Race and Ambivalent Criminal Procedure Remedies

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I. INTRODUCTION

A prominent scholar recently observed, "The story of the development of our criminal procedure jurisprudence is largely a story about race."[1] One therefore might expect a robust body of race-conscious criminal procedure doctrine inviting lawyers and judges to explore racial inequities in the criminal justice system. But quite the opposite exists: race largely has played a background role to race-neutral doctrine in the world of constitutional criminal procedure. As an explicit constitutional claim, race has been confined to equal

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1. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 1 (2011). *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (examining "the linkage between the birth of modern criminal procedure" and several landmark criminal cases involving black Southern defendants).

protection violations under the Fourteenth and Fifth Amendments.[2] Therefore, to argue that racial injustice necessitates a criminal procedure remedy, a defendant must prove intentional discrimination against him or her on the basis of race—a difficult story to tell.[3]

Because of this demanding legal standard, one might expect to find clear criminal procedure remedies in place to sanction each and every proven equal protection violation. Yet, a fairly ambivalent picture of remedies exists. For example, the United States Supreme Court has not recognized an equal protection exclusionary rule, and several lower courts have rejected this proposed remedy. Many lower courts also have subjected racialized evidence and argument offered by prosecutors to traditional preservation and harmless error doctrine. As a result, equal protection violations, even if proven, often lack a meaningful criminal procedure remedy. If our criminal justice system is a story of race, lawyers will find little constitutional doctrine through which to tell this story in an individual defendant's case.

This paper theorizes that this framework reflects no accident in jurisprudence. On the contrary, courts appear committed to remedying equal protection violations in criminal cases when the violation harms an "innocent" victim, such as a juror during jury selection.[4] But, when the equal protection violation affects only the "guilty" criminal defendant, many courts revert to a position of ambivalence—not outright disregard, but mixed feelings of ambivalence contributing to notably hushed tones in criminal courts on the subject of race.[5] This judicial ambivalence, I will suggest, may reflect judicial deference to misguided utilitarian and moral premises about the role of race in our criminal justice system.

This paper will propose that courts instead should commit to remedying all equal protection violations in criminal cases, consistent with the nature and gravity of this wrong. To illustrate, this paper will highlight the concurring opinion of Washington State Supreme Court Chief Justice Barbara Madsen in

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2. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The U.S. Supreme Court has inferred a parallel equal protection right from the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

3. *See infra* notes 19-20 and accompanying text (explaining equal protection legal standards).

4. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 89 (1986); *see also infra* notes 80-82 and accompanying text.

5. *See* Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & CIV. RTS. L. REV. 29, 40-41 (2010) (reviewing authorities arguing that criminal court advocacy has become increasingly "colorblind" and "post-racial").

State v. Monday.[6] In *Monday*, Chief Justice Madsen argued that "[r]egardless of the evidence of [a] defendant's guilt, the injection of insidious discrimination . . . is so repugnant to the core principles of integrity and justice upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint."[7] This paper concludes that only this approach properly will curb and sanction intentional discrimination in criminal cases, and ensure that the law engages the important and ongoing story of race in our criminal justice system.

II. RACE, RIGHTS, AND REMEDIES

Racial bias has plagued, and continues to affect, the United States' criminal justice system. The early twentieth century criminal procedure cases from the U.S. Supreme Court responded to egregious incidents of racial animus and mistreatment in the criminal justice system.[8] In recent times, reported incidents of explicit racial animus in criminal prosecutions have become less open and commonplace—although they do still appear.[9] Nevertheless, racial bias remains a dominant topic in criminal justice discourse because of the profound racial disparities that exist at almost every stage of the criminal justice system. As numerous studies have demonstrated, minorities "are over-represented

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6. 257 P.3d 551, 558-60 (Wash. 2011).

7. *Id.* at 558-59.

8. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932); Moore v. Dempsey, 261 U.S. 86 (1923); *see also* Johnson v. State, 373 U.S. 61, 61-62 (1963) (vacating an African American defendant's contempt conviction for refusing to leave a segregated portion of a local courtroom reserved for whites); Klarman, *supra* note 1, at 50-77 (detailing four landmark criminal procedure decisions from the interwar period that involved "southern black criminal defendants convicted and sentenced to death after egregiously unfair trials").

9. *See, e.g.*, James C. McKinley, Jr., *In Houston, 2 Cases Raise Tough Racial Questions*, N.Y. TIMES, May 15, 2010, at A10, *available at* http://www.nytimes.com/2010/05/15/us/15houston.html (discussing incidents of racially-motivated police violence); *Seattle Cops Stomp on Detainee*, KIROTV.COM (May 6, 2010, 3:44 PM), http://www.kirotv.com/news/news/seattle-cops-stomp-on-detainee/nDRHc/ (reporting on a "videotape of two Seattle police officers stomping on an innocent detainee" while making racially explicit threats, including, "'I'm going to beat the f***ing Mexican piss out of you homey. You feel me?'"); Mosi Secret, *Officer Held in Civil Rights Case After Frisking*, N.Y. TIMES, Oct. 18, 2011, at A21, *available at* http://www.nytimes.com/2011/10/18/nyregion/officer-accused-of-civil-rights-violation-in-false-arrest.html (discussing the case of a white officer accused of falsely detaining an African American individual and making a statement to a friend that he "'fried another [ni**er]'"); *see also* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997) (discussing empirical evidence demonstrating that race is a dominating factor in police arrests, including a case where an informal group of Ohio police officers referred to themselves as the "'Special [Ni**er] Arrest Team'").

among those arrested and imprisoned in this country—practically everywhere, and for almost every type of crime."[10] The sources of these modern disparities

10. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, LAW & CONTEMP. PROBS., Summer 2003, at 71, 72; *see also* THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1, 22 & fig.1 (2d ed. 2008), *available at* http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf; M.K.B. Darmer, *Teaching* Whren *to White Kids*, 15 MICH. J. RACE & L. 109, 111-12 (2009) (summarizing data correlating race and the criminal justice system); Kirwan Inst., *Fourteen Examples of Systematic Racism in the U.S. Criminal Justice System*, RACE-TALK (July 26, 2010), http://www.race-talk.org/?p=5185 (identifying loci of discrimination in the criminal justice system); Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, PROPUBLICA (Dec. 3, 2011, 11:00 PM), http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites/single (reporting on racial disparities in presidential pardons and finding that "[w]hite criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities," and "[b]lacks have had the poorest chance of receiving the president's ultimate act of mercy"). For one example of this modern discourse, consider the debate over the New York City Police Department's "stop-and-frisk" program. Matthew Deluca & Jose Martinez, *NYPD's Stop and Frisk Tactics Protested in Harlem; Princeton Prof. Cornel West Among Those Arrested*, N.Y. DAILY NEWS (Oct. 21, 2011), http://articles.nydailynews.com/2011-10-21/local/30326087_1_latino-protesters-frisk-cornel-west; Rob Harris, *Officials Renew Call for U.S. Review of Stop and Frisk Policy*, N.Y. TIMES (Oct. 19, 2011, 4:33 PM), http://cityroom.blogs.nytimes.com/2011/10/19/officials-renew-call-for-u-s-review-of-stop-and-frisk-policy/.

There is also a significant amount of information available regarding state-specific instances of racial disparities. *See, e.g.*, Farrakhan v. Gregoire, 590 F.3d 989, 1012 (9th Cir. 2010) (finding that "Plaintiffs have demonstrated that [Washington] police practices, searches, arrests, detention practices, and plea bargaining practices lead to a greater burden on minorities that cannot be explained in race-neutral ways" and that "Plaintiffs' evidence suggests not only that Washington's criminal justice system adversely affects minorities to a greater extent than non-minorities, but also that this differential effect cannot be explained by factors other than racial discrimination"), *rev'd on other grounds en banc*, 623 F.3d 900; Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 47 GONZ. L. REV. 251, 265 (2012) (identifying racial disparities in Washington State at many different stages of the criminal justice system, from investigation, to charge, to bail, to plea bargaining, to sentencing, to post-conviction treatment); Michael Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. REV. 2119, 2144-45 (2011) (studying death penalty data in North Carolina and concluding that the odds of a death sentence for a suspect who kills a white person are three times higher than the odds for a suspect who kills a black person); Ben Poston, *Racial Gap Found in Traffic Stops in Milwaukee*, MILWAUKEE J. SENTINEL (Dec. 3, 2011), http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html (reporting on data demonstrating higher rates of traffic stops for African American and Hispanic drivers, particularly in Milwaukee where "[a] black Milwaukee driver is seven times as likely to be stopped by city police as a white resident driver"; also noting racial disparities in arrest rates after traffic stops and in issuance of warnings to drivers rather than formal citations).

may be complex and varied,[11] but few dispute that these racial disparities are significant.[12]

One might reasonably expect to find a host of race-conscious criminal procedure doctrine arising out of early- and mid-twentieth century jurisprudence, or in response to the modern crises of racial disparity in criminal justice. But not so. Rather, the Supreme Court addressed racism "indirectly through general constitutional standards that did not explicitly address race but that were nonetheless calculated to constrain racially motivated policies."[13] The Court thus developed largely objective, race-neutral constitutional standards "to regulate the everyday conduct of police officers, with an eye to the racial injustice that often pervaded the relationship between police and minority groups."[14]

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11. *See generally* Task Force on Race & the Criminal Justice Sys., *supra* note 10 (examining several contributing factors to racial disparities, including crime commission rates, structural and institutional racism, and bias).

12. Some commentators have appeared to minimize the policy significance of racial disparities in criminal justice by sourcing responsibility for these disparities largely with minorities. *See, e.g.*, Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 21, 2010, 9:16 PM), http://seattletimes.nwsource.com/html/localnews/2013226310_justices22m.html (reporting that Washington State Supreme Court Justices Richard Sanders and James Johnson "disputed the view held by some that racial disparity plays a significant role in [imprisonment] disparity"). But even these controversial comments do not deny the statistical significance of these disparities. By contrast, some observers have suggested that modern racial disparities in criminal justice have established a new Jim Crow era. *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010) ("[M]ass incarceration in the United States ha[s], in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."). *But see* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. (forthcoming Apr. 2012), *available at* http://ssrn.com/abstract=1966018 (reviewing authorities who use new Jim Crow analogies and noting that although the "analogy helps us see the toll that mass incarceration has taken on America's black communities," it also "obscures much that matters" about modern mass incarceration and "diminishes our understanding of the particular harms associated with the old Jim Crow").

13. Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1157-58 (1998); *see also* Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1628 (2006) ("By delimiting the constitutional contours of permissible everyday interactions, the Warren Court hoped to regularize those interactions, thereby diminishing the [racial] tensions they produced.").

14. David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 371 (2001).

Consequently, "[s]ince the Warren Court era, racial discrimination has grown increasingly muted as a constitutional basis for challenging police action."[15] For example, in *Whren v. United States*,[16] the Supreme Court held that racially discriminatory police investigations do not violate the Fourth Amendment.[17] "Subjective intentions," the Court concluded, "play no role in ordinary, probable-cause Fourth Amendment analysis."[18] Instead, as *Whren* makes clear, the Court has cabined stories of race in individual criminal cases to claims of discrimination under the Equal Protection Clause.[19] The right to equal protection perhaps does supply a natural legal home for stories of race. But equal protection claims also are notoriously difficult to prove in criminal cases because they require a defendant to prove intentional discrimination on the basis of race between otherwise similarly situated individuals.[20] The law thus severely limits the number of criminal cases where it will deem race relevant to a lawyer's advocacy and a judge's decision-making.

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15. Holland, *supra* note 5, at 35; *see also* Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851, 852 (2002) ("[L]aw enforcement's call for a drug war has influenced the United States Supreme Court to accept racial profiling and limit appellate review of police activity.").

16. 517 U.S. 806 (1996).

17. *See id.* at 813; Harris, *supra* note 14, at 376 (noting *Whren*'s basic message that "[w]hatever else the Fourth Amendment does or used to do, it will no longer serve as a tool to prevent racially biased policing"); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 362-86 (1998) (arguing that the Supreme Court's weakening of the Fourth Amendment has permitted many racially discriminatory police practices to continue without constitutional regulation).

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

19. *See id.* ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause . . . .").

20. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948-49 (2009); United States v. Armstrong, 517 U.S. 456, 465 (1996); McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987); Washington v. Davis, 426 U.S. 229, 239-42 (1976); Monroe v. City of Charlottesville, 579 F.3d 380, 388 (4th Cir. 2009) (identifying doctrinal grounds for an equal protection violation under Supreme Court jurisprudence); United States v. Benitez, 613 F. Supp. 2d 1099, 1101-02 n.3 (S.D. Iowa 2009) ("[T]he Court cannot conceive of a plausible means of satisfying this . . . legal standard short of either a candid admission by an officer or a comprehensive statistical study."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 788 (3d ed. 2009) (observing that under equal protection jurisprudence, "proving discriminatory purpose is very difficult; rarely will such a motivation be expressed and benign purposes can be articulated for most laws"); Capers, *supra* note 1, at 14 (commenting that while "the numbers *are* the argument" concerning racial profiling, "racialized policing is often subtle, [and] is rarely the product of intentional discrimination").

Yet, expecting that the law would seek to encourage advocacy and judicial decision-making in proven cases of intentional racial discrimination, one might assume that the law would remedy each and every equal protection violation. As Chief Justice John Marshall famously declared, "'[W]here there is a legal right, there is also a legal remedy . . . whenever that right is invaded.'"[21] Professor Karl Llewellyn put a more pragmatic point on this maxim about rights and remedies: "Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."[22] The law, however, has trended in the opposite direction, toward a narrow equal protection right working in tandem with ambivalent judicial remedies. These ambivalent remedies often leave even proven equal protection violations without legal consequence. The law therefore collectively fails to "incentivize and normalize attorney and judicial engagement with the subject of race."[23]

The following section will review the evidence of judicial ambivalence toward concrete remedies for proven claims of racial discrimination in different stages of the criminal process. The paper next will contrast this ambivalence with the judiciary's approach to jury selection. With jury selection, courts have remedied equal protection rights more consistently, but where the law also identifies the innocent juror as a victim of that unlawful discrimination. Concluding that this picture suggests that courts may undervalue the harm of racial discrimination when it is directed solely at the defendant, this paper will argue that the law consistently should remedy proven equal protection violations in criminal cases.

III. AMBIVALENT JUDICIAL REMEDIES

A. *Police Investigations*

Defendants may claim racial discrimination during a police investigation. These claims commonly assert that the police impermissibly have targeted an individual for investigation because of his or her race—a claim of racial

21. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (London, W. Strahan, T. Cadell & D. Prince 9th ed. 1783)).

22. K.N. LLEWELLYN, THE BRAMBLE BUSH 82 (1930).

23. Holland, *supra* note 5 (arguing that this framework has led to a type of post-racialism in criminal practice); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1063-64 (2010) (lamenting "a toothless equal protection remedy that, more often than not, will leave [defendants] with an unenforceable right").

profiling.[24] This "discrimination in policing is often manifested . . . in common police practices such as car and pedestrian stops, detentions, and searches."[25]

When proven, cases of intentional racial profiling violate the U.S. Constitution.[26] The traditional criminal procedure remedy for constitutional violations during police investigations is the exclusionary rule.[27] The Supreme Court's recent exclusionary rule jurisprudence emphasizes that the rule is justified in excluding evidence from the prosecution's case when it deters culpable police misconduct.[28] In this vein, few constitutional violations involve the degree of culpability of an equal protection violation: intentional discrimination against an individual because of his or her race. As an

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24. *See* Cooper, *supra* note 15, at 852 n.9 (describing racial profiling to include "three components: (1) a categorization of people with certain characteristics as a 'race'; (2) a 'profile' that describes the implications of someone's status as a member of a particular race; and (3) a 'profiler' who links the racial categorization to a profile and applies the profile to an individual"); *see also* April Walker, *Racial Profiling—Separate and Unequal Keeping the Minorities in Line—The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 591 (2011) ("In general, racial profiling is the target[ing] of specific racial groups as suspects in criminal activities based on the assumption that certain racial groups are predisposed to commit certain crimes.").

25. David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 102 (2007); *see also* Chavez v. Ill. State Police, 251 F.3d 612, 635 (7th Cir. 2001) (surveying various cases addressing racial profiling in the context of motor vehicle stops and searches); United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000) (en banc) ("A significant body of research shows that race is routinely and improperly used as a proxy for criminality, and is often the defining factor in police officer's [sic] decisions to arrest, stop or frisk potential suspects."); Capers, *supra* note 1, at 14-19; Maclin, *supra* note 17, at 346-52; Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 664 n.179 (1998) (reviewing authorities and noting that "[c]onsiderable evidence suggests that police use [minor] offenses as a reason to stop Black motorists they suspect of other crimes for no other reason than their race"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957-59 (1999); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 453-57 (2004).

26. *See* Johnson v. Crooks, 326 F.3d 995, 999 (8th Cir. 2003); United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997); Commonwealth v. Betances, 886 N.E.2d 679, 682 (Mass. 2008).

27. *See* Mapp v. Ohio, 367 U.S. 643, 646-61 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914).

28. *See* Davis v. United States, 131 S. Ct. 2419, 2427-28 (2011) (holding that "the deterrence benefits of exclusion var[y] with the culpability of the law enforcement conduct," and thus, under exclusionary rule precedents the "absence of police culpability dooms" a claim for suppression (first alteration in original) (internal quotation marks omitted)); Herring v. United States, 555 U.S. 135, 143 (2009) (identifying officer "culpability" as a critical factor in the exclusionary rule's deterrence rationale).

intentional, culpable violation of the Constitution, an equal protection violation thus would seem especially well suited to application of the exclusionary rule.[29]

The U.S. Supreme Court, however, "has not addressed whether the exclusionary rule applies to equal protection violations."[30] Several lower courts addressing the question have rejected the argument that the Equal Protection Clause includes an exclusionary rule remedy. For example, in *United States v Nichols*,[31] the police stopped Nichols's vehicle after running the vehicle's tags for outstanding warrants.[32] The police found a loaded handgun in the vehicle during the stop.[33] Nichols argued that the police checked his vehicle tags for warrants only because of Nichols's race.[34] The U.S. Court of Appeals for the Sixth Circuit agreed that "checking individuals for outstanding warrants in an intentionally racially discriminatory manner may violate the Equal Protection Clause."[35] Nevertheless, the court categorically rejected the availability of the exclusionary rule remedy, even for proven equal protection violations. Citing "the rule's 'costly toll upon truth-seeking and law enforcement objectives,'"[36] the court found exclusion unnecessary to deter the police from racial discrimination in criminal investigations.[37] The court concluded that aggrieved defendants instead should file civil suits under 42 U.S.C. § 1983.[38]

Although a handful of courts have embraced an equal protection exclusionary rule,[39] a number of the courts to address this question have sided

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29. Holland, *supra* note 5, at 57-58; *see also id.* at 57-68 (examining deterrence- and culpability-based cases for an equal protection violation); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1119-26 (2000) (positing that the exclusionary rule serves the function of deterrence and ensuring judicial integrity).

30. Holland, *supra* note 5, at 40; *see also* United States v. Williams, 431 F.3d 296, 299-300 (8th Cir. 2005) (noting that whether the Equal Protection Clause includes an exclusionary rule remains undecided); United States v. Lopez-Moreno, 420 F.3d 420, 434 (5th Cir. 2005) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause . . . ." (internal quotation marks omitted)); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004-05 (1998) (arguing for the application of the exclusionary rule as a remedy for equal protection violations).

31. 512 F.3d 789 (6th Cir. 2008).

32. *Id.* at 791-92.

33. *Id.* at 792.

34. *Id.* at 793.

35. *Id.* at 794.

36. *Id.* at 794-95 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

37. *Id.* at 795.

38. *Id.* at 794.

39. *See, e.g.*, United States v. Benitez, 613 F. Supp. 2d 1099, 1101 n.3 (S.D. Iowa

with the conclusion in *Nichols*.[40] As one prominent scholar observed following the *Whren* decision, "[w]e should . . . be troubled if the major effect of the move from regulating [racial profiling] . . . under the Fourth Amendment to regulating [it] under the Equal Protection Clause is to exclude the exclusionary rule as a remedial strategy."[41] Yet, this demonstrated lack of traction for an equal protection exclusionary rule reveals precisely this judicial ambivalence to the main criminal procedure remedy for constitutional violations committed during police investigations.

B. *Trial and Sentence*

Courts over the years have been asked to remedy numerous instances of racially discriminatory evidence and argument offered by the prosecution at trial or sentence. Courts began to treat these cases as substantive constitutional violations with more regularity during the civil rights era. For example, in one Texas case from the 1950s, the prosecutor argued during the defendant's capital rape trial: "'This Negro is a lustful animal, without anything to transform to any kind of valuable citizen, because he lacts [sic] the very fundamental elements of mankind.'"[42] The reviewing court declared: "[W]e do not think that this defendant has had a fair trial with such denunciations of the district attorney ringing in the ears of the jury who tried him."[43]

2009) (observing that "exclusion would seem to be the proper remedy [for an equal protection violation]," in part because of the difficulty of proving such a violation); United States v. Hartwell, 67 F. Supp. 2d 784, 792 (E.D. Mich. 1999) (indicating that, on proof of an equal protection violation, the "defendant would be entitled to have all evidence uncovered suppressed as a result of the search which arose out of the unconstitutional stop"); Commonwealth v. Lora, 886 N.E.2d 688, 699 (Mass. 2008).

40. *See* United States v. Harmon, 785 F. Supp. 2d 1146, 1150 (D.N.M. 2011) ("Even if there was evidence that [the police] purposefully discriminated against [the defendant] in stopping him, the Court does not believe that suppression would be an appropriate remedy . . . ."); United States v. Cousin, No. 1:09-CR-89, 2010 WL 338087, at * 5 (E.D. Tenn. Jan. 19, 2010) (finding that the magistrate judge's decision "correctly . . . precluded application of the exclusionary rule to a violation of the Equal Protection Clause"), *aff'd*, 448 F. App'x 593 (6th Cir. 2012); United States v. Foster, No. 2:07-cr-254-WKW, 2008 WL 1927392, at *4 (M.D. Ala. Apr. 28, 2008) (holding that the proper remedy for an equal protection violation is a 42 U.S.C. § 1983 action, not suppression); People v. Fredericks, 829 N.Y.S.2d 78, 78 (App. Div. 2007) ("[S]uppression of evidence is not a recognized remedy for [an equal protection violation] . . . .").

41. Karlan, *supra* note 30, at 2014.

42. Richardson v. State, 257 S.W.2d 308, 309 (Tex. Crim. App. 1953).

43. *Id.*

Claims of improperly racialized trial evidence and argument did not disappear following the civil rights era.[44] Yet, even in cases where courts agreed that the prosecution improperly injected race into a criminal case, many courts conditioned a remedy for these equal protection violations on whether the defendant preserved the error through objection and established that the violation prejudiced the defendant's case. Therefore, even in cases where courts did remedy the violation, these courts still voiced their ambivalence by requiring the defendant to demonstrate both timely assertion of the right to equal protection and prejudice as a condition to any remedy.

1. Preservation

When a defendant raises a legal error on appeal, the law typically demands that the defendant have preserved this error through an objection before the trial court.[45] This requirement ensures an adversarial record for the appellate court to review, gives the trial court an opportunity to correct the error during the trial, and prevents a defendant from "sandbagging" the court by "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."[46] If a defendant fails to object to the claimed error during trial, "his claim for relief from the error is forfeited."[47] As a result, "appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed."[48]

Some courts, however, have not required defendants to preserve "structural" or "systemic" errors for appeal: violations of a "law that a trial court has a duty to follow even if the parties wish otherwise."[49] In these cases,

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44. *See, e.g.*, Withers v. United States, 602 F.2d 124, 125-27 (6th Cir. 1979) (vacating a kidnapping conviction against two African American defendants because of the Assistant U.S. Attorney's summation argument that "'[n]ot one white witness has been produced in this case that contradicts [the victim's] position in this case'"); Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1212-14, 1233-35 (1992) (discussing case examples through the early 1990s, and dividing these cases into three categories of racial references at trial: "blatant slurs," "gratuitous references," and "comments serving a probative function").

45. *See* FED. R. CRIM. P. 51(b).

46. Puckett v. United States, 556 U.S. 129, 134 (2009) (internal quotation marks omitted); *see also* State v. Cruz, 122 P.3d 543, 553 (Utah 2005) (explaining the justification for the preservation requirement).

47. *Puckett*, 556 U.S. at 134.

48. *Id.*; *see also* FED. R. CRIM. P. 52(b) (identifying the "plain error" standard of review).

49. Harlow v. State, No. 08-08-00129-CR, 2010 WL 658447, at *1-2 (Tex. App. Feb. 24, 2010); *see also* Mendez v. State, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004)

"[a] defendant may complain on appeal that such a requirement was violated, even if he failed to complain or waived the issue."[50] Examples of structural or systemic violations of law include lack of personal and subject matter jurisdiction, complete denials of the right to counsel, a biased trial judge, denial of a public trial, or erroneous instruction on the reasonable doubt standard for conviction.[51]

One might imagine violation of the right to racial equality in a criminal prosecution as the type of structural or systemic error where courts would forego any preservation requirement. Indeed, our courts repeatedly have declared that "'discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice,'"[52] and the "'[r]acial fairness of the trial is an indispensable ingredient of due process and racial equality a hallmark of justice.'"[53] Courts further have emphasized that, "because of the risk that the factor of race may enter the criminal justice process, [courts must] engage[] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."[54] Accordingly, one might expect a racial discrimination claim during a criminal trial to constitute a non-waivable right, where the claim remains viable on appeal even if the defendant affirmatively consented to the error.[55]

(confirming that a "systemic requirement" of law may be raised on appeal even if not preserved); Marin v. State, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993), *overruled on other grounds by* Cain v. State, 947 S.W.2d 262 (Tex. Crim. App. 1997) (explaining that procedural default rules cannot apply to rights that are waivable only, or to absolute structural rights). *See generally* 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 103:1 (7th ed. 2012) (explaining that "[s]ome errors are so fundamental that they infect the entire trial process undermining its structural integrity," and that these errors "require automatic reversal regardless of whether . . . the error was properly preserved below"). *But see* Johnson v. United States, 520 U.S. 461, 465-66 (1997) (rejecting that a claim of structural error eliminates the preservation requirement, although noting that the claim may still be reviewed under the plain error standard); State v. Garcia, 597 S.E.2d 724, 745 (N.C. 2004) ("Structural error, no less than other constitutional error, should be preserved at trial."); *see also Cruz*, 122 P.3d at 549-50 (noting but not resolving the question of whether the preservation requirement is excused in cases of structural or systemic error).

50. *Harlow*, 2010 WL 658447, at *1-2.

51. *See* Neder v. United States, 527 U.S. 1, 8 (1999); Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993).

52. United States v. Doe, 903 F.2d 16, 21 (D.C. Cir. 1990) (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979).

53. United States v. Cabrera, 222 F.3d 590, 595 (9th Cir. 2000) (quoting *Doe*, 903 F.2d at 25).

54. *Doe*, 903 F.2d at 21 (quoting McClesky v. Kemp, 481 U.S. 279, 309 (1987), and Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

55. *Cf. Marin*, 851 S.W.2d at 279-80 (distinguishing between rights which are "waivable-only," such as the right to counsel, and structural requirements of law that may

Lower courts, however, have rejected racial discrimination claims on procedural default grounds for lack of preservation. For example, in *Saldano v. State*, the Texas Court of Criminal Appeals reviewed Saldano's challenge to evidence elicited by the State at the punishment phase of his capital murder trial.[56] The State's expert witness opined that Saldano's ethnicity correlated to a higher risk of future dangerousness, an aggravating death penalty factor under Texas law.[57] Saldano's conviction and sentence were upheld on direct appeal, where the State was represented by the County District Attorney's office.[58] The U.S. Supreme Court granted review and the Texas State Attorney General, representing the State for the first time, confessed error that this racialized evidence violated Saldano's right to equal protection.[59] The Supreme Court remanded the case to the Texas Court of Criminal Appeals "for further consideration in light of the confession of error by the Solicitor General of Texas."[60]

On remand, the Texas Court of Criminal Appeals noted that Saldano's trial counsel did not object to the State's evidence that Saldano was Hispanic and "'blacks and Hispanics are over-represented in the . . . so-called dangerous population.'"[61] The court observed that trial "objections promote the prevention and correction of errors,"[62] emphasizing further that "'[a]ll but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong.'"[63] Closely examining the nature of Saldano's racial discrimination claim, the court rejected the confession of error by the state attorney general to the U.S. Supreme Court. The court instead concluded:

> That the State refrain from introducing evidence that violates the defendant's rights under the Equal Protection Clause is neither an absolute, systemic requirement nor a right that is waivable only. . . . A defendant's failure to object to testimony prevents his raising on appeal a

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not be waived, such as jurisdiction).

56. 70 S.W.3d 873, 884-91 (Tex. Crim. App. 2002).

57. *See id.* at 884-85; *see also* TEX. CODE CRIM. P. ANN. art. 37.071, § 2(a)(1) (West Supp. 2011).

58. *See Saldano*, 70 S.W.3d at 875, 883; *see also* Saldano v. Cockrell, 267 F. Supp. 2d 635, 639 (E.D. Tex. 2003), *aff'd sub nom.* Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004).

59. *See Saldano*, 70 S.W.3d at 875.

60. Saldano v. Texas, 530 U.S. 1212 (2000) (mem.).

61. *Saldano*, 70 S.W.3d at 885.

62. *Id.* at 887.

63. *Id.* (quoting Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993)).

> claim that the testimony was offered for the sole purpose of appealing to the potential racial prejudices of the jury.[64]

Federal courts ultimately granted habeas relief to Saldano, but only after the Texas State Attorney General affirmatively waived this procedural default defense after representing the State again on the case's return to federal court.[65] The federal courts, however, still treated Saldano's claim as subject to traditional preservation requirements.[66] Other lower state and federal courts similarly have subjected racial discrimination claims to preservation requirements that, if not satisfied, deny defendants any remedy.[67]

2. Harmless Error

Even in cases where defendants have preserved an equal protection claim against racialized evidence or argument, most courts nonetheless apply harmless error doctrine to these claims. Harmless error doctrine reflects the view that legal errors that have not prejudiced a defendant should not entitle a defendant to a new trial or other relief.[68] The doctrine can be folded into two categories: non-constitutional errors and constitutional errors. With non-constitutional errors, the defendant typically must prove that the error prejudiced the outcome of the proceeding;[69] with constitutional errors, the

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64. *Id.* at 889.

65. *See* Saldano v. Cockrell, 267 F. Supp. 2d 635, 639-40 (E.D. Tex. 2003), *aff'd sub nom.* Saldano v. Roach, 363 F.3d 545 (5th Cir. 2004). The federal courts consistently refused to permit the county district attorney to intervene to defend the judgment against the state attorney general's confessions of error. After a new punishment phase, Saldano again was sentenced to death. *Id.* at 641; *Ex parte* Saldano, No. WR-41313-03, 2008 WL 152732, at *1 (Tex. Crim. App. Jan. 16, 2008).

66. *See Saldano*, 267 F. Supp. 2d at 642-45.

67. *See, e.g.*, State v. Monday, No. 60265-9, 2008 WL 5330824, at *6-7 (Wash. Ct. App. Dec. 22, 2008) (emphasizing, in affirming a murder conviction, that the defendant did not object to either the prosecutor's references to the "po-leese" with an offensive accent when questioning an African American witness, or the prosecutor's argument in summation about a "code" that "black folk don't testify against black folk"), *rev'd*, 257 P.3d 551 (Wash. 2011); *see also* Buck v. Thaler, 345 F. App'x 923, 927-29 (5th Cir. 2009); Gonzalez v. State, No. 05-04-00670-CR, 2005 WL 668230, at *1 (Tex. App. Mar. 23, 2005); Castaneda v. State, No. 10-03-00223-CR, 2004 WL 3008714, at *6-10 (Tex. App. Dec. 29, 2004).

68. *See* FED. R. CRIM. P. 52(a).

69. *See* United States v. Clifton, 406 F.3d 1173, 1179 (10th Cir. 2005) ("[N]on-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." (internal quotation marks omitted)); Simpson v. State, 876 P.2d 690, 701 (Okla. Crim. App. 1994) ("[T]he burden is on an appellant to show injury in most circumstances."); State v. Fisher, 202 P.3d 937, 947 (Wash. 2009) ("The burden rests on the defendant to show the prosecuting attorney's

prosecution must prove that the error was harmless.[70] Structural errors, however, are exempt from a requirement of prejudice, because "structural errors affect the very "'framework within which the trial proceeds, rather than simply . . . the trial process itself.'"[71]

Numerous appellate courts analyzing claims of racial discrimination have analyzed whether the error proved harmless, even when the defendant prevailed in obtaining some relief.[72] These decisions thus demonstrate a willingness to withhold any remedy if the defendant's case was not prejudiced by the violation.

Consistent with this premise, harmless error doctrine in some cases has justified no remedy whatsoever, even though the defendant presented a meritorious claim of racial discrimination. For example, one state's appellate court recently considered a challenge to the prosecutor's arguments at trial asserting the race of witnesses as a reason to discredit their testimony.[73] Even though the court found that "the prosecutor's comments were improper,"[74] the court nevertheless highlighted that "[the defendant] does not establish they

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conduct was both improper and prejudicial."); State v. Warren, 195 P.3d 940, 945 (Wash. 2008) (requiring the defendant to show that he was prejudiced by the prosecutor's improper trial arguments).

70. *See* Chapman v. California, 386 U.S. 18, 22 (1967) (announcing the harmless error standard for most constitutional errors); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

71. United States v. Cubelo, 343 F.3d 273, 281 (4th Cir. 2003) (quoting Neder v. United States, 527 U.S. 1, 8 (1999), and Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

72. *See, e.g.*, United States v. Vue, 13 F.3d 1206, 1213 (8th Cir. 1994); United States v. Cortez, 949 F.2d 532, 543 (1st Cir. 1991); United States v. Doe, 903 F.2d 16, 27-28 (D.C. Cir. 1990); Withers v. United States, 602 F.2d 125, 127 (6th Cir. 1979); Miller v. North Carolina, 583 F.2d 701, 705-06 (4th Cir. 1978); McFarland v. Smith, 611 F.2d 414, 419-20 (2d Cir. 1974); Haynes v. McKendrick, 481 F.2d 152, 161 (2d Cir. 1973); State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005) (applying the harmless error doctrine to all claims of racially discriminatory trial evidence or argument); *cf.* United States v. Cabrera, 222 F.3d 590, 595-97 (9th Cir. 2000) (applying the plain error standard); State v. Varner, 643 N.W.2d 298, 304-06 (Minn. 2002) (examining whether the defendant was "prejudiced" by a racial remark); Riascos v. State, 792 S.W.2d 754, 758-59 (Tex. App. 1990) (requiring the defendant to show, by a preponderance of the evidence, that his lawyer provided ineffective assistance by not objecting to the prosecution's focus on race and national origin).

73. State v. Monday, No. 60265-9, 2008 WL 5330824, at *6 (Wash. Ct. App. Dec. 22, 2008) (after witnesses acknowledged a "code" followed by some individuals against cooperating with the police, the prosecutor argued in summation that "'the code is black folk don't testify against black folk. You don't snitch to the police'"), *rev'd*, 257 P.3d 551 (Wash. 2011).

74. *Id.*

were prejudicial."[75] Accordingly, the court affirmed the defendant's conviction.[76] Other courts and judges have followed suit, leaving proven equal protection violations without remedy absent proof of sufficient prejudice.[77]

3. The Exception to Judicial Ambivalence: Jury Selection

These authorities evidence judicial "'ambivalence' to criminal procedural remedies in the equal protection context."[78] With some remedies, such as the exclusionary rule, courts may categorically reject the existence of a criminal procedure remedy even for proven equal protection violations. With other remedies, such as appellate remedies for racialized trials or sentencing proceedings, courts may condition relief on showings of preservation and prejudice. For a defendant to secure appellate relief, therefore, the defendant must invoke and defend his or her right to racial equality before the trial court, and further show that the denial of this right prejudiced the outcome.[79]

In one area of equal protection jurisprudence, however, courts have varied markedly from this approach: jury selection. A prosecutor's exclusion or removal of a juror from a criminal trial on account of race violates the Equal Protection Clause.[80] When confronted with an equal protection violation

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75. *Id.*

76. *See id.* at *9. This court's holding was reversed on further appeal. *Monday*, 257 P.3d 551. Yet, this unanimous appellate court decision denying relief for such blatant racial bias by a prosecutor further reveals the judicial ambivalence to remedies at the heart of this paper's thesis.

77. *See, e.g.*, Buck v. Thaler, 345 F. App'x 923, 929 (5th Cir. 2009) (finding the error to be harmless); *Monday*, 257 P.3d at 564-65 (J.M. Johnson, J., dissenting) (arguing that the majority should not grant a new trial based on the prosecutor's racially discriminatory arguments to the jury, because "there is [no] substantial likelihood that the misconduct affected the jury's verdict"); State v. Miller, 220 S.E.2d 326, 339-40 (N.C. 1975), *rev'd*, Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

78. Holland, *supra* note 5, at 40 (quoting Karlan, *supra* note 30, at 2004).

79. The U.S. Supreme Court may have suggested that it will not entertain harmless error analysis if a defendant can prove that "the prosecutor *deliberately* charged the defendant on account of his race . . . ." Vasquez v Hillery, 474 U.S. 254, 264 (1986) (emphasis added) (citing United States v. Batchelder, 442 U.S. 114, 125 & n.9 (1979)). But the Supreme Court has not ruled on this question definitively. United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996) ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."); *see also* Lovill v. State, 319 S.W.3d 687, 691-92 (Tex. Crim. App. 2009) (subjecting the defendant's selective prosecution claim, brought under the Equal Protection Clause, to traditional preservation requirements).

80. *See* Powers v. Ohio, 499 U.S. 400, 404 (1991) ("[A] defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have

during jury selection, courts consistently have demanded a remedy—often reseating of the juror or dismissal of the jury panel tainted by racial discrimination.[81] On appeal, moreover, if a defendant demonstrates that the prosecution discriminated against jurors on account of race, courts will not apply harmless error doctrine: courts will presume prejudice and order a new trial.[82]

Does this judicial commitment to equal protection remedies in the jury-selection context undermine my thesis that courts are ambivalent about criminal procedure remedies for equal protection violations? I think not. Rather, close examination of the jury selection cases reveals that courts may be entertaining faulty moral and utilitarian premises to differentiate their commitment to equal protection remedies in the jury selection context. A better approach, I will argue, is for the judiciary to commit to criminal procedure remedies for equal protection violations in all contexts, consistent with the law's approach to remedying racial discrimination during jury selection.

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been excluded by the State's purposeful conduct."); Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race. . . ."); *cf.* Carter v. Texas, 177 U.S. 442, 447 (1900) (holding that the Equal Protection Clause applies to the selection of grand juries); State v. Moore, 404 S.E.2d 845, 848 (N.C. 1991) (rejecting a harmless error argument when the prosecution selected the grand jury foreperson in a racially discriminatory manner, reasoning that equal protection violations "involve more than the reliability of the result of the proceedings" because "[t]he integrity of the judicial system is at issue, and a harmless error analysis under these circumstances is inapposite").

81. *See* People v. Willis, 43 P.3d 130, 136-37 (Cal. 2002) (reviewing available *Batson* remedies, including mistrial, dismissal of the jury panel, reseating of stricken jurors, sanctions against offending lawyers, and the granting of additional peremptory challenges to the opposing party); 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, 1109 (2011) ("The Supreme Court has never endorsed a trial court remedy for *Batson* violations, although *Batson* itself takes note of the two most obvious potential remedies: (1) 'discharg[ing] the venire' and (2) 'disallow[ing] the discriminatory challenges and resum[ing] selection with the improperly challenged jurors reinstated on the venire.'" (alterations in original) (quoting *Batson*, 476 U.S. at 100 n.24)).

82. *See* Bellin & Semitsu, *supra* note 81 ("[A]n appellate finding of *Batson* error leads to automatic reversal . . . ."); Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir. 1998) ("[A] *Batson*/*Powers* claim is a structural error that is not subject to harmless error review."); Turner v. Marshall, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997) ("There is no harmless error analysis with respect to *Batson* claims.").

IV. MISGUIDED PREMISES AND A BETTER APPROACH

A. *Moral and Utilitarian Premises*

Why has the judiciary committed itself to remedying equal protection violations during jury selection, yet exhibited a pattern of ambivalence in other contexts? The cases themselves do not distinguish these contexts to explain the differing trends in remedies. As the U.S. Supreme Court developed its jury selection jurisprudence, however, the Court made clear that it understands racially discriminatory jury selection to violate not only the defendant's equal protection rights, but the excluded juror's rights, as well.[83] Moreover, the Court has observed that "if a court allows jurors to be excluded because of group bias, '[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.'"[84] Accordingly, an equal protection violation during jury selection harms many victims: not just the defendant, but the excluded jurors, society, and the rule of law as a whole. Through this extension of equal protection interests, the Court has prohibited racially discriminatory peremptory challenges where the defendant and the stricken juror are of different races,[85] for instance, and even racially discriminatory peremptory challenges by the defense.[86]

By contrast, in the cases where courts have shown greater ambivalence to equal protection remedies, the equal protection violations typically implicated only the individual defendant's right to equal protection of the law. Particularly at the appellate stage, courts in these cases hear the defendant's equal protection claim following the defendant's conviction, and where the claim may not necessarily bear on the defendant's factual guilt or innocence. This distinction suggests that courts, under utilitarian or moral rationales, may be open to withholding equal protection remedies from "guilty" defendants, but are more committed to remedies when an equal protection violation is seen as harming "innocent" victims, such as jurors.[87]

For example, courts more readily may believe that the social benefit of punishing a clearly guilty defendant outweighs the cost of not remedying an equal protection violation when other "innocent" victims are not harmed by the

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83. *See* Georgia v. McCollum, 505 U.S. 42, 48-50 (1992); *Powers*, 499 U.S. at 406.

84. *McCollum*, 505 U.S. at 49-50 (quoting State v. Alvarado, 534 A.2d 440, 442 (N.J. Super. Ct. Law Div. 1987)); *see also Powers*, 499 U.S. at 411-12.

85. *See Powers*, 499 U.S. 415.

86. *See McCollum*, 505 U.S. at 48-50.

87. *See* McAdams, *supra* note 25, at 653 ("Perhaps the more fundamental basis for hostility to [equal protection remedies in] selective prosecution claims is that they are presented by the guilty.").

violation.[88] Courts also may consider that the moral wrong of the defendant's own criminal conduct offsets the moral offense of the state's equal protection violation when that violation is limited to the culpable defendant alone.[89]

These rationales for limiting equal protection remedies, however, are misguided. The law cannot forget the historical stain, or minimize the current reality, of racial bias so unique to our criminal justice system.[90] Regardless of whether racial discrimination has distorted the accuracy of a particular case outcome, racial injustice in our society undermines human dignity.[91] Moreover, when the state discriminates invidiously against an individual based on race, every person in that group is harmed by the violation because the state

88. *See id.* at 653-59 (examining utilitarian arguments against a dismissal remedy in selective prosecution cases, such as whether possible release of a violent criminal is better for society than accepting a race-based prosecution).

89. *See id.* at 653, 659-66 (reviewing retributivist arguments against a dismissal remedy in selective prosecution cases, including the concern that "the [crime] 'victim' still deserves criminal punishment whatever the motives of the prosecutors").

90. *See supra* text accompanying notes 8-12.

91. *See* Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1678 (2009) (noting "identity," such as "class, gender, race, and more," as "[i]ntegral to human dignity" and "shap[ing] the subjective experience of personhood intuitively and cognitively"); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 805 (1991) ("When a racial classification is employed to serve a racist motive or perspective . . . those classified are dehumanized by the underlying racism. . . . [S]uggesting that racial classifications can offend notions of human dignity simply restates the proposition that racial classifications might have been employed because of racial prejudice, and policies reflecting racial prejudice offend human dignity."); Rhonda V. Magee Andrews, *Affirmative Action After* Grutter*: Reflections on a Tortured Death, Imagining a Humanity-Affirming Reincarnation*, 63 LA. L. REV. 705, 713 (2003) ("[A]t the heart of racism, race-based oppression and the legacies of slavery and Jim Crow in America are injuries to the basic human dignity interests of subordinated races and a thwarting of the inherent desire for mutual recognition that we all share."); Rhonda V. Magee Andrews, *Racial Suffering as Human Suffering: An Existentially-Grounded Humanity Consciousness as a Guide to a Fourteenth Amendment Reborn*, 13 TEMP. POL. & CIV. RTS. L. REV. 891, 908 (2004) [hereinafter Andrews, *Racial Suffering as Human Suffering*] ("[R]acial justice claims may be seen as calls for true human dignity (materially, socially, spiritually) for all."); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 500 (2003) ("[T]he problem of race in society today [is not] *sui generis*, but . . . an important symptom of a deeper flaw in the value system of our constitutional government which impacts us all: its insufficient attention to, and inadequate protection of, basic human dignity for all."). *See generally* Jeremy Waldron, *How Law Protects Dignity* 2 (N.Y. Univ. Sch. of Law, Pub. Law Research Paper No. 11-83, 2011), *available at* http://ssrn.com/abstract=1973341 (defining "dignity" as a "*status*-concept," relating to "the *standing* (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in society and in her dealings with others").

subordinates the human dignity of everyone whom the state has branded as unequal on account of that shared group identity.[92] Indeed, racial discrimination in our criminal justice system harms not just the individual defendant and the group against whose shared identity the state discriminates, but society as a whole, because the state has limited all citizens' human dignity by invidious racial divisions.[93] Racial discrimination in the administration of the law additionally strips the law of its own virtue.[94] The state consequently may lose the moral integrity that the criminal law requires to punish the guilty effectively through moral condemnation.[95]

Racial injustice also presents significant utilitarian concerns. The law is "a forum and communicator in the process by which moral norms are reinforced, established or diluted."[96] If the law "has developed a reputation as a reliable statement of existing norms, people will be willing to defer to its moral authority . . . ."[97] If, however, the state compromises its moral integrity by excusing violations of human dignity in the name of harmless error or preservation doctrine, the state weakens its ability to influence behavior through its normalizing moral authority.[98] Thus, when the law fails to condemn

92. *See* Capers, *supra* note 1, at 19 (arguing that racial profiling is "citizenship diminishing, suggesting a racial hierarchy inconsistent with our goal of equal citizenship"); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 353 (2003) ("[R]ace-based law enforcement is part of a larger series of institutions and cultural practices that relegate racial minorities to a caste-like, second-class citizenship.").

93. *See* Andrews, *Racial Suffering as Human Suffering*, *supra* note 91, at 909, 919-23 (arguing that racial discrimination destroys our human relationships as a constitutional "We, the People").

94. If virtue keeps the soul healthy, as the old saying goes, racial discrimination sickens the soul of the state, and thus of the people who are represented by the state.

95. *See* United States v. Bass, 404 U.S. 336, 348 (1971) ("[C]riminal punishment usually represents the moral condemnation of the community . . . ."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) ("Punishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation."); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 911 (2010) ("[R]etributive punishment is not about matching pain for pain but rather serves as an attempt to communicate to the offender society's condemnation by means of a deprivation of an objective good such as liberty . . . .").

96. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 474 (1997).

97. *Id.*

98. *See id.* at 477 ("[T]he criminal law can only hope to shape moral thinking or to

moral wrongs like racial injustice by withholding concrete remedies, the law cannot expect the police or society voluntarily to honor the law's moral judgments, including when the law itself presses for racial justice in other contexts.[99]

Furthermore, without consistent remedies for violations of equal protection rights, lawyers and judges will not consistently engage the subject of race and criminal justice. Lawyers and judges will not argue and decide a claimed legal violation itself if no remedy exists[100]—which numerous courts have held concerning police investigations and the exclusionary rule.[101] Even if a remedy exists in theory, when procedural rules discourage a court from remedying violations—such as harmless error and preservation doctrine[102]—the court simply may deny the remedy on procedural grounds and avoid addressing the merits of the violation altogether.[103] As a result, the stories of race in these criminal cases will remain unexplored.

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have people follow its rules in ambiguous cases if it has earned a reputation as an institution whose focus is morally condemnable conduct and is seen as giving reliable statements of what is and is not truly condemnable."); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 657 (2009) ("Social psychologists point to normative bases for compliance rather than instrumental ones, and they have connected voluntary compliance with the law to the fact that individuals believe that the law is 'just' or that the authority enforcing the law has the right to do so."); *see also* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 246-47 (2002) (exploring circumstances where "[i]t will be best to use law to supplement morality").

99. *See* Holland, *supra* note 5, at 68 ("Racial profiling . . . provides the kind of teaching moment that Brandeis had in mind [in *Olmstead v. United States*, 277 U.S. 438 (1928)]: intentional racial discrimination in law enforcement is intolerable, and . . . [a concrete remedy] establishes and reinforces moral clarity on this point.").

100. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1080-81 (2011) ("The exclusionary rule for changing law is critical to the development of Fourth Amendment law . . . ."); Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 238 (noting the importance of remedies to "law-developing litigation," which "concerns where the law should go, not where it has been"); David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L REV. 563, 586 (2010) ("[B]ecause vindication of a constitutional right always serves a unique public purpose, the remedial imperative in this context is heightened."); *see also* LLEWELLYN, *supra* note 22, at 82-83.

101. *See supra* notes 30-40 and accompanying text.

102. *See* discussion *supra* Part III.B.

103. *Cf.* Owens, *supra* note 100, at 583-84 (predicting that judicial discretion to reject Fourth Amendment civil claims on qualified immunity grounds without first deciding whether the Fourth Amendment was violated will inhibit the development of substantive Fourth Amendment law). *But see* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 640-41 (2011) (analyzing lower court data and concluding that some courts still issue prospective rulings on the merits of Fourth

By contrast, if the law commits to remedying proven equal protection violations consistently and concretely,

> the criminal justice system will have openly and honestly examined race in . . . cases where defendants, police, lawyers, and judges all had something important to say about [t]his subject, even if it is 'no' to a constitutional sanction. The 'no' will be transparent, explained, and justified—unlike the prevailing state of affairs now, which is a growing practice of colorblind silence about race.[104]

Accordingly, for all of these moral and utilitarian reasons, a judicial commitment to equal protection criminal procedure remedies is necessary.

B. *A Better Approach*

Three justices of the Washington State Supreme Court recently embraced this commitment to equal protection remedies. In *State v. Monday*,[105] the defendant was prosecuted for first-degree murder and other offenses following a shooting in Seattle, Washington.[106] At trial, "many of the State's witnesses were not enthusiastic proponents of the State's case."[107] The prosecutor, apparently frustrated with this lack of enthusiasm, questioned witnesses about a "code" against snitching to explain the witnesses' reluctance to cooperate fully.[108] During an exchange with one witness, the prosecutor repeatedly referred to the police as the "po-leese" while employing an offensive accent.[109] Furthermore, during closing argument to the jury, the prosecutor argued:

> [T]he only thing that can explain to you the reasons why witness after witness after witness is called to this stand and flat out denies what cannot

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Amendment claims, even when they may skip directly to qualified immunity to deny the claim).

104. Holland, *supra* note 5, at 72; *see also id.* at 40-41 (examining the potential trend toward colorblind advocacy in criminal cases).

105. 257 P.3d 551 (Wash. 2011).

106. *See id.* at 552-53.

107. *Id.* at 553; *see also id.* at 554 (noting the trial judge's comment that "'virtually every lay witness has been very reticent to testify in this case, and the memory of virtually every lay witness has had significant holes in places where one would not expect that they would have memory lapses'").

108. *Monday*, 257 P.3d at 553-54.

109. *See id.* (alteration in original).

> be denied on that video is the code. And that code is black folk don't testify against black folk. You don't snitch to the police.[110]

The defendant, an African American himself,[111] did not object to these comments.[112]

On appeal to the Washington State Supreme Court, the defendant argued that the prosecutor "injected racial prejudice into the trial proceedings by asserting that black witnesses are unreliable and using derogatory language toward a black witness . . . ."[113] The majority agreed, declaring that "[i]f justice is not equal for all, it is not justice."[114] The majority, however, applied harmless error doctrine, giving the prosecution an opportunity to prove lack of prejudice as a reason not to remedy this violation. The prosecution failed in this effort and thus the court reversed.[115] But the majority made clear that if this violation had not prejudiced the verdict, it would not have remedied the violation.[116]

In response, Chief Justice Barbara Madsen, joined by Justices Mary Fairhurst and Debra Stephens, concurred separately.[117] Chief Justice Madsen noted the "abundant evidence of the defendant's culpability."[118] But, the Chief Justice argued, "[r]ather than engage in an unconvincing attempt to show the error here was not harmless, the court should hold instead that the prosecutor's injection of racial discrimination into this case cannot be countenanced at all, not even to the extent of contemplating to any degree that error might be harmless."[119] Exploring how discriminatory appeals to race have denied criminal justice historically, Chief Justice Madsen concluded that the prosecutor's "corruption of the trial cannot be tolerated,"[120] even under preservation or harmless error doctrine:

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110. *Id.* at 555.

111. *See id.* at 560.

112. *See* State v. Monday, No. 60265-9, 2008 WL 5330824, at *8-9 (Wash. Ct. App. Dec. 22, 2008), *rev'd*, 257 P.3d 551.

113. See *Monday*, 257 P.3d at 556.

114. *Id.* at 557.

115. *Id.* at 558.

116. In an effort to "deter" similar violations, the majority did apply a "constitutional" version of harmless error doctrine, requiring the prosecution to prove lack of prejudice instead of the defendant being required to prove prejudice. *Id.*

117. *See id.*

118. *Id.* at 559.

119. *Id.*

120. *Id.* at 560.

> A criminal conviction must not be allowed to stand when it is obtained in a trial permeated by racial bias deliberately introduced by the prosecution, as occurred here. Regardless of the evidence of this defendant's guilt, the injection of insidious discrimination into this case is so repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest that only a new trial will remove its taint.[121]

Chief Justice Madsen's opinion thus properly treats intentional racial discrimination as a type of structural error in a criminal prosecution.[122] Few judicial decisions have committed so unambiguously to remedying equal protection violations in criminal cases—perhaps only one other court decision has matched Chief Justice Madsen's commitment.[123] Anything short of this commitment, however, conveys judicial ambivalence about a subject critical to the moral integrity and human dignity of our criminal justice system. This system, and the individuals affected by it, deserves clarity in the law's commitment to remedying racial injustice as a structural error that "cannot be minimized or easily rationalized as harmless."[124]

V. CONCLUSION

This paper does not propose that consistent equal protection remedies in criminal cases would operate as a panacea to the problem of racial bias and disparity in our criminal justice system. On the contrary, this paper addresses the small number of cases where an equal protection violation can be established. Nor does this paper attempt to delineate the precise trial or appellate remedies necessary for every possible equal protection violation. Instead, I argue that the law should assure a meaningful criminal procedure remedy for proven equal protection violations that does not hinge on whether the remedy will deter future violations, or on whether the defendant preserved the violation and can survive harmless error analysis. Racial injustice denies a criminal prosecution of any semblance of justice. A criminal case must be cleansed of this taint.

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121. *Id.* at 558-59.

122. *See supra* notes 49-51 and accompanying text.

123. See Weddington v. State, 545 A.2d 607, 614-15 (Del. 1988) ("[T]he right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error.").

124. *Monday*, 257 P.3d at 558.