the effects of race on jurors' perception of trial evidence and deliberations. For instance, we could look to statistics about how people of color feel about police officers, who often testify in criminal cases, as a means for evaluating how credible jurors of color might find such witnesses on the stand.¹²⁷ Another possible inquiry could be based on studies that attempt to quantify perceptions of the criminal justice system as a whole or statistics denoting whether people of color are more or less likely than Whites to believe eyewitness testimony. But such statistics, which are not readily available, are also not very telling, as they could account for not just race, but also class and other differences. They also require an inferential leap if their implications are to be applied to every unique jury trial.

Because trials are complex and vary from case to case, it would be exceedingly difficult to create a statistical test that could incorporate and evaluate all possible scenarios, including all of the possible evidence and witness testimony that could be presented at any given trial. In other words, we face a situation where the data required to make a truly reliable outcome-based determination is unavailable. Sociological theories provide only an incomplete lens of evaluation, as they can provide general ideas but not case-specific applications. When faced with competing theories that differ on the severity and depth of the psychological and social effects of race, an appellate court would be unable to determine which theory was controlling in a particular trial and how much the viewpoints of other jurors would have been affected.

For these reasons, a thorough outcome-based evaluation is an improbable and administratively difficult mechanism for disposing of *Batson*-related IAC claims, especially when compared with the relatively easily conducted composition-based standard and its benefits.

B. *The Composition-Based Test*

In evaluating whether an unchallenged peremptory strike implicating *Batson* satisfies *Strickland*'s prejudice prong, courts should adopt a standard that asks whether there was an effect in the outcome

¹²⁶ While many studies indicate that racially diverse juries deliver verdicts that differ statistically from those rendered by racially homogeneous (i.e., all-White) juries, these studies do not systematically explore the reasons behind this phenomenon and how race impacts each phase or aspect of the trial. See, e.g., Bayer et al., *supra* note 23; John J. Francis, *Peremptory Challenges, Grutter, and Critical Mass: A Means of Reclaiming the Promise of Batson*, 29 VT. L. REV. 297 (2005).

¹²⁷ Cf. Coke, *supra* note 117, at 355 ("To understand that race and culture play a role in jury deliberations does not compel the conclusion that minority jurors are 'biased' against law enforcement or in favor of defendants.").

of jury selection. This approach is superior and appropriate for three reasons: (1) The composition-based test will ensure the guarantee of the constitutional rights protected by *Batson* and *Strickland*, (2) this approach is consistent with the Supreme Court's equal protection jurisprudence, and (3) it allows courts to avoid difficult questions regarding the effects of race on the trial by focusing solely on whether the missed objection would have been meritorious.

1. *The Use of the Composition-Based Test Will Ensure that the Defendant's Constitutional Right to a Fair Trial Is Not Rendered Illusory*

Criminal defendants are entitled to a fair trial by the Fourteenth Amendment.¹²⁸ An essential part of this guarantee stems from the seating and subsequent verdict of a fairly empanelled, impartial jury.¹²⁹ A jury empanelled through discriminatory means should never be deemed fair, constitutional, or impartial. However, if courts were to adopt the outcome-based test, the result of the trial could stand even if the jury were found to have been unconstitutionally empanelled, thus undermining the guarantee of a fair trial. In contrast, the composition-based test upholds this fundamental right to a fair trial by giving criminal defendants a meaningful opportunity to challenge the outcome of a case decided by an unconstitutionally empanelled jury. It also provides the opportunity to question the ineffectiveness of their trial counsel by giving teeth to the *Strickland* standard and the fair trial guarantee of the Sixth Amendment as a whole.¹³⁰ If based on an effect on the trial verdict, counsel error will often be deemed minimal and non-prejudicial.¹³¹ By finding prejudice on the basis of an effect on the jury selection process, the composition-based test gives renewed meaning to the "effective" counsel standard and encourages a more nuanced understanding of the *Strickland*

¹²⁸ See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process.").

¹²⁹ See *Irvin*, 366 U.S. at 722 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

¹³⁰ See *supra* Part III.A.1 (explaining how the fair trial guarantee includes the right to effective counsel and trial by an impartial jury and how these rights are further intertwined in the context of *Batson*-related *Strickland* claims).

¹³¹ See *supra* notes 68–73 and accompanying text (outlining the practical difficulties of prevailing on the prejudice prong). These difficulties, coupled with the inadequacies of the outcome-based test, will render a challenge using this test virtually meaningless.

standard that reflects current doctrine and trends in the legal profession.¹³²

The outcome-based test also fails to acknowledge *Batson*'s intent to uphold the rights of potentially excluded jurors. The composition-based test, by limiting the inquiry to whether jurors were improperly excluded and focusing on the actions of the prosecutor, places the ultimate burden of *Batson* where it belongs: on those who have made race-based challenges. Rather than requiring the defendant to show that the excluded juror may have changed the verdict, the composition-based test asks only whether the juror was wrongfully excluded on the basis of his race. The composition-based test thus upholds the rights protected by *Batson* and the Constitution.

2. *The Composition-Based Test Allows for Incorporation of the Court's Equal Protection Doctrine Through the Use of the Diversity Rationale*

The composition-based test allows courts to adhere to the Supreme Court's current equal protection jurisprudence and to account for the state's compelling interest in ensuring that juries are diverse.¹³³ As noted previously, the question of whether the racial makeup of the jury affected the outcome of a trial is an incredibly fact-intensive, race-based inquiry.¹³⁴ The composition-based test avoids this nearly impossible burden by asking whether the jury ultimately empanelled would have been made up differently had the *Batson* objection been made. Additionally, the composition-based test allows courts to exercise a more exacting review of these claims in a way that also furthers a compelling state interest: the empanelling of diverse juries.¹³⁵

The Supreme Court has embraced diversity as a compelling interest in its public higher education affirmative action jurisprudence.¹³⁶ Though the Court has embraced this rationale thus far only

¹³² See *supra* notes 73–74, 82 and accompanying text (noting the recent evolution of *Strickland* and attorney recognition of the importance of jury selection).

¹³³ See Joshua Wilkenfeld, Note, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004) (arguing that the state's compelling interest in diversity in higher education also applies to juries).

¹³⁴ See *supra* Part III.A.3 (describing the difficulty of this task).

¹³⁵ The fact that empanelling diverse juries reflects a compelling state interest is important because it indicates that the composition-based test can survive an equal protection challenge no matter the level of scrutiny.

¹³⁶ See Walsh, *supra* note 19, at 456 (“The Court’s holding in *Grutter*, that student body diversity is a compelling interest, resolved the debate among the lower federal courts as to whether *Bakke* was still valid precedent. Justice O’Connor’s majority opinion affirms Justice Powell’s holding in *Bakke*” (footnote omitted)). Some scholars argue that the

in the field of higher education,¹³⁷ the application of the rationale to the jury box is perhaps uniquely fitting.¹³⁸ There is no greater need for diversity than in the American jury, where we most pride ourselves on fairness and where we have already explicitly recognized the value of having a group of peers determine one's fate.¹³⁹ And where diversity

Court implicitly supported diversity even before *Bakke* and *Grutter*. See, e.g., Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 592–602 (2009) (tracing the history of the diversity rationale from the Court's desegregation cases to its present-day affirmative action cases).

¹³⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”). Some scholars believe that *Grutter* and the diversity rationale can be extended beyond higher education. See, e.g., Helen Norton, *Stepping Through Grutter’s Open Doors: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543, 547 (2005) (noting that *Grutter* “opens new doors to race-based decisionmaking”); David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 788–812 (2005) (arguing that the goal of diversity can be extended from higher education to other areas, including the workplace).

¹³⁸ The *Grutter* Court advanced several reasons for its adoption of the diversity rationale. First, diversity represented a means for ensuring that students gained exposure to different viewpoints, and this exposure could lead to the end of racial stereotypes. See *Grutter*, 539 U.S. at 330 (“These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’” (alteration in original) (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001), *rev’d*, 288 F.3d 732 (6th Cir. 2002), *aff’d*, 539 U.S. 306 (2003))). The Court also noted the importance of having government leaders, many of whom have legal educations, of diverse backgrounds. *Id.* at 332. The Court also placed special emphasis on the role of public universities in preparing students for citizenship and how diversity furthered that goal. See *id.* at 331 (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.” (citations omitted)). The jury box, as an incredibly important public institution essential to our justice system and thus society as a whole, should likewise be made available to all eligible persons. See Phoebe A. Haddon, *Does Grutter Offer Courts an Opportunity to Consider Race in Jury Selection and Decisions Related to Promoting Fairness in the Deliberation Process?*, 13 TEMP. POL. & CIV. RTS. L. REV. 547, 552 (2004) (“[L]ike the benefits of rich exchange that can flow from creating a diverse student body, it can be argued that having a diverse jury serves the deliberative process. Notably the unique and essential feature of the jury is its deliberative decision-making role.”); Wilkenfeld, *supra* note 133, at 2306 (“[T]he analysis justifying Michigan’s affirmative action program supports diversity as a legitimate criterion in the evaluation of jurors . . . because the criminal justice system serves functions of comparable importance to education, the possibility of extending the *Grutter* doctrine seems initially plausible.”).

¹³⁹ See *supra* notes 102–07 (describing the nature and function of juries). Further, many studies and scholars have noted the difference in conviction rates based on whether the jury was all-White and the whether the defendant was Black or White. See, e.g., Francis, *supra* note 126, at 298 (citing studies showing all-White juries “are more likely to convict a Black defendant” than a “diverse jury” and more likely to convict a Black defendant than a White defendant “charged with a similar crime”). Moreover, ensuring that there are diverse voices on the jury and that there is a significant number or “critical mass” of those voices ensures that these voices will be given real consideration during deliberation. See *id.*

as a rationale fails in other contexts, it can achieve immediately impactful results as applied to juries.¹⁴⁰

The diversity rationale has garnered much criticism for purporting to support and advance equality through affirmative action in higher education while actually stymying other efforts to achieve racial justice.¹⁴¹ However, the critique that diversity distracts from addressing underlying problems does not easily extend to the jury context in every respect.¹⁴² Because using the composition-based test will serve to ensure that people of color are not shut out of jury service through race-based peremptory challenges, this approach is not an attempt to avoid race and class barriers, but instead an attempt to remove one such barrier. Though there are class barriers to serving on juries (such as the loss of wages due to the minimal compensation

at 351 (describing this concept); Haddon, *supra* note 138, at 552 (drawing on *Grutter's* discussion of studies showing evidence of the value of a diversity of viewpoints in educational settings, and applying it to the need for "more than token" representation of "traditional under-represented perspectives" on juries).

¹⁴⁰ See Haddon, *supra* note 138, at 553–54 (noting that *Grutter's* language and the diversity rationale "creates the possibility for litigants to encourage courts to carry over the interest in a fair cross section at the venire stage to the composition of the jury" and "provides the impetus for courts not only to provide opportunities for more diverse juries but to give meaning to that outreach").

¹⁴¹ See, e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003) (describing these issues). As Professor Bell argued, the diversity rationale enables avoidance of racial and class barriers, invites further litigation by haphazardly approving or rejecting affirmative action policies, legitimizes other criteria that favor Whites in higher education admissions, and redirects attention from the barriers of poverty that will prevent access to higher education despite affirmative action programs. *Id.* at 1622. For a description of the possible historical and philosophical underpinnings of the value of diversity, see Michele S. Moses & Mitchell J. Chang, *Toward a Deeper Understanding of the Diversity Rationale*, 35 EDUC. RESEARCHER 6, 9 (2006) ("Despite charges by opponents of affirmative action that the diversity rationale is intellectually rootless and should not be used to justify public policy, we find a long and rich discussion about the idea of diversity among a set of notable philosophers."). Still others argue that it creates rather than dispels stereotypes for people of color and risks harming their academic performance. See *Grutter*, 539 U.S. at 372–73 (Thomas, J., dissenting) ("[O]vermatched students . . . find that they cannot succeed in the cauldron of competition. . . . [N]o social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'" (last two alterations in original) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment))).

¹⁴² This is not to say that the application of the diversity rationale to *Batson*-related *Strickland* claims will not have issues or garner any criticism beyond that mentioned here. The use of diversity as a rationale will often, if not always, run the risk of being co-opted in ways that do not always benefit the parties it was initially adopted to assist. However, if used correctly and with prudence, its risks can be mitigated.

provided to jurors),¹⁴³ they are not implicated by utilizing the diversity rationale to support the composition-based test.

Two components of the distraction critiques as applied to juries cannot be ignored. The utilization of the diversity rationale for jury service, even in this limited context, could allow commentators and jurists to ignore other instances of racial inequity that plague our criminal justice system. As juries become more diverse and courts give real effect to the requirements of *Batson* and *Strickland*, we may begin to believe that the criminal justice system is rendered fair by virtue of these diverse juries. This may occur despite substantial evidence that the problems of the criminal justice system extend far beyond the racial makeup of juries.¹⁴⁴ This test also will not serve to avoid litigation, as courts will necessarily differ in applying the composition-based standard, even if they are armed with the diversity justification. Despite these critiques, the use of this standard and the diversity rationale to support it are vital to the protection and enforcement of the rights of criminal defendants and potential jurors. As such, the composition-based standard should be implemented—albeit with precautions to ensure that distraction from other issues does not occur and that courts achieve some level of uniformity in carrying out this test.

Accepting the diversity rationale in the context of juries and *Batson*-related *Strickland* claims only means we accept that diversity can affect jury outcomes.¹⁴⁵ Specifically, to the extent that an unmade *Batson* challenge at trial would have resulted in a more diverse jury with a variety of viewpoints, we can accept that the preferable outcome would be a correctly empanelled jury with a diverse set of voices. In other words, because we have already recognized that diver-

¹⁴³ See Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 295–97 (2002) (describing the inadequacy of juror compensation).

¹⁴⁴ Numerous scholars have documented the various issues that plague our justice system, such as the disproportionately negative effects and interactions experienced by poor people and people of color, which is exacerbated by the underresourced indigent defense system and unfair sentencing practices. For an overview of these and many other problems, see generally COLE, *supra* note 7.

¹⁴⁵ I do not argue that the diversity rationale should be applied in such a way so as to ensure that juries have a certain composition; to do so would violate explicit prior holdings of the Court. See Wilkenfeld, *supra* note 133, at 2300–01 (“[W]hile the courts have refused to guarantee defendants the right to a representative petit jury, they are cognizant of the problems engendered by unrepresentative juries.”). I do argue that the rationale provides further justification for the use of a composition-based standard over an outcome-based standard. If diversity is a compelling value in higher education, then it should also be so in the jury box; the natural extension of this premise is that a prejudiced voir dire that thwarts diversity and incorporates discrimination is prejudicial and unconstitutional.

sity is a compelling state interest,¹⁴⁶ any test that seeks to achieve a diverse jury as its central concern should meet the compelling state interest requirement. What can be more compelling than the need to ensure actual and perceived fairness in criminal trials? As discussed above, because the outcome-based test is virtually unworkable and constitutionally questionable, it cannot further this interest. The composition-based test, meanwhile, provides a practical way of doing so. Moreover, if we incorporate the diversity rationale into the analysis of IAC claims for unmade *Batson* challenges, it can be extended to *Batson* challenges that are actually made. Armed with this rationale, courts may no longer feel compelled to accept the most dubious of reasons given for striking potential jurors—especially when those reasons have no real connection to the excluded individuals' ability to perform as jurors—thus reinforcing *Batson*'s goals of protecting both the defendant and potential jurors.

3. *The Composition-Based Test Requires an Inquiry that Is Easier to Administer than the Outcome-Based Test*

Though it still retains some complications, the composition-based test is simpler to administer than the outcome-based test. Furthermore, just as courts have improperly carried out the outcome-based test,¹⁴⁷ courts have also improperly executed the composition-based test. Properly determining whether the jury composition would have been different requires its own three-part inquiry. First, the voir dire record must be examined to determine which possible jury members were dismissed using peremptory challenges. Second, each juror's race must be identified. Finally, the trial transcript must be examined to determine if there is any context for the unmade challenge.¹⁴⁸ *Batson*

¹⁴⁶ See *Grutter*, 539 U.S. at 331–32 (“The United States, as *amicus curiae*, affirms that ‘[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.’” (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 176635, at *13)); cf. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1037–38 (2003) (“If diversity on the jury enhances its ability to consider a variety of perspectives in evaluating the evidence at trial, that ability is reduced when juries fail to reflect the diversity in the community from which they are drawn.”).

¹⁴⁷ See *supra* Part III.A (describing the inadequate method of courts in evaluating these claims using a weight-of-the-evidence approach under the outcome-based test).

¹⁴⁸ See *Padilla v. Jacquez*, No. EDCV 07-00353 DDP (SS), 2010 WL 2598130, at *14–15 (C.D. Cal. Apr. 8, 2010) (finding no unreasonable performance or prejudice where a court found a *Batson* challenge would have been unmeritorious given multiple instances in the record that could explain why jurors were struck, including family involvement with police shooting and financial concerns), *adopted by* No. EDCV 07-00353 DDP (SS), 2010 WL 2593517 (C.D. Cal. June 25, 2010).

challengers may establish a prima facie case that the peremptory challenges were discriminatory based on the totality of the facts and circumstances.¹⁴⁹ As such, if this three-part inquiry creates an inference that the prosecutor used race-based peremptory strikes, the composition-based test would support the finding of prejudice.¹⁵⁰ The inference could arise from the prosecutor's striking of all jurors of a particular race or an absence in the record of indications why the potential jurors were excused. A properly supported inference at the end of the inquiry should lead to the remand of the verdict and a hearing on the *Batson* claim, just as a properly-made but rejected *Batson* challenge can be appealed and remanded for a new determination of the *Batson* issue.¹⁵¹

Of course, there will be many instances where the above inquiry is impossible. Some trial transcripts will provide no information whatsoever about the jury selection process, or insufficient information to make any determinations about jurors' race or other facets of the inquiry. In fact, the very reason that the *Batson* case itself was remanded was to get information on the record regarding the use of the strikes at issue.¹⁵² As is the case where *Batson* objections are improperly decided,¹⁵³ in instances of *Batson*-related *Strickland* claims, the case should be reversed and remanded for determination of the *Batson* issue either when the defendant has alleged a prima facie case as discussed above or where the defendant cannot make a full showing due to the lack of information in the record. When a defendant asserts that the prosecution struck members of a particular race from the jury for unspecified reasons, the lack of information in the record to support his prima facie case should not be held against him. The basis of the IAC claim is trial counsel's failure to make an objection that otherwise would have led to more information on the record; thus, to penalize the defendant for not having this information

¹⁴⁹ See *supra* note 34 and accompanying text (describing a prima facie case of discrimination under *Batson*).

¹⁵⁰ Because this is not actually a *Batson* claim, but an IAC claim based on *Batson*, the full *Batson* inquiry is neither necessary nor dispositive. It is enough for a petitioner to show that a challenge should have been made—to which a neutral reason should have been proffered—for the reviewing court to find that a hearing on the matter is required.

¹⁵¹ See, e.g., *Coombs v. Diguglielmo*, 616 F.3d 255, 263, 265 (3d Cir. 2010) (holding that “the trial court failed to conduct a full and complete *Batson* third step analysis” and remanding to the district court for an evidentiary hearing).

¹⁵² See *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (“In this case, petitioner made a timely objection to the prosecutor's removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings.”).

¹⁵³ See *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1316–17 (11th Cir. 2003) (citing several cases that were reversed and remanded for *Batson* errors).

would be circular. Though there may be appropriate and legitimate reasons for the strikes at issue, those reasons cannot be determined without some type of evidentiary hearing—and the rights at issue are so fundamental as to make resolving this question through an adversarial hearing imperative.

Despite these potential issues, the composition-based test is still simpler to administer than the outcome-based test. The latter test requires evidence that may be impossible to obtain or inquiries that are too complex to administer.¹⁵⁴ Meanwhile, implementation of the composition-based test would require looking at the trial record or holding an evidentiary hearing, measures that are much simpler than evaluating the implications of race on the vote of every potential juror that was excluded. The inherent difficulties in the administration of the outcome-based test impede the test's ability to fulfill the mandates of *Batson* and *Strickland*. Furthermore, beyond ensuring the protections of *Batson* and *Strickland*, increasing jury diversity—which serves to increase fairness in the trial—can also be achieved by looking to whether the actual seated jury would have been different.

CONCLUSION

Months after John Smith's trial, his defense attorney faces the same prosecutor in a different case. As the prosecutor again seeks to strike all potential jurors of color in the venire, the defense attorney begins to notice a pattern. He is now suspicious that this prosecutor may be doing something wrong. He has an inkling of Batson from his public defender training, and he objects to one of the strikes based on Batson. The judge then looks to the prosecutor to proffer a constitutionally valid reason for his strike. The prosecutor barely manages, offering some assertion of "shiftiness" in demeanor; though this satisfies the judge, the prosecutor now knows that he is being monitored. Furthermore, the defense attorney's objection and the prosecutor's reason are now on the trial record and may yield grounds for appeal. The prosecutor even declines to strike the last two veniremen of color, and the seated jury looks somewhat different from the jury that decided John Smith's fate. Though only marginally different in racial makeup, this jury already lends a greater air of legitimacy to the trial and begins to inspire confidence in the accused that he might receive a fair trial. The defendant is also more confident in his lawyer, who is already proving himself a competent and effective advocate . . .

John Smith is filing an appeal. His appellate counsel thinks he may have a claim based on ineffective assistance of counsel, albeit a long shot. He was shocked to find out that John had no jurors of color

¹⁵⁴ For a discussion of these issues, see *supra* Part III.A.3.

decide his fate, especially being tried in a jurisdiction with thirty percent of its population comprised of people of color. When John told him that his trial attorney had raised no objections to the striking of all the veniremen of color using peremptory challenges, he decided to make a Batson-related IAC claim. Though he still couldn't be certain how it would play out given the standards, with his jurisdiction following a composition-based test, he was hopeful that he could get John an evidentiary hearing on the matter, where the prosecutor would be forced to provide some explanation for his actions. It didn't mean his conviction would be reversed or that he'd get a new trial, but at least it was something. He knew it would definitely be something to John Smith.

John Smith—and hundreds of real defendants like him—was given a constitutionally flawed trial. His lawyer, despite his good intentions, failed to challenge the prosecutor's apparently discriminatory use of peremptory strikes. As John's sole legal advocate, it was his duty to ensure that John received his constitutional guarantee to a fair trial, including a jury selected for nondiscriminatory reasons. His failure to do so should constitute ineffective assistance of counsel under the *Strickland* standard. That John was prejudiced by a constitutionally defective jury should be evidenced solely by determining whether his jury would have been different but for his counsel's error. To look at his trial record—including any evidence presented—and evaluate whether the objection would have affected the jury's verdict is too onerous a task and almost impossible to carry out. Nothing short of polling every single member of the venire could satisfy such a task. Instead, a composition-based standard accounts for the Supreme Court's desire to protect the rights of the criminal defendant and the jurors under the Equal Protection Clause. Finally, as the Supreme Court has long recognized the importance of diversity in higher education, there should be no hesitation to extend this rationale to the jury box, where diverse viewpoints and opinions are accepted, debated, and desired. In a justice system where the jury is so fundamental, a diverse jury is a prerequisite to legitimacy. A jury that is homogeneous in viewpoint, background, gender, or race would be little better than the singular, unchallenged viewpoint of a judge.

Neither *Batson* nor *Strickland* has lived up to its promise; this has never been more obvious than when these two decisions meet. I have argued that the composition-based test is preferable to the outcome-based test for analyzing whether the constitutional right to effective assistance of counsel has been violated where defense counsel has failed to challenge the prosecutor's discriminatory use of preemptory strikes. Though I have proposed a standard of evaluation to deal with

missed *Batson*-related IAC challenges, I also join the mass of commentators who have argued for more meaningful standards to lower the incidence of the underlying problems themselves—discriminatory use of peremptory strikes or poor lawyering.¹⁵⁵ The latter standards must be reevaluated and strengthened so that the rights of the accused to a fair trial and to equal protection of the laws can truly be guaranteed.

¹⁵⁵ In terms of *Batson*, there should be more rigorous scrutiny of prosecutors' reasoning, or even the abolition of peremptory challenges entirely. See, e.g., Hoffman, *supra* note 5, at 853 (arguing from experience as a state court trial judge that "peremptory challenges conflict with the most basic notions of individual liberty and individual responsibility inherent in the idea of trial by an impartial jury" and must be abolished). In terms of *Strickland*, state and national bar associations should promulgate uniform rules governing counsel effectiveness, and courts should adopt those standards as guidelines. *Supra* note 63 and accompanying text.