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Motivating Constitutional Compliance

Erica Hashimoto

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Abstract

Some constitutional rights of criminal defendants lend themselves to systematic violations at the trial level. In particular, state officials may gravitate toward such violations when (1) the nature of the relevant right renders violations difficult to detect at the trial level, and (2) constitutional compliance imposes especially high costs. For rights with those two characteristics, a trial-level remedy may not adequately protect the right, and a robust appellate remedy may be necessary to provide an adequate incentive for constitutional compliance. But because the Court has not considered the importance of deterring constitutional violations outside of the exclusionary rule context, it has significantly limited the availability of appellate remedies. As a result, states have an incentive to violate these high-cost constitutional rights in situations where the violation is unlikely to be discovered. The *Strickland* right to effective assistance of counsel provides a paradigmatic, and widespread, example of the breakdown in remedies where constitutional violations are both hidden at the trial level and cost effective for state actors.

This Article argues that as to this category of constitutional violations, the Court should reformulate remedies to foster meaningful compliance with critical constitutional protections afforded to criminal defendants. At the very least, the Court should put in place strengthened remedies if the defendant can establish that a state both has abridged a constitutional right and has a custom of doing so. Only by embracing this new remedial approach can the Court close the gap between its articulation of theoretical individual rights and the real-world incentives of states to violate certain constitutional rights.

* Professor of Law and Director, Appellate Litigation Program, Georgetown University Law Center. I greatly appreciate the helpful comments provided by Dan Coenen, Michael Coenen, and Usha Rodrigues. I also want to thank my research assistants, Lee Deneen ('15) and Nicola Rossi ('15), for all of their work.

INTRODUCTION

State officials, including law enforcement officers and prosecutors, have significant incentives to respect many constitutional rights guaranteed to criminal defendants because the U.S. Supreme Court has created costly remedies for violating those rights. Because many constitutional violations can be easily detected, trial-level remedies provide a sufficient incentive for state actors to comply with those rights. But trial-level remedies may be insufficient to deter violations of high-cost constitutional rights that are difficult to detect, such as violations of the right to effective assistance of counsel or the right to a fair and impartial jury. And because the Court has only considered the importance of deterring constitutional violations in the context of the exclusionary rule, it has provided little in the way of appellate remedies for trial-level violations of constitutional rights.

The Court has specifically tailored the exclusionary rule remedy to provide law enforcement officers with an incentive to comply with defendants' constitutional rights.[1] To put it another way, the Court has

1. *See, e.g.*, United States v. Leon, 468 U.S. 897, 906 (1984) (noting that the exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights

provided trial courts with the capacity to remove any incentive for law enforcement to violate constitutional rights by eliminating any benefit law enforcement might gain from such violations.[2] Because this remedy focuses exclusively on motivating compliance with constitutional rights, the Court has limited it to situations in which providing a remedy will have the greatest probability of deterring constitutional violations.[3] Thus, the Court has created exceptions to the exclusionary rule for situations in which the remedy "does not result in appreciable deterrence."[4]

By contrast, the Court has never explicitly considered the importance of deterring constitutional errors that occur during the trial process itself. Most of these errors, however, generally are readily correctable at the trial level. After all, defense counsel can object to the violation of most of these rights, and trial courts can either prevent or correct any constitutional error. As to these rights, the primary incentive for compliance lies in the fact that state actors recognize the likelihood that constitutional error will be corrected—occasionally at significant cost to the case—thereby eliminating any potential benefit to the state from the error and providing an affirmative incentive for constitutional compliance.[5] The perceived adequacy of that structure assuring

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generally through its deterrent effect'"); United States v. Janis, 428 U.S. 433, 446 (1976) (noting that "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct'" (quoting United States v. Calandra, 414 U.S. 338, 347 (1974))); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that the exclusionary rule prohibiting admission at trial of unconstitutionally seized evidence applies to the states).

2. Elkins v. United States, 364 U.S. 206, 217 (1960) (concluding that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

3. *Calandra*, 414 U.S. at 348 (observing that "[a]s with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served").

4. *Janis*, 428 U.S. at 454; *accord Leon*, 468 U.S. at 922 (holding that providing a remedy where law enforcement officers acted in good faith reliance on a search warrant that later proved to be defective would not provide any incentive to comply with the Constitution because the officers had believed that they were in compliance).

5. For instance, if the state introduces a testimonial hearsay statement against a defendant in clear violation of her Sixth Amendment right to confront witnesses, see Crawford v. Washington, 541 U.S. 36, 40 (2004), that error will be obvious to defense counsel and the trial judge, making it unlikely that the prosecutor will gain any benefit from violating the right. In addition, because the trial judge could grant a mistrial based upon the constitutional violation, prosecutors have an affirmative incentive to comply with the constitutional right. *Cf.* Bruton v. United States, 391 U.S. 123, 128–37 (1968) (rejecting the argument that "the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence" based on the "threats to a fair trial" inherent in the admission of a co-defendant's extrajudicial confession); United States v. Doherty, 233 F.3d 1275, 1283 (11th Cir. 2000) ("[T]he admission of such testimony is error precisely because 'the jury can [not] possibly be expected to forget it in assessing the defendant's guilt.'" (alteration in original)).

constitutional compliance before trial courts has prevented the Court from explicitly considering the importance of providing an incentive for constitutional compliance.[6]

Because the Court has not considered the importance of providing incentives for constitutional compliance in the context of these rights, appellate remedies have been limited to instances in which the fairness of the proceedings and the reliability of the outcome have been compromised.[7] For most constitutional rights, this remedial scheme provides sufficient incentives for constitutional compliance to prevent widespread violations of constitutional rights.[8] But not for all. One particular category of rights arising after initiation of trial court proceedings has both escaped remedy and been subject to systemic violations. This category includes rights with two distinctive characteristics: (1) violations are hidden (or at the very least not obvious) at the trial court level, and (2) they are high-cost rights, or, to put it another way, the state has strong incentives to violate them. For this category of constitutional rights, trial courts cannot sufficiently incentivize constitutional compliance, and a more robust appellate remedy therefore is needed. But because the Court has never recognized the importance of deterrence for these violations, remedies have remained elusive.

The right to the effective assistance of counsel under *Strickland v. Washington*[9] provides a paradigmatic example.[10] The Court held in *Strickland* that defendants have a constitutional right not only to counsel but also to the *effective* assistance of counsel.[11] But these ineffective assistance errors tend to remain hidden at the trial level. After all, defense lawyers have little to no incentive, or perhaps lack the self-awareness, to raise their own ineffectiveness. Because defense counsel serve as the

6. *See* United States v. Cronic, 466 U.S. 648, 658 (1984) ("[B]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation." (internal citation omitted)).

7. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963).

8. To be sure, this remedial scheme, which provides only limited remedies for constitutional rights, has been the subject of much criticism. *See, e.g.*, Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 172 (1991) (observing that "even the accused have rights and that only automatic reversal can fully vindicate such rights"). Broader remedies likely would incentivize greater constitutional compliance, but most constitutional rights do not lend themselves to widespread, systematic violations, and the current remedial scheme likely assures compliance with many rights.

9. 466 U.S. 668, 686–87 (1984).

10. *Id.*

11. *Id.* at 685–86.

primary protectors of their clients' rights,[12] a lawyer's failure to function within the meaning of the Sixth Amendment likely will go unnoticed at the trial level. In addition, providing effective assistance of counsel to all defendants who are entitled to counsel is an incredibly expensive proposition for state and local jurisdictions.[13] As a result, local and state jurisdictions have strong incentives to cut corners on indigent defense if they think there will be no consequence to those decisions.

Because the Court, in crafting appellate remedies for constitutional rights that arise after the initiation of criminal proceedings, has focused entirely on fair trial concerns, it has never considered the importance of

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12. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 732 (2007) ("There is, perhaps, no right as fundamental to the defendant as the right to have the assistance of an effective attorney, because that attorney is the conduit through which all other constitutional rights are asserted."); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 93 (1995) ("Nevertheless, . . . attorneys were taught to keep in sight one central goal, namely, to provide the best possible representation for each client by ensuring that all his constitutional rights were vindicated throughout the criminal justice process.").

13. States vary regarding the entity that has to provide the funding for indigent defense systems. In some states, the state itself funds indigent defense. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53 (2009), http://www.constitutionproject.org/manage/file/139.pdf [hereinafter JUSTICE DENIED] ("[T]he majority of states (28) now essentially fully fund indigent defense (i.e., provide more than 90% of the funding)."); *State Indigent Defense Systems*, SIXTH AMENDMENT CTR. (last visited July 1, 2016), http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems/ (listing the percentage of state funding for indigent defense in every state as of 2013). In other jurisdictions, states provide some of the funding and local or county jurisdictions provide the rest. *See* JUSTICE DENIED, *supra*, at 54 ("Five states provide between 50% and 85% of the funds required for indigent defense, and 16 states shift the burden of over half the funding to the counties."); *see also* Justine Finney Guyer, Note, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 342 (2009) (noting that while Missouri's public defender system is technically state funded, counties are responsible for funding public defender office space and utilities). Additionally, in a handful of jurisdictions, primary responsibility for indigent defense representation still lies with local or county jurisdictions. *See* JUSTICE DENIED, *supra*, at 54 & n.31 (noting that while only two states require counties to fund all indigent defense expenses, an additional six states contribute less than ten percent of indigent defense funding); *see also* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 242–43 (2010) (explaining that most of the funding for indigent defense in Arizona comes from county general funds). Finally, in many states, local jurisdictions are responsible for providing counsel in misdemeanor cases, particularly local code offenses although sometimes also for state misdemeanors. *See, e.g.*, HOLLY R. STEVENS ET AL., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 28 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf (noting that in Kansas, the state funds felony criminal defense, but counties provide the funding for misdemeanor and juvenile cases).

providing a remedy to motivate constitutional compliance.[14] In particular, the Court has limited the appellate remedy for *Strickland* violations to defendants who can establish a reasonable probability of a different result absent counsel's errors.[15] The result has been widespread violations of the constitutional right to the effective assistance of counsel at the trial level.[16]

To be sure, most jurisdictions comply with their constitutional obligations. But not every jurisdiction does. And the problem is that the criminal justice system relies primarily (if not exclusively) on the good faith of state or local governmental actors operating within the system. None of the other potential external mechanisms for assuring constitutional compliance—federal habeas; the federal civil damages remedy under 42 U.S.C. § 1983; state habeas and tort remedies; and ethical rules—adequately affect the conduct of governmental officials.

Because this particular category of constitutional rights defies constitutional compliance, this Article argues that the Court should create a more robust appellate remedy in certain cases. In jurisdictions that have demonstrated disregard for a constitutional right, the Court should require a reversal remedy where a defendant can establish (1) that the state did not comply with its constitutional obligations *and* (2) that the state had a custom of violating this constitutional right. Such a remedy would provide state actors with an incentive for constitutional compliance that has been absent in the past.

This Article proceeds in four parts. Part I describes the exclusionary rule and its deterrent effect. Part II identifies a category of constitutional rights that lend themselves to widespread, systematic violations and focuses on the importance of deterring those constitutional violations. Part III discusses the ineffectiveness of other remedies that might incentivize constitutional compliance. Finally, Part IV proposes a remedial modification for this category of constitutional rights—specifically, a new systemic remedy for the failure to comply with the Constitution when there is evidence of a custom of constitutional non-compliance.

I. DETERRENCE AND THE EXCLUSIONARY RULE

The Supreme Court has recognized that certain constitutional rights—the Fourth Amendment right to be free from unconstitutional searches and seizures, the Fifth Amendment right to remain silent, and the Sixth

14. *See Strickland*, 466 U.S. at 684–85.

15. *Id.* at 694.

16. *See infra* Section II.B (discussing the result of limiting appellate remedies for constitutional errors).

Amendment right to counsel during interrogation—would mean little absent some mechanism for enforcing those rights. In crafting those remedies, the Court has repeatedly emphasized the importance of deterring unconstitutional conduct by law enforcement officers.[17] It therefore has designed a remedial scheme to incentivize law enforcement to comply with constitutional requirements.[18] In particular, the Court has tailored the exclusionary rule to provide incentives for state actors (primarily law enforcement officers) to respect defendants' constitutional rights.[19]

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17. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 14 (1995) ("[T]he exclusionary rule was historically designed as a means of deterring police misconduct . . . ."); Illinois v. Gates, 462 U.S. 213, 263 (1983) (White, J., concurring) ("[T]he exclusionary rule was adopted to deter unlawful searches by police."); *see also* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 53 (2010) ("The benefit of deterring police misconduct was not among the original justifications presented for the exclusionary rule in *Weeks*. . . . [H]owever, deterrence . . . is now considered the only benefit and purpose of the exclusionary rule."); Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173, 181–84 (1991) (describing the rise of the deterrence rationale in the Court's decisions concerning the exclusionary rule); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1858–59 (2008) ("The prevailing understanding of the exclusionary rule is that it is a constitutionally required deterrent of future unreasonable searches and seizures. According to the accepted wisdom, the rule eliminates incentives for illegality by denying officers the profits of their illegal acts." (internal citation omitted)).

The Court has treated statements slightly differently than searches, holding that the constitutional violation in cases where law enforcement has failed to comply with the Fourth Amendment's requirements occurs at the time of the illegal search, whereas the constitutional violation in cases in which police fail to comply with *Miranda* occurs when any statement is introduced in evidence against the defendant at trial. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912–13 (2014) (explaining that a suspect's Fourth Amendment rights are infringed at the time the police conduct an unconstitutional search and the suspect's due process rights are infringed if the fruits of the unconstitutional search are later relied on by a court to impose a conviction); Chavez v. Martinez, 538 U.S. 760, 767 (2003) (explaining that a violation of the Fifth Amendment's Self-Incrimination Clause does not occur until statements compelled by police interrogation are used against a defendant at trial because a defendant is not made to be a "witness" against himself in violation of the Clause if his statements are never admitted as testimony against him in a criminal case).

18. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 608 (2006) (holding that the purpose of the exclusionary rule is to "compel respect for the constitutional guaranty . . . by removing the incentive to disregard it" (alteration in original) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))); Brinegar v. United States, 338 U.S. 160, 181 (1949) ("[T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.").

19. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states); Weeks v. United States, 232 U.S 383, 398 (1914) (approving the implementation of the exclusionary rule in federal trials); *see also* United States v. Janis, 428 U.S. 433, 446 (1976) (noting that "the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future

Because the exclusionary rule has focused on providing law enforcement with an incentive to comply with the Constitution, the Court has not hesitated to recognize exceptions where the existence of a remedy is unlikely to deter unconstitutional conduct.[20] In short, the Court has tailored the exclusionary rule to provide relief only where necessary to deter unconstitutional conduct. To be sure, the exclusionary rule has been roundly criticized as ineffective because of these exceptions. But empirical evidence suggests that the availability of these remedies at least correlates with constitutional compliance by law enforcement officers.

A. *Incentives for Constitutional Law Enforcement Conduct*

The Supreme Court has recognized that remedies deter law enforcement officers from violating the rights of suspects in their custody.[21] For the past fifty years, the exclusionary rule—which prevents the state from introducing evidence seized in violation of the Fourth Amendment right to be free from unreasonable searches and seizures, and statements taken in violation of the Fifth Amendment protection against being compelled to be a witness against oneself and the Sixth Amendment right to counsel during interrogation—has been the primary means of deterring unconstitutional law enforcement conduct.[22]

Justifying a remedy for violations of these constitutional rights presented the Court with a dilemma.[23] For instance, although defendants

unlawful police conduct'" (quoting United States v. Calandra, 414 U.S. 338, 347 (1974))); Stone v. Powell, 428 U.S. 465, 484–85 (1976) (emphasizing that the judicial integrity policy reasoning for the exclusionary rule plays a "limited role . . . in the determination [of] whether to apply the rule in a particular context"); Olmstead v. United States, 277 U.S. 438, 485 (1928) (emphasizing the exclusionary rule's purpose to protect the integrity of the criminal justice system).

20. *See, e.g.*, United States v. Leon, 468 U.S. 897, 925–26 (1984) (recognizing the good-faith exception to the exclusionary rule); United States v. Havens, 446 U.S. 620, 627 (1980) (recognizing the impeachment exception to the exclusionary rule); Jones v. United States, 362 U.S. 257, 261–64 (1962) (establishing the standing exception to the exclusionary rule).

21. *See, e.g.*, *Weeks*, 232 U.S. at 391–92; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 281, 286–87 (1988) (observing that "[t]he Supreme Court has recognized the shortcomings of traditional tort remedies—and has accordingly embraced deterrent remedies" involving the violation of constitutional rights by law enforcement); *see also* Grant, *supra* note 17, at 179–80 (noting that eight members of the Court had accepted the deterrent rationale by 1949).

22. *Chavez*, 538 U.S. at 772 (noting that the Court has "established the *Miranda* exclusionary rule as a prophylactic measure to prevent violations of the right protected by the text of the Self–Incrimination Clause"); Miranda v. Arizona, 384 U.S. 436, 475–76 (1966) (holding that the right to counsel during interrogation is a "prerequisite[] to the admissibility of any statement made by a defendant"); *Mapp*, 367 U.S. at 660 (1961) (applying the exclusionary rule to bar evidence obtained in violation of Fourth Amendment).

23. *See* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638 (1982) (asserting that the rule was originally adopted because

have a constitutional right to be free from unreasonable searches and seizures, evidence that law enforcement seizes as a result of unconstitutional searches or seizures does not raise concerns of unreliable evidence being introduced against defendants. Instead, the unconstitutionally seized evidence very likely is perfectly reliable—and often compelling—evidence of the defendant's guilt.[24] But as the Court recognized in *Weeks v. United States*[25] and *Mapp v. Ohio*,[26] law enforcement officers seeking to amass evidence for use in prosecuting defendants have strong incentives to ensure that they gather the most compelling evidence.[27] If illegally seized evidence or illegally obtained statements were admissible, law enforcement officers would have every incentive to illegally collect that evidence and take those statements.

Recognizing the importance of ensuring that law enforcement officials have at least some incentive to respect the constitutional rights of defendants in their custody, the Court created the exclusionary rule to remedy constitutional violations, prohibiting the introduction of unconstitutionally obtained evidence against criminal defendants at their trials.[28] Of course, if defendants whose rights were violated had other remedies—for instance a robust remedy through a civil action in tort—then that could provide an incentive for law enforcement to comply with

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"there was no alternative sanction for violations of the [F]ourth [A]mendment that did not cause severe underdeterrence," but arguing from a law and economics perspective that the exclusionary rule "imposes a deadweight loss—the suppression of socially valuable evidence" and "produces overdeterrence").

24. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 595 (2006) (identifying the cost of the exclusionary rule as the "grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society)"); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); Rakas v. Illinois, 439 U.S. 128, 137 (1978) ("Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.").

25. *See Weeks*, 232 U.S. at 398.

26. *See Mapp*, 367 U.S. at 656–57.

27. *See id.* at 656 (noting that officers have an incentive to disregard the constitutional guarantee); *Weeks*, 232 U.S. at 392 (acknowledging "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions").

28. *Mapp*, 367 U.S. at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by [the authority of the Fourth and Fourteenth Amendments], inadmissible in a state court."). In addition to deterring unconstitutional conduct, some scholars have argued that the exclusionary rule also prevents courts from admitting and legitimizing illegally seized evidence. *See, e.g.*, Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562 (1972).

the Constitution. But no such robust remedy exists.[29] As a result, the exclusionary rule remedy operates fundamentally, and virtually exclusively, to provide law enforcement officers with an incentive to respect the constitutional rights of criminal defendants.

B. *Incentive-Based Exceptions to the Exclusionary Rule*

Because the Court understood that the exclusionary rule provides incentives for constitutional compliance, it has limited the remedy to situations most likely to lead to such compliance.[30] Exploring a couple of these remedial limitations—the good faith exception and the direct result limitation—in greater depth further demonstrates the shaping of law enforcement incentives as the primary purpose of the exclusionary rule.

Perhaps the most ubiquitous of the exclusionary rule exceptions, the "good faith" exception precludes a remedy if law enforcement officers had a good faith belief that they were complying with the Constitution.[31] In *United States v. Leon*,[32] law enforcement officers conducted a search pursuant to a warrant obtained from a magistrate.[33] The district court and court of appeals later concluded that the magistrate had erred in finding probable cause and therefore held the warrant invalid.[34] Emphasizing the exclusionary rule's focus on incentivizing constitutional behavior, the Supreme Court concluded that if the officers executing the warrant had no way of knowing that the warrant later would be deemed invalid, excluding evidence seized pursuant to the warrant would not in any way incentivize constitutional conduct.[35] Indeed, only the magistrate's conduct in issuing the warrant could conceivably be "deterred" by excluding the evidence seized, since only the magistrate arguably engaged in the "wrongful" conduct of issuing a warrant on less than probable cause.[36] But because there was no evidence either that a magistrate judge was intentionally issuing invalid warrants or that the exclusionary rule would affect his determinations of probable cause, the Court held that the exclusionary rule did not serve a sufficient purpose under these circumstances.[37]

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29. *See infra* Section III.B (describing the limitations of the tort remedy provided by 42 U.S.C. § 1983).

30. Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 679–86 (2011) (discussing the Court's retrenchment of the exclusionary rule remedy).

31. United States v. Leon, 468 U.S. 897, 925–26 (1984).

32. *Id.* at 922–23.

33. *Id.* at 902.

34. *Id.* at 903–05.

35. *Id.* at 919–21.

36. *Id.* at 916.

37. *Id.* at 916–17.

In the years since the Court created the good faith exception, the Court has significantly expanded it to include not just searches undertaken pursuant to a warrant but also warrantless searches.[38] For instance, the Court has held that the good faith exception covers evidence seized in a warrantless search undertaken in reliance on precedent that permitted the search at the time but that later was deemed unconstitutional.[39] Similarly, the Court has held that the exclusionary rule does not apply to warrantless searches conducted either pursuant to a subsequently invalidated statute[40] or on the basis of erroneous information about a pending warrant in a database.[41] The wisdom of the good faith exception has been hotly disputed,[42] but the reasoning behind it makes sense if the primary purpose of the exclusionary rule remedy is incentivizing constitutional compliance.

The Court also has relied on the importance of incentivizing constitutional compliance in holding that the exclusionary rule bars admission only of evidence that *directly* resulted from the unconstitutional conduct.[43] When the constitutional violation did not directly procure the evidence, law enforcement officers would be much less likely to understand the evidentiary consequences and respond accordingly in the future. In *New York v. Harris*,[44] for example, the police had probable cause to arrest the defendant, but because they arrested him

38. Davis v. United States, 131 S. Ct. 2419, 2434 (2011).

39. *Id.*

40. Illinois v. Krull, 480 U.S. 340, 352–53 (1987).

41. Herring v. United States, 555 U.S. 135, 147–48 (2009); Arizona v. Evans, 514 U.S. 1, 14–16 (1995).

42. *See* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 934 (1986) (condemning the Court's reasoning in *Leon* as treating the Fourth Amendment as nothing but an "advisory norm"). Despite his harsh criticism of the *Leon* opinion, however, Professor Donald Dripps believes that where the police obtain a warrant, there will almost always be probable cause and that an appellate court generally should not second-guess that probable cause determination. *Id.* at 941–42; *see also Herring*, 555 U.S. at 153 (Ginsburg, J., dissenting) (pointing out that the Court's claim that punishing negligence will not achieve deterrence flouts a most basic premise of tort law); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009) (criticizing every aspect of the Court's decision to extend the good faith exception to cases where the Fourth Amendment violation is the result of "negligence attenuated from the arrest").

43. United States v. Ceccolini, 435 U.S. 268, 279 (1978) (declining to apply the exclusionary rule where the connection between the Fourth Amendment violation and the incriminating evidence is sufficiently attenuated). The Court is more likely to find such attenuation if the violation led to discovery of a witness rather than an object. *Id.* at 280; *see also* Dunaway v. New York, 442 U.S. 200, 217–18 (1979) (listing factors to be considered in the attenuation analysis and explaining that where the official misconduct leads more directly to evidence, the exclusionary rule should apply both to deter misconduct and to maintain the integrity of the courts).

44. 495 U.S. 14 (1990).

in his house without a warrant, they violated his Fourth Amendment rights.[45] After his arrest, the officers took the defendant to the police station where he confessed to the crime.[46] The question before the Court was whether the conceded Fourth Amendment violation—the warrantless arrest of the defendant in his house—should result in the exclusion at trial of the station house statement.[47]

The Court first held that the police had the defendant in lawful custody at the time he made the statement because they had probable cause for his arrest, and the Fourth Amendment violation concerned only the circumstances of his arrest (in his house rather than on the street).[48] Because his statement did not directly result from unlawful custody, "the incremental deterrent value [from excluding evidence] would be minimal."[49] The Court contrasted these facts with a situation in which officers illegally arrested a defendant in his house and took a statement from him in the house.[50] Because the statement in that case could be directly attributed to the officers' unconstitutional conduct, exclusion would have a more significant deterrent effect and therefore would outweigh the cost to the system of suppressing the evidence.[51]

There are, of course, other incentive-based exceptions to the exclusionary rule,[52] and many scholars have argued that the value of the exclusionary rule has been so diluted that it provides law enforcement with only the most minimal incentive to comply with the Fourth and Fifth

45. *Id.* at 15–16.
46. *Id.* at 16.
47. *Id.*
48. *Id.* at 18.
49. *Id.* at 20.
50. *Id.*
51. *Id.* at 20–21.
52. For instance, the Court has held that defendants cannot assert claims based on the violation of the constitutional rights of others—the so-called "standing" doctrine—grounding this exception in the fact that law enforcement officers have little incentive to violate the rights of one person to seek evidence against another person. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980) (finding that the defendant had no reasonable expectation of privacy in another person's purse and therefore could not challenge the search of that purse); Rakas v. Illinois, 439 U.S. 128, 139 (1978) (changing the nature of the inquiry from "standing" to substantive rights but maintaining the same rules); Jones v. United States, 362 U.S. 257, 261 (1960) (holding that a defendant cannot challenge the introduction of evidence that resulted from a search or seizure of a third party). The "public safety" exception, which renders admissible statements elicited in reasonable response to public safety concerns even without prior *Miranda* warnings, responds to the balancing of the deterrent value of exclusion against the societal cost of exclusion. *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (permitting police to question a suspect without *Miranda* warnings when necessary to protect the public safety and declining to inquire into the subjective motivation of the officers).

Amendments.[53] But even in its diluted form, because the remedial limitations focus on the extent to which providing a remedy might affect law enforcement conduct, the exclusionary rule has retained its core function of providing an incentive to comply with the Fourth, Fifth, and Sixth Amendment rights.[54]

C. *Evidence of the Incentivizing Effect of the Exclusionary Rule*

The Court's recognition of the exclusionary rule has been the subject of abundant academic discussion over the past fifty years,[55] at least some of which has criticized both the importance and effectiveness of the exclusionary rule as a mechanism to deter unconstitutional conduct.[56] But empirical evidence suggests that, at least in the context of *Miranda v. Arizona*,[57] and likely the Fourth Amendment, the conduct of law

53. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 755 (1998) (explaining that the results of an empirical study show "[t]he exclusionary rule does not even apply to most police misconduct, and therefore is simply inadequate as a deterrent"); *see also* David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 10 (2012) (arguing that the many exceptions to the exclusionary rule allowing admission of illegally seized evidence in a variety of litigation forums collateral to criminal trials encourage state and local police officers to engage in illegal searches and seizures); David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 194 (2009) (noting that "police officers rarely if ever suffer personal or professional consequences for disobeying Fourth Amendment rules" and that "some substantial number of officers find it easy, or worthwhile in some way, to ignore the exclusionary rule for what they perceive as good and sufficient reasons").

54. *See* Herring v. United States, 555 U.S. 135, 144 (2009) (holding that a Fourth Amendment violation triggered by police negligence did not justify application of the exclusionary rule and reasoning that the exclusionary rule "serves to deter deliberate, reckless or grossly negligent conduct"); *see also* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (noting that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights" (footnotes omitted)).

55. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (acknowledging in euphemistic language that "[t]he debate within the Court on the exclusionary rule has always been a warm one"); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 1 (2001) ("Few debates in American law are as sustained, or as bitter, as the debate over the exclusionary rule.").

56. *See, e.g.*, Bloom & Fentin, *supra* note 17, at 78–80 (advocating reliance on the judicial integrity rationale); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 822 (2013) (asserting that "[a]lthough it is well accepted that the Court now treats the exclusionary remedy as exclusively deterrence-driven, the Court has not articulated a coherent theory explaining how it expects exclusion to deter unconstitutional searches and why it considers deterrence a worthy goal" (footnote omitted)).

57. 384 U.S. 436, 476 (1966) (holding that the right to counsel during interrogation is a "prerequisite[] to the admissibility of any statement made by a defendant").

enforcement officers corresponds to the likelihood that defendants have a remedy.[58] To be sure, the evidence is not overwhelming.[59] But data at least suggest that law enforcement officers conform their conduct to the likelihood of a remedy.

In particular, data demonstrate that limiting the exclusionary rule remedy results in more deliberate violations.[60] Since *Miranda*, the Court has created two exceptions to its exclusionary rule: (1) permitting the state to introduce statements taken in violation of *Miranda* for impeachment purposes,[61] and (2) permitting law enforcement to use those statements during their investigation.[62] As Professor Charles Weisselberg has documented, as soon as the Court allowed some use of statements obtained in violation of *Miranda*, law enforcement officials began training officers in permissible uses of the statements.[63]

After the Court's decisions permitting use of statements taken in violation of *Miranda*, training materials distributed to California law enforcement officers contained explicit instructions that questioning "outside *Miranda*"—after defendants have invoked their right to silence or asked for counsel—does not violate a defendant's rights and is

58. *See* Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442–43 (1987) (describing how the Court's exclusionary rule jurisprudence incentivizes police officers to follow the law where a violation would provide the defendant a remedy and to cross the line where no remedy is available); Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 524–25 (2002) (discussing the effect of exclusionary rule remedies on law enforcement compliance with *Miranda*); Dellinger, *supra* note 28, at 1563 (arguing against the adoption of a tort remedy as a substitute for the exclusionary rule because it would permit law enforcement officers to buy their way out of complying with the Constitution); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132 (1998) (documenting the sensitivity of police to the remedies provided for a violation of *Miranda*); *see also* Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 227–28 (2010) (citing a study of Maryland police officers that showed in 48.4% of non-consent searches pursuant to traffic stops, the police found contraband). Professor Dripps argues that after discounting small, personal amounts of marijuana, the "hit rate" for these searches is actually under ten percent and that these numbers indicate that the exclusionary rule is the appropriate remedy for warrantless searches, but that the low "hit rate" shows that the exclusionary rule does not currently do enough to deter illegal warrantless searches. *Id.* at 228.

59. *See, e.g.*, Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1368 (2008) (stating that it is not possible to quantify the effect of the exclusionary rule on police behavior).

60. *See* Weisselberg, *supra* note 58, at 134–36.

61. *See* Harris v. New York, 401 U.S. 222, 226 (1971).

62. *See* Michigan v. Tucker, 417 U.S. 433, 450–52 (1974) (holding that although the state could not introduce against the defendant evidence of a statement law enforcement officers obtained in violation of *Miranda*, the state could use the defendant's statement to find other witnesses against him).

63. Weisselberg, *supra* note 58, at 134–35.

permissible to gain information that can be used in any way except directly against the defendant at trial.[64] As a result, "a substantial number of appellate decisions . . . reported deliberate *Miranda* violations in interrogations in counties all around the state."[65]

The data are somewhat mixed regarding whether the exclusionary rule effectively deters illegal searches and seizures, but at least some studies have concluded that it has had a deterrent effect.[66] And this makes sense. After all, the suppression remedy requires law enforcement officers to weigh the likelihood that the court will suppress the evidence they collect against the potential benefit gained by violating the defendant's constitutional rights.[67] But without any possibility of suppression, there is no incentive to comply with those rights.

To be sure, many state actors would comply with their constitutional responsibilities even without any incentive.[68] But in the rough and tumble of criminal prosecutions, at least some law enforcement officers believe they have an obligation to society to build a strong case against those who they believe have done wrong.[69] To the extent that the Constitution does not provide a remedy for actions they take, it perhaps is understandable

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64. *Id.*

65. *Id.* at 136.

66. *See, e.g.*, Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1065 (1991) (analyzing data from seven counties and concluding that the exclusionary rule "serves as an incentive for many police officers to follow the limits imposed by the Fourth Amendment" and that "police were willing to follow guidelines established by the Constitution, the district attorney's office, and the courts when writing search warrant applications"). *But see* James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 276–77 (1973) (citing to studies of motions to suppress and finding that "[t]he sample is small but it seems to indicate that some police, at least, are not deterred by the exclusionary rule at all").

67. *See* Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 1001 (2012) (contending that the Court's exceptions to excluding evidence obtained in violation of *Miranda* incentivize police misconduct). Professor Yale Kamisar points out that even if individual police officers do not engage in this sort of economic analysis, the authors of their training manuals will. *Id.*

68. *See* Albert W. Alschuler, *The Descending Trail: Holmes'* Path of the Law *One Hundred Years Later*, 49 FLA. L. REV. 353, 374–75 (1997) (acknowledging that prosecutors usually obey a constitutional ruling even if they could generally violate it without any extrinsic consequences).

69. *Cf.* Kinports, *supra* note 56, at 833–34 (discussing "organizational theory" and how it posits that police officers have developed their own cultural norms that may result in widespread wrongdoing without any individual officer thinking he is doing anything wrong). In an editorial imploring citizens to provide information about a murder, columnist Mary Mitchell wrote that police officers sometimes justify violating citizens' rights when looking for a dangerous perpetrator because witnesses will not "snitch," and therefore police feel obligated to do whatever it takes. Mary Mitchell, *Who's Helping Tinley Park Killer Hide?*, CHI. SUN-TIMES, Feb. 10, 2008, at A12.

that they believe their conduct justified.[70] Thus, for better or worse, the availability of a suppression remedy has had an impact on the conduct of law enforcement.[71]

II. THE IMPORTANCE OF DETERRING INVISIBLE VIOLATIONS OF HIGH-COST CONSTITUTIONAL RIGHTS

In contrast to the exclusionary rule remedial scheme, the Court in devising a remedial scheme for *trial*-level violations of constitutional rights has never considered the importance of providing incentives for constitutional conduct by state actors.[72] For this category of constitutional error—occurring after the trial court has appointed counsel and taken oversight of the case—the Court essentially has entrusted defense counsel and trial courts with the responsibility of protecting the constitutional rights of criminal defendants.[73] This may be because trial courts that have the authority and obligation to respond to objections by the defendant can generally correct errors that occur before the trial court—for instance, violations of the defendant's constitutional right to confront witnesses or to not testify—relatively easily. And to the extent that defense counsel can anticipate and raise a potential constitutional error, trial courts can act to prevent that error.

Because the Court appears to assume that trial courts will correct these errors, it has limited post-violation appellate remedies to situations where constitutional violations deprive defendants of fundamentally fair trials.[74]

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70. *See* Weisselberg, *supra* note 58, at 153 (noting that exceptions to the exclusionary rule for *Miranda* violations have taught police officers that they should only follow the law when necessary to avoid suppression of evidence).

71. *See* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 114 (2003) (stating that other than the exclusionary rule, there are almost no incentives for police to follow the law); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1245 (2005) (arguing that exceptions to the availability of remedies for criminal defendants causes "prosecutors and police to tailor their actions to the sub-constitutional level").

72. *Cf.* United States v. Morrison, 449 U.S. 361, 364–65 (1981) (reviewing precedent on Sixth Amendment violations and concluding that "[the Court's] approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial").

73. *Id.* at 365 (reasoning that absent "some adverse effect upon the effectiveness of counsel's representation or . . . other prejudice to the defense. . . . there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial").

74. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 686 (1984) ("In giving meaning to the [constitutional requirement of effective assistance of counsel] . . . we must take its purpose—to ensure a fair trial—as the guide."); *see also* Rose v. Clark, 478 U.S. 570, 577–78 (1986) (recognizing that some constitutional errors require reversal because these errors "necessarily render a trial fundamentally unfair. . . . [and w]ithout these basic protections, a criminal trial

To be sure, trial courts do provide at least some incentive for state actors to respect the constitutional rights of criminal defendants.[75] After all, the threat of the trial court imposing a costly remedy provides an incentive for compliance with most constitutional rights. Many constitutional errors that occur within a trial court's jurisdiction therefore are readily correctable by those courts.

But there is a particular category of constitutional rights for which remedies before the trial court are wholly inadequate to incentivize constitutional compliance.[76] State actors often have incentives—both economic and non-economic—to err on the side of violating the Constitution if there is no consequence to that violation. If ensuring robust respect for those constitutional rights imposes significant costs, states and local jurisdictions face a substantial disincentive to respect those rights. And if trial courts cannot easily detect those constitutional violations, states have little external incentive to comply with the Constitution. For this particular category of rights—violations of which are shrouded from the trial court and counsel and compliance with which is costly—states have virtually no incentive, outside of their own moral compass and the ethical rules, to protect these rights.[77] Two rights—(1) *Strickland v. Washington*'s right to the effective assistance of counsel,[78] and (2) *Batson v. Kentucky*'s right to a fair and impartial jury[79]—provide

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cannot reliably serve its function as a vehicle for determination of guilt or innocence"); *Morrison*, 449 U.S. at 365 (reasoning that absent "some adverse effect upon the effectiveness of counsel's representation or . . . other prejudice to the defense. . . , there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial"); Powell v. Alabama, 287 U.S. 45, 53 (1932) (finding a constitutional violation because the state court's actions "amount[ed] to a denial of effective and substantial aid [of counsel]"); United States v. Stein, 541 F.3d 130, 144 (2d Cir. 2008) (noting that in cases involving the alleged denial of the Sixth Amendment right to counsel, the court "must 'identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial' [and that] [d]ismissal of an indictment is a remedy of last resort"); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1337 (1994) (discussing the automatic reversal standard when an error alters the structure of a trial so much that a reliable verdict could not be attained).

75. *See supra* note 5.

76. The lack of any incentive for constitutional compliance does not mean that every jurisdiction systematically violates the rights of criminal defendants. It does, however, mean that some jurisdictions systematically violate certain rights with no fear of repercussions.

77. By "systematic" violations, this Article refers to constitutional errors that occur regularly and frequently in a particular jurisdiction.

78. Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

79. Batson v. Kentucky, 476 U.S. 79, 84, 96–98 (1986) (reaffirming that purposeful exclusion of jurors based on race violates the Equal Protection Clause and establishing a burden-shifting framework for determining when a violation occurs).

illustrative examples of invisible constitutional error and the importance of providing appellate remedies for violations of those rights.

A. *Invisible Denials of High-Cost Constitutional Rights*

Although trial courts can correct many constitutional errors that occur within their jurisdiction, certain errors are far more difficult to detect and remedy at the trial level. This occurs either because defense counsel cannot (or will not) identify the error or because the error lies primarily within the knowledge of the prosecutor.[80] If those invisible errors also provide significant benefit to the state, the risk of systemic violations of those constitutional rights increases substantially.

Violation of *Strickland*'s right to effective assistance of counsel is the paradigmatic example of an error not usually raised before trial courts. Lawyers for defendants raise most errors on behalf of their clients.[81] But trial lawyers are unlikely to recognize or raise their own ineffectiveness, particularly when their clients are pleading guilty.[82] And unless a defendant knows to raise the lack of diligence or investigation by counsel, trial courts often are unaware that there is a problem. Thus, appellate (or post-conviction) counsel raise most claims that trial counsel provided constitutionally deficient assistance in violation of the Sixth Amendment.[83] As a result, courts usually consider ineffective assistance claims only on appeal, if at all.

Batson errors similarly may be hidden. To establish that a prosecutor violated *Batson* by striking a potential juror on prohibited race or gender grounds, defendants must show *intentional* discrimination by the prosecutor; that is, that the prosecutor struck the juror because of her race

80. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 678–81 (1985) (discussing different forms of prosecutorial misconduct).

81. James A. Morrow & Joshua R. Larson, *Without a Doubt, A Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in* State v. Ramey, 31 HAMLINE L. REV. 351, 353 (2008) ("[D]efense attorneys are obligated to object to prosecutorial error when it occurs and seek corrective action by the trial court.").

82. There are instances of court-appointed counsel asserting that they cannot be effective because of their caseloads, but those cases are relatively rare. *See, e.g.*, Pub. Def., Eleventh Jud. Cir. of Fla. v. State, 115 So. 3d 261, 265 (Fla. 2013).

83. *See* Daryl J. Levinson*, Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999) (pointing out that defendants tend to raise ineffective assistance of counsel claims only on collateral review because the defendant typically retains his trial lawyer on direct appeal). In some states, defendants cannot bring claims of ineffective assistance of counsel on direct appeal and can only raise them in collateral proceedings. *See, e.g.*, Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (holding that procedural default does not prevent collateral review of an ineffective assistance of trial counsel claim in Arizona because a defendant could bring such a claim only on collateral review when the defendant did not have right to counsel).

or gender.[84] Of course, prosecutors likely possess evidence regarding why they struck particular jurors and whether they *intended* to exclude jurors from a defendant's jury on prohibited grounds. But other than the facts in the particular case—that the prosecutor struck most of the people of color or women from the jury—defendants often have little evidence that a particular prosecutor has engaged in intentional discrimination.[85]

Each of these constitutional rights, moreover, carries an elevated risk of systemic violations. This is so either because of the high cost of complying with these rights or because of entrenched views on the benefits of not complying with defendants' rights.[86] Of course, almost every constitutional right imposes at least some cost on the state insofar as it reduces the likelihood of a conviction.[87] But the cost—either financial or in terms of workload—of respecting some constitutional rights is higher than for others.

Strickland's ineffective assistance of counsel standard lends itself to systematic violations primarily because ensuring effective assistance of counsel for every criminal defendant has significant monetary costs for the state.[88] The state (or local jurisdiction, depending on what entity provides counsel for indigent defendants) has a strong financial incentive to minimize the costs of indigent defense providers (usually public defender offices).[89] As a result, many jurisdictions chronically and

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84. *See Batson*, 476 U.S. at 96–98 (describing the three-step burden-shifting process to determine whether the prosecution engaged in "purposeful discrimination").

85. *See* Hernandez v. New York, 500 U.S. 352, 365 (1991) (noting that there will likely not be much evidence bearing on the ultimate issue of intentional discrimination and that "the best evidence often will be the demeanor of the [prosecutor]"); Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 322 (2007) ("*Batson* challenges occur in a virtual evidentiary vacuum . . . .").

86. *See supra* note 13 and accompanying text; Miller-El v. Cockrell, 537 U.S. 322, 346 (2003).

87. *See, e.g.*, United States v. Nuckols, 606 F.2d 566, 568 (5th Cir. 1979) (noting that advising the defendant of his privilege against self-incrimination before he enters a guilty plea ensures that the defendant has knowingly waived this constitutional right that "reduce[s] the likelihood of conviction").

88. *See* John P. Gross, *The True Benefits of Counsel: Why "Do-it-Yourself" Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1, 31 n.129 (2013) (citing cases where the Supreme Court has recognized the financial burden that the right to counsel places on the states); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 32, 43–47 (1995) (recognizing that "[c]ost is usually the primary factor determining what type of indigent defense system a state or county adopts" and providing examples of state funding methods).

89. *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space."); *see also* Kim Taylor-Thompson, *Tuning Up* Gideon*'s Trumpet*, 71 FORDHAM L. REV. 1461, 1462 (2003) (arguing that the *Gideon* Court's failure to

seriously underfund their indigent defense systems.[90] Public defenders in some jurisdictions carry such enormous caseloads that they cannot possibly provide every defendant, in the words of the *Strickland* Court, the "assistance of counsel guaranteed by the Sixth Amendment."[91] Indigent defense counsel carrying caseloads of 1000–1600 cases per year cannot possibly provide effective assistance.[92]

Respecting *Batson* also involves costs for prosecutors, at least in jurisdictions in which prosecutors believe that jurors of color will be less likely to convict.[93] Before *Batson*, at least some jurisdictions had explicit policies and training to ensure that prosecutors did not seat jurors of color,

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provide states with clear guidance on how to develop and fund a system of effective indigent representation has contributed to the common practice of "jurisdictions tolerating and even fostering minimal levels of performance"). *See generally* STEPHEN D. OWENS ET AL., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, NCJ 246683, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012 – UPDATED 1 (2014) (describing the various funding methods states use to provide indigent defense and reporting the budget of each state through 2012).

90. *E.g.*, Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 421 (2011) ("Excessive caseloads due to the underfunding of public defenders have been the status quo for decades . . . ."); Wayne A. Logan, *Litigating the Ghost of* Gideon *in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 885–87 (2010) (stating that "public indigent defense systems nationwide operate in perpetual crisis mode" and describing the system of chronic underfunding in Florida).

91. Strickland v. Washington, 466 U.S. 668, 706 (1984); *accord* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1054–57 (2006) (detailing the problem of crushing caseloads for indigent defense counsel); *see also* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 470–71 (2007) (providing data on caseloads of public defenders); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 391–92 (1993) (identifying problems caused by excessive caseloads); Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 908 (2004) (identifying excessive caseloads as one of the problems confronting indigent defense systems in this country); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240–41 (1993) (noting that "staggering caseloads" lead to "burnout" among public defenders); Taylor-Thompson, *supra* note 89, at 1509 (recognizing that caseload caps are critical to quality representation).

92. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17 (2004), http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf [hereinafter *GIDEON'S* BROKEN PROMISE] ("Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases." (quoting Jonathan Gradess, Executive Director, New York State Defenders Association)).

93. *See* Miller-El v. Dretke, 545 U.S. 231, 263–65 (2005) (condemning a Dallas County District Attorney manual on how to systematically exclude African-Americans from juries that remained in circulation until at least 1976).

particularly in death penalty cases.[94] In those jurisdictions, prosecutors were trained that jurors of color would side with the defendant and would not view the evidence fairly.[95] A prosecutor trained that jurors of color could not fairly hear the evidence, of course, would have an enormous temptation to ensure that no jurors of color sat on the jury.

For this category of error, trial-level remedies do not incentivize constitutional compliance, and a robust appellate remedy is needed to incentivize constitutional compliance. But, as discussed below, because the Court has only considered the importance of deterring constitutional violation in the context of the exclusionary rule, it has limited appellate remedies such that they do not provide an adequate means for deterring this category of constitutional error.

B. *Limitations on Appellate Remedies of Constitutional Error*

Because the Court has never considered the importance of deterring constitutional error in criminal cases outside of the exclusionary rule, it has never contemplated the importance of appellate remedies for ensuring compliance with constitutional rights. Instead, when considering constitutional violations that occur after the start of trial proceedings and the appointment of counsel, the Court's remedial scheme has focused solely on the *fairness* of the proceedings.[96] It therefore has limited appellate remedies—through the harmless error rule and the *Strickland* prejudice standard among others—to constitutional errors affecting the *outcome* of proceedings with no consideration of incentives for constitutional compliance.

Beginning with harmless error, in *Chapman v. California*,[97] the Court held that most claims of constitutional error can be remedied on appeal only if there is a reasonable possibility that the constitutional violation might have contributed to the outcome.[98] Or, to phrase it slightly

94. *See id.* at 264 (noting the District Attorney Office's "formal policy to exclude minorities from jury service").

95. *See* Ronald J. Tabak, *The Continuing Role of Race in Capital Cases, Notwithstanding President Obama's Election,* 37 N. KY. L. REV. 243, 267–68 (2010) (discussing the Dallas District Attorney Office policy at issue in *Miller-El* and an instructional video used by a District Attorney in Philadelphia to train prosecutors on how to evade *Batson*); *Former Philadelphia Prosecutor Accused of Racial Bias*, N.Y. TIMES, Apr. 3, 1997, at A14, http://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html (quoting the Philadelphia District Attorney training video that instructed that "blacks from the low-income areas are less likely to convict" because of "a resentment for law enforcement").

96. *Strickland*, 466 U.S. at 686.

97. 386 U.S. 18 (1967).

98. *Id.* at 24; *see also* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2035–37 (describing the history of the constitutional harmless error rule). If a defendant fails to object in the trial court to a

differently, a court will not deem constitutional errors harmless unless the state establishes beyond a reasonable doubt that the error did not contribute to the verdict.[99] At first blush, it appears unlikely that a court would ever find constitutional errors harmless. After all, requiring proof beyond a reasonable doubt that the error did *not* contribute to the verdict sets a high bar for a finding of harmless error.[100]

In operation, however, the harmless error doctrine blocks a significant number of claims of constitutional error. Indeed, one study that examined cases of criminal defendants who later were exonerated found that appellate courts in sixteen percent of those cases had previously found constitutional error but concluded that the error was harmless.[101] The prevalence of court findings of harmless error arises from the fact that the standard increasingly has moved toward assessing the strength of *other* evidence of the defendant's guilt, rather than evaluating the magnitude of the constitutional error.[102] Thus, regardless how egregious the violation of the defendant's constitutional rights, as long as the state has strong evidence of guilt, a court will deem the error harmless.[103]

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constitutional error, appellate review is even more limited. *See* United States v. Olano, 507 U.S. 725, 732 (1993) (limiting review of errors that were not objected to during trial to those that "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" (quoting United States v. Young, 470 U.S. 1, 15 (1985))).

99. Of course, states may require reversal of constitutional error even if harmless, but most jurisdictions adhere to some form of the harmless error rule. *See* Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The "Guilty as Hell" Rule in State Courts*, 36 AM. J. TRIAL ADVOC. 233, 236 & n.23 (2012) (concluding that most state courts follow the Supreme Court's harmless error rule with regard to coerced confessions); Dick R. Schlegel, *The Evolution of Harmless Error in Iowa: Where Do We Go from Here?*, 43 DRAKE L. REV. 547, 549 (1995) (noting that state courts, particularly Iowa, follow *Chapman*'s harmless error rule).

100. The standard for obtaining reversal for *non*-constitutional error presents a much higher burden for criminal defendants. *See* Kotteakos v. United States, 328 U.S. 750, 760 (1946) (reiterating that in the context of a non-constitutional violation, the burden is on "the party seeking a new trial [to show] that any technical errors that he may complain of have affected his substantial rights" (quoting H.R. REP. NO. 913, 65th Cong. 3d Sess., at 1 (1919))).

101. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 108 tbl.8 (2008).

102. *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995) ("The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt. This approach is dangerously seductive, for our natural inclination is to view an error as harmless whenever a defendant's conviction appears well justified by the record evidence. However, the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong."); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 58–60 (criticizing the Court for assuming the error was harmless whenever there is other strong evidence of guilt and arguing that the Court has effectively placed the burden on the defendant to prove that the error was harmless).

103. *See* Edwards, *supra* note 102.

The harmless error standard does not apply to constitutional errors "so basic to a fair trial that their infraction can never be treated as harmless error."[104] But this category of "structural error"—an error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself"[105]—is narrow, encompassing only constitutional violations that both strike at the core of the most fundamental constitutional rights *and* defy harmless error analysis.[106] Structural errors include *Batson* violations,[107] as well as actual or constructive denials of counsel, denials of the right to a public trial or the right to proceed pro se, and denial of the right to an unbiased judge or jury.[108] Violations of precious few other rights have been deemed structural errors.[109]

The harmless error doctrine has been the subject of intense criticism because of the extent to which it curtails the availability of an appellate remedy for constitutional violations.[110] But the Court's instinct that not every constitutional violation should result in reversal is understandable.[111] After all, in the absence of a requirement that the constitutional error in *some* way affected the result of the proceeding, even the most trivial of errors would result in reversal.[112] And although some scholars contend that *constitutional* errors cannot be trivial,[113]

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104. Chapman v. California, 386 U.S. 18, 23 (1967).

105. Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (White, J., dissenting).

106. *See id.* at 290–91 (listing the limited categories of structural error and criticizing the majority for construing structural error so narrowly).

107. *See* Rivera v. Illinois, 556 U.S. 148, 160–61 (2009).

108. *See* Fairfax, *supra* note 98, at 2038.

109. *See, e.g.*, *Fulminante*, 499 U.S. at 307–09 (holding that the introduction of a coerced confession is trial error rather than a structural error and therefore subject to harmless error analysis); *see also* Fairfax, *supra* note 98, at 2038–39 (analyzing *Fulminante*).

110. *See* Edwards, *supra* note 102, at 1169–70; Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 172 (1991) (observing that "even the accused have rights and that only automatic reversal can fully vindicate such rights").

111. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 3–4 (1970) (describing how courts used to reverse convictions for the most trivial of errors). For example, Judge Roger Traynor discusses a case where the appellate court reversed because the indictment charged the defendant with "larcey" instead of "larceny." TRAYNOR, *supra* (discussing *People v. St. Clair*, 56 Cal. 406 (1880)); *cf.* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 20 (2002) (noting that although the precise content of the harmless error doctrine has been subject to dispute, "there is near unanimity in support of harmless error as a concept").

112. *See* Fairfax, *supra* note 98, at 2035 (noting that before *Chapman*, virtually every constitutional error resulted in reversal of a conviction).

113. *See* Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 126, 164–66 (1993) (arguing that harmless error doctrine should not apply to constitutional errors in the penalty phase of a capital case); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 91–92

requiring a new trial where the constitutional violation was neither particularly egregious nor particularly harmful to the defendant likely would not lead to a different outcome for the defendant.

Like the harmless error doctrine, *Strickland*'s prejudice standard examines the fairness of the proceeding and the reliability of the outcome in assessing the availability of a remedy. Under the familiar standard established in *Strickland*, a defendant must establish (1) that counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that the errors of counsel led to the outcome.[114] As with harmless error, the Court has explained the requirement that the defendant show prejudice almost entirely with reference to the goal of ensuring trials that give rise to reliable outcomes: "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[115] And as with harmless error, the Court increasingly has moved to assessing the strength of the government's evidence against the defendant in determining materiality.[116]

Those similarities aside, *Strickland*'s prejudice standard presents a significantly higher bar to relief than the harmless error standard for two reasons. First, the defendant has the burden of proving prejudice, whereas the state has the burden of establishing harmless error.[117] Second, prejudice requires that the defendant establish a reasonable probability of a different result.[118] Because the Court has held that courts may consider the prejudice prong even before finding deficient performance,[119] *Strickland*'s prejudice requirement has come to dominate the law of ineffective assistance, with courts disposing of the vast majority of ineffective assistance claims on prejudice grounds.[120]

(1988) (proposing that reversal should be required whenever the error impairs the purpose of the relevant constitutional right or when reversal is needed for deterrence).

114. *See* Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).

115. *Id.* at 691–92.

116. *See* Braithwaite, *supra* note 99, at 243–44 (noting that many state courts now determine whether an error was harmless by asking "whether, once erroneously admitted evidence is excluded, there remains overwhelming evidence to support the jury's verdict" (quoting Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16 (1976))).

117. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

118. *See Strickland*, 466 U.S. at 696.

119. *See id.* at 697.

120. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996) (stating that defendants usually have to show prejudice even if counsel was drunk, asleep, or under the influence of drugs); *see also* Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 396–97 (1994) (noting that the *Strickland* framework makes it likely that the issue of counsel's

One other arguable difference between harmless error and *Strickland*'s prejudice standard deserves mention: the right–remedy distinction. The Court has been quite clear that the harmless error standard, which applies across a number of constitutional doctrines, concerns only the availability of a *remedy* for constitutional violations.[121] In other words, whether the state violated the defendant's constitutional rights is distinct whether the error was harmless.[122]

It is much less clear, however, whether prejudice defines (1) the scope of the right to effective assistance, (2) the parameters of a *Strickland* violation, or (3) the existence of a remedy for violation of the right. In *Strickland* itself, the Court held only that a claim of ineffective assistance requires a showing of prejudice on appeal. Indeed, as the Court put it:

> A *convicted* defendant's claim that counsel's assistance was so defective as to require *reversal of a conviction or death sentence* has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[123]

Because the first prong of the *Strickland* inquiry focuses on whether counsel was acting as the "counsel" required by the Sixth Amendment,[124] that prong of the analysis appears to focus entirely on whether the

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performance does not even arise in most cases); *Right to Counsel*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 497–99, n.1560 (2008) (compiling cases on ineffective assistance of counsel); Martin C. Calhoun, Note, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413, 455 (1988) (noting that courts rejected 43.3% of all unsuccessful ineffective assistance of counsel claims studied solely for lack of prejudice).

121. *See* Chapman v. California, 386 U.S. 18, 21–24, 49 (applying for the first time harmless error analysis to constitutional violations); *see also* Neder v. United States, 527 U.S. 1, 7 (1999) (reminding courts that apart from a very limited class, those that affect "substantial rights," constitutional errors must be disregarded if they are harmless beyond a reasonable doubt); Rose v. Clark, 478 U.S. 570, 578–79 (1986) (stating that almost all errors must go through harmless error analysis).

122. The Court has made clear that courts can assess the issue of harm before deciding whether there in fact was constitutional error, but the two inquiries remain separate. *See* Edwards, *supra* note 102, at 1182 (noting that sometimes courts openly decline to decide whether a defendant's rights have been violated by determining that any arguable violation is harmless).

123. *Strickland*, 466 U.S. at 687 (emphasis added).

124. *Id.*

defendant received the right to counsel guaranteed by the Sixth Amendment. After all, the Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. The only question, then, would be whether the deprivation of that right entitles the defendant to a remedy, i.e., whether the deficient performance of counsel prejudiced the defendant.

To be sure, the Court in *Strickland* defined violation of the right to counsel in terms of prejudice: "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[125] But it appears nonsensical to assert that a defendant who has established deficient performance—that counsel "made errors so serious" counsel did not provide the assistance required by the Sixth Amendment—has not established a violation of that right.[126] In any event, regardless whether the state's disregard of the right to counsel constitutes a violation of the defendant's right without a remedy or is instead a deprivation of a constitutional right that does not rise to the level of a constitutional violation, the parameters of defendants' constitutional rights in this context appear clear.

C. *The Importance of Remedies for Deterring Invisible, Cost-Effective Constitutional Error*

The Court's failure to consider the importance of incentivizing constitutional compliance outside of the exclusionary rule context has led, in certain jurisdictions, to patterns of intentional, invisible constitutional error—particularly the failure to provide effective assistance of counsel.[127] The traditional framework fails to assure that the system operates within constitutional constraints because these errors cannot be corrected at the trial level and instead require a showing on

125. *Id.* at 692.

126. *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1–2, 11 (recognizing that defendants presumably have a right to effective assistance of counsel but that the toothless *Strickland* test dilutes that right); *see also* Joan Stumpf, Case Note, *Criminal Law—A New Standard for Ineffective Assistance of Counsel Claims*—Commonwealth v. Pierce, 61 TEMP. L. REV. 515, 521, 537–38 (1988) (recognizing the right to effective assistance of counsel but criticizing the *Strickland* prejudice prong as subordinating it to the right to a fair trial). *But see* Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 35–36 (2009) (stating that *Strickland* currently requires prejudice as an element of a Sixth Amendment violation but that the Court has recently shown willingness to separate the Sixth Amendment right to effective assistance of counsel from the Due Process-based prejudice showing).

127. *See* Anderson, *supra* note 90, at 421–22 (noting that Florida and Colorado have passed laws that "effectively legislate around the Sixth Amendment").

appeal or habeas of a violation of the defendant's fair trial rights. For these errors, then, the system incentivizes hiding errors.

Before examining instances of systematic *Strickland* violations, however, this Section reviews the operation of *Batson*'s remedies to demonstrate that remedies for widespread constitutional violations deter blatantly *deliberate* violations of constitutional rights. Prior to *Batson*, some jurisdictions could (and did) train prosecutors to strike jurors solely on the basis of race with no repercussion.[128] *Batson*, of course, both held unconstitutional juror strikes motivated by race and, importantly, also held that such strikes constitute "structural error" that does *not* require the defendant to show harmless error.[129] In addition, because the Court has determined that evidence that a prosecutor's office consistently engaged in discriminatory conduct can help establish its discriminatory motive,[130] prosecutors' offices now have reason to fear that courts will overturn convictions, regardless of the strength of the evidence against the defendant, if the office (1) has a policy (formal or informal) endorsing the violation of this right, *or* (2) engages in a pattern of striking jurors of color.[131]

As a result, prosecutors now have an incentive to avoid systematically and blatantly violating *Batson*. Of course, this does not mean that *Batson* is respected in every case.[132] Instead, it means that prosecutors' offices can no longer have policies of training their lawyers to violate *Batson*, and they also have good cause to worry about establishing patterns of striking jurors of color absent good reasons. Allegations of *Batson* violations still occur,[133] but allegations of more recent *Batson* violations appear to involve allegations of more nuanced violations.[134] To put it another way, the *Batson* remedy prevents the most blatant violations.

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128. *See supra* notes 93–95 and accompanying text (discussing the pre-*Batson* circulation of both a manual that advocated for the systematic exclusion of African Americans at the Dallas County District Attorney's Office and a comparable instructional video in Philadelphia).

129. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986); *see also* Rivera v. Illinois, 556 U.S. 148, 153, 160–61 (2009) (noting that *Batson* errors are structural and not subject to harmless error review).

130. *See* Miller-El v. Dretke, 545 U.S. 231, 253 (2005); Miller-El v. Cockrell, 537 U.S. 322, 346–47 (2003).

131. *See supra* notes 93–95 and accompanying text.

132. Professor Albert Alschuler describes the indisputable impact of *Batson* on prosecutors' offices despite its numerous "loopholes." *See* Alschuler, *supra* note 68, at 374–75.

133. *See id.* at 374.

134. *See, e.g.*, Green v. LaMarque, 532 F.3d 1028, 1033 (9th Cir. 2008) (finding a *Batson* violation where the prosecutor noted the race of each venire member he struck from the jury pool); Fernandez v. Roe, 286 F.3d 1073, 1078–80 (9th Cir. 2002) (finding a prima facie case of racial discrimination when the prosecutor struck two African Americans and four Hispanics because the strikes could be analyzed together to raise an inference of discrimination). *But see* Bond v. Beard, 539 F.3d 256, 273–74 (3d Cir. 2008) (holding that a video instructing prosecutors on how to take

Batson's deterrence of at least the most blatant violations contrasts with the lack of any incentive to comply with *Strickland*.[135] After all, states can hide ineffectiveness of defense counsel with the assurance that a court is extremely unlikely to overturn a conviction. As a result, at least a few jurisdictions have tailored constitutional compliance to the likelihood that a court will reverse the conviction on appeal, rather than respecting the constitutional rights of defendants.[136] The incentive structure for states raises virtually no chance that a court will reverse a conviction for ineffective assistance of counsel. This is because there is only a minimal chance that a defendant will actually raise ineffective assistance on appeal, and, if the claim is raised, it is extremely unlikely that a court will find counsel's errors prejudicial.[137] The probability of both of these events happening is exceedingly minimal.[138] This is so for

race into account but circumvent *Batson* did not show a pattern of discrimination because the general office policy was to comply with *Batson*); United States v. Moreno, 217 F.3d 592, 594 (8th Cir. 2000) (finding no *Batson* violation where the defendant was Mexican American and the prosecutor struck the only Mexican American from the jury because another Hispanic American did serve on the jury and the prosecutor gave a race-neutral reason); McCain v. Gramley, 96 F.3d 288, 292–94 (7th Cir. 1996) (finding no *Batson* violation when the prosecutor struck a higher percentage of African Americans than the percentage of African Americans in the venire because this amounted to only two African Americans, and the prosecutor gave race-neutral reasons).

135. Defendants' right under *Brady* to disclosure of exculpatory evidence in the hands of prosecutors provides another example of invisible constitutional error. Prosecutors have every incentive to hide exculpatory material from defendants at trial, and *Brady*'s materiality standard precludes most defendants from obtaining a reversal. The New Orleans District Attorneys' Office under former-District Attorney Harry Connick provides perhaps the clearest example. *See* Adam Liptak, *$14 Million Jury Award to Ex-Inmate Is Dismissed*, NY TIMES (Mar. 29, 2011), http://www.nytimes.com/2011/03/30/us/30scotus.html.

136. *See* Nancy J. King & Joseph L. Hoffmann, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 MISS. L.J. 433, 438 (2008) (noting that post-conviction litigation focuses on mistakes of counsel rather than the merit of constitutional claims).

137. This Article recognizes it is unlikely that local or state legislatures' actions are this deliberate. If, however, local legislatures believed that convictions would be overturned because they were not adequately funding indigent defenders, funding undoubtedly would increase.

138. There are no existing statistics on the possibility of a felony conviction leading to a successful ineffective assistance of counsel claim, but the existing data strongly suggest that the chance of a felony case being reversed on appeal ranges from slim to none. In 2008, for instance, there were a total of thirty-five published federal court decisions (either at the district court or appellate level) finding ineffective assistance of counsel either on direct appeal or on habeas motions. *See* TERESA L. NORRIS, SUMMARIES OF PUBLISHED SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS POST-*WIGGINS V. SMITH* (2013), https://www.capdefnet.org/hat/uploadedFiles/Public/Helpful_Cases/Ineffective_Assistance_of_Counsel/IAC%20PostWiggins%2072613.pdf (compiling and summarizing successful, published ineffective assistance of counsel cases). In that same year, there were 76,572 felony convictions in federal court alone. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, NCJ 231822, 2008- STATISTICAL TABLES tbl.4.2., http://www.bjs.gov/content/pub/html/fjsst/2008/tables/fjs08st402.pdf. Suffice it to say that successful ineffective assistance of counsel claims are rare.

a couple of reasons. First, most defendants plead guilty,[139] and many either waive their right to appeal or have no basis for an appeal after their pleas.[140] Second, the chance that a defendant can establish prejudice on appeal constitutes an almost nonexistent threat.[141] States therefore have little cause for concern that defendants' convictions will be overturned for ineffective assistance.

Infringements of the constitutional right to effective assistance of counsel, moreover, are widespread because of the very real financial pressures states face. Unlike the vast majority of constitutional rights guaranteed to criminal defendants, the right to counsel requires significant expenditures by the state (and in many jurisdictions also the county or the city).[142] Good lawyers often cost more than bad lawyers, if for no other reason than that they actually spend the necessary time on each case.[143] States, of course, have every incentive to provide the cheapest representation they can find, regardless of the quality. This is particularly true given that criminal defendants have at most little (and

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139. *See* MATTHEW R. DUROSE & PATRICK A. LANGAN, DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 215646, FELONY SENTENCES IN STATE COURTS, 2004 at 1 (2007), http://www.bjs.gov/content/pub/pdf/fssc04.pdf (indicating that ninety-five percent of felony convictions in state courts were the result of a guilty plea in 2004).

140. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011) ("[B]ecause most guilty pleas waive defendants' rights to appeal, few typical guilty-plea cases ever reach[ ] the Supreme Court."); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2087–95 (2000) (noting that courts usually uphold plea bargain waivers of the right to appeal); J. Peter Veloski, Comment, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargain Waivers of Collateral Relief*, 86 TEMP. L. REV. 429, 430 (2014) (noting that it is common for defendants to waive their rights to appeal in plea bargains, even before they know what sentence they will receive).

141. Establishing prejudice from counsel's conduct during a guilty plea is even more complicated than in a post-trial situation because the defendant must establish that the defendant would not have pleaded guilty absent counsel's errors. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 737–39 (2002) (noting that even if defense counsel were required to inform clients about the collateral consequences of guilty pleas under the performance prong, it would be difficult for the defendant to establish he would not have taken the plea anyway).

142. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1866–70, 1883 (1994) (arguing that the inadequacy of counsel for the poor is partially due to most state governments' unwillingness to pay for it); Taylor-Thompson, *supra* note 89, at 1480 (criticizing the *Gideon* Court for failing to acknowledge the enormous financial burden it placed on the states and, thus, failing to make clear that the Court expected "more than a cosmetic adherence to its ruling").

143. This Article recognizes that this often is not true. Indeed, experienced public defenders often prove more cost-effective than other lawyers. But experienced and responsible lawyers will not accept the caseloads required in some jurisdictions because they recognize that they cannot responsibly do so.

very likely no) voice or power in the matter because states set their own budgets.

As a result, in many jurisdictions across the country, legislators expect public defenders to manage caseloads so excessive that they cannot possibly provide constitutionally adequate representation to all of their clients. This problem has been exhaustively and comprehensively documented in many reports and articles.[144] The American Bar Association and many advocates have worked to enact caseload standards that would limit criminal defense lawyers to handling 150 felony cases per year or 400 misdemeanor cases.[145] In light of those standards, one example suffices to demonstrate the excessive caseload point. In testimony before the ABA given in 2004, the Executive Director of the New York State Defenders Association said: "Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases."[146] A lawyer working eight hours per day every weekday with no vacation for fifty-two weeks has 2080 hours of work time per year. That lawyer would have just over an hour to devote to each of her 1600 clients, assuming she spent her business day working directly on those clients' cases rather than on any administrative tasks. Given those statistics—and the fact that even one client who chooses to go to trial requires a lot of court time, in addition to investigation time—a public defender with that caseload could not possibly meet the constitutional standard in every case.

But these jurisdictions have no incentive to spend money on indigent defense in the absence of a costly consequence. And because remedies on appeal provide no incentive to comply, states have every incentive to shirk these constitutional rights. The critical question, then, is whether the system currently provides any other remedies to motivate constitutional compliance.

III. THE INADEQUACY OF OTHER REMEDIES TO DETER INVISIBLE CONSTITUTIONAL ERROR

If other review mechanisms ensured constitutional compliance, then remedies on direct criminal appeal for violations of these invisible errors

144. *See* sources cited *supra* notes 90–91; *see also* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 235–36 (2004) (recognizing the caseload crisis and advocating for caseload parity between defense counsel and prosecutors).

145. *See* NAT'L LEGAL AID & DEFENDER ASS'N, REPORT OF THE TASK FORCE ON COURTS, STANDARD 13.12 (1973), http://www.nasams.org/Defender/Defender_Standards/Standards_For_The_Defense. These standards have been criticized for requiring public defenders to accept too many cases, but suffice it to say that even these standards are not being met.

146. *GIDEON'S* BROKEN PROMISE, *supra* note 92.

would be unnecessary.[147] But the alternative mechanisms for remediating constitutional harm—the federal and state habeas and constitutional tort statutes—restrict remedies even more drastically than direct review of convictions. And the ethical rules, which in theory give lawyers and judges at least some incentive to comply with the commands of the Constitution, turn out to be toothless tigers.

The Court has recognized that other potential remedies could provide sufficient incentives for complying with the Constitution. The four remedies most likely to provide incentives for constitutional compliance are (1) the post-conviction habeas remedy available in federal courts to defendants alleging violations of their constitutional rights at some stage of the proceedings leading to conviction;[148] (2) federal tort actions, primarily the § 1983 civil damages remedies for violation of constitutional rights;[149] (3) state habeas and tort remedies; and (4) the ethical rules governing the conduct of lawyers.[150] If any of these remedies provided significant relief for constitutional violations, they arguably could provide an incentive for constitutional conduct.[151] But none does.

A. *The Federal Habeas Remedy*

Beginning with the habeas remedy, the Judiciary Act of 1789 provided an equitable remedy to prisoners "in custody, under or by colour of the authority of the United States."[152] In keeping with English law, this statute authorized relief from confinement where the court imposing confinement lacked jurisdiction or where the Executive had detained the prisoner without legal process.[153] In 1867, Congress authorized federal

147. *See* Hudson v. Michigan, 547 U.S. 586, 596–97 (2006) (holding that the exclusionary rule remedy for knock and announce violations is not a necessary deterrent because of the availability of the § 1983 remedy for such violations).

148. 28 U.S.C. §§ 2241(a)–(c), 2254–55 (2012).

149. 42 U.S.C. § 1983 (2012); Rudovsky, *supra* note 71, at 1207–09.

150. *See* MODEL RULES OF PROF'L CONDUCT rr. 1.1, 8.5 (AM. BAR ASS'N 2016).

151. The Constitution does not appear to require any of these remedies (except the very limited *Bivens* remedy), so all of the other remedies have been either enacted by a legislature or passed by state bar associations. *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There A Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 908 (1994).

152. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82. As other scholars note, the federal statutory habeas remedy merely supplemented the common law habeas remedy available in state courts, and even post-*Erie*, the federal courts also for many years created a federal "common law" of habeas. *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 3 (2001); Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 43–45 (2010). As discussed below, many of the federal habeas gatekeeping bars initially arose as part of that common law tradition.

153. *See* McCleskey v. Zant, 499 U.S. 467, 478 (1991); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 486–87 & n.120

courts to grant writs of habeas corpus to prisoners in *state* (as well as federal) custody.[154] As a result, criminal defendants convicted in either state or federal proceedings have an opportunity to seek a remedy in federal court to correct federal constitutional errors that occurred during the proceedings in their cases.[155]

The habeas statute in theory could provide a powerful tool for ensuring that state actors respect the constitutional rights of criminal defendants. As the Court itself has recognized, however, the habeas remedy is so attenuated from constitutional violations that it does not affect the conduct of law enforcement officers.[156] Perhaps more to the point, the habeas statutes pose such significant limitations on relief that it is extremely unlikely that the remedy does anything to alter the conduct of state actors.

The federal habeas statutes completely preclude relief for a variety of reasons.[157] For instance, if the applicant fails to raise his claim within one year of the judgment, the federal court cannot grant relief.[158] Similarly, the defendant must present his constitutional claim to the state courts,

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(1963); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2041–42 (1992); Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 575 (2009).

154. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; *see also McCleskey*, 499 U.S. at 478 (citing and explaining the Act of Feb. 5).

155. 28 U.S.C. §§ 2241(a)–(c), 2254–55 (2012).

156. *See* Stone v. Powell, 428 U.S. 465, 493–94 (1976) (holding that as long as the state provided full and fair opportunity to litigate Fourth Amendment claim, the habeas statute provides no relief for Fourth Amendment violations because the remedy is too far removed from the original violation to provide deterrence).

157. In addition to the limitations listed below, the statute precludes relief if the applicant raises the claim in a second or subsequent application for habeas relief, 28 U.S.C. § 2244(a)–(b), and if the applicant failed to exhaust state remedies for the error. 28 U.S.C. § 2254 (b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State . . . .").

158. 28 U.S.C. § 2244(d)(1); *see* Pace v. DiGuglielmo, 544 U.S. 408, 419 (2005) (holding that the Antiterrorism and Effective Death Penalty Act (AEDPA) statute of limitations bars a habeas petition that a petitioner files beyond the deadline and that is not entitled to any tolling); Carey v. Saffold, 536 U.S. 214, 216–17 (2002) (determining that the one-year limit does not include time between issuance of the lower court opinion and filing of notice to appeal to a higher court for the AEDPA). There are limited exceptions to this bar, including the equitable tolling doctrine and the discovery of new evidence that the petitioner could not previously have discovered. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1933–34 (2013) (holding that evidence that shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]" may bypass the statute of limitations (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995))); Holland v. Florida, 560 U.S. 631, 645 (2010) (holding that the AEDPA statute of limitations is subject to equitable tolling in appropriate cases). However, applicants are rarely successful arguing these exceptions. *See* Stephen Reinhardt, *The Anatomy of an Execution: Fairness v. "Process*,*"* 74 N.Y.U. L. REV. 313, 317 n.21 (1999) (observing that at the time of writing, the author could find *no* cases that had successfully argued this exception).

otherwise it is deemed waived.[159] If the state defendant does timely raise a claim that the state courts considered and denied, the court cannot grant relief unless the applicant can establish that the state court committed an error that

> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[160]

As others have documented, this standard presents a significant obstacle to applicants' chances of succeeding on any claim.[161] The wisdom of each

159. 28 U.S.C. § 2254(e)(2); *see, e.g.*, Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) (noting that under the procedural default rules, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule"); Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (discussing the procedural default doctrine generally). The procedural default bar can be excused if the applicant can establish both cause for the default and prejudice from the failure to consider his claim. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (restating the cause and prejudice standard of review of alleged violations of federal law in habeas proceedings); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding that the state procedural default doctrine barred federal habeas review absent a showing of cause and prejudice for the default). Suffice it to say that the cause and prejudice standard affords only the narrowest exception to the procedural default bar. *See* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 957–59 (2000); Ruthann Robson & Michael Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CALIF. L. REV. 87, 96–97 (1988).

160. 28 U.S.C. § 2254(d); *see* Williams v. Taylor, 529 U.S. 362, 412 (2000) (holding that before a federal court may grant a writ of habeas corpus to a state prisoner, the applicant must show either that the state court adjudication "(1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States'" (alteration in original) (quoting 28 U.S.C. § 2254(d)(1) (2012)); *see also* Bell v. Cone, 535 U.S. 685, 694 (2002) (stating that "contrary to" and "unreasonable application" have independent meanings under AEDPA).

161. *See, e.g.*, NANCY J. KING, ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (EXECUTIVE SUMMARY) 6 (2007), https://www.ncjrs.gov/ pdffiles1/nij/grants/219558.pdf (providing statistics on defenses); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 292–93 (2006) (arguing that there is uncertainty surrounding the application of these claims); John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 475–77 (2011) (highlighting how the complexity and unyielding nature of 28 U.S.C. § 2254(d) encourages dismissal of otherwise meritorious claims); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 926–28 (2001) (objecting to courts' application of § 2254).

of these limitations is hotly contested,[162] but, wise or not, they continue to limit the availability of a habeas remedy in federal court, and as a result, they limit the extent to which the potential availability of a habeas remedy influences the conduct of state actors.[163]

One additional barrier exists to limit the capacity for the habeas remedy to set incentives for state actors. In many jurisdictions, elected district attorneys for the local jurisdiction or county prosecute criminal defendants,[164] but the state's attorney general's office represents the state in federal habeas actions.[165] The fact that the state actor making decisions at the defendant's criminal trial does not represent the state in any subsequent habeas action dilutes the impact of any deterrent effect provided by the habeas remedy. As a result, the federal habeas remedy provides little, if any, incentive for state actors to respect the Constitution.[166]

B. *Section 1983 Federal Tort Remedies*

Like the federal habeas remedy, the federal tort remedy provided by 42 U.S.C. § 1983 does not provide much incentive for constitutional conduct by government actors. Passed over a century ago as part of the Ku Klux Klan Act, Congress intended for § 1983 to provide a federal tort remedy for plaintiffs whose federal constitutional rights have been violated by state or local government employees.[167] But like the federal

162. *See* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 771–73 (2002); *see also* Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 555–56 (2006) (discussing AEDPA's controversial infringement on the jurisdictional power of federal courts in habeas proceedings).

163. Professor Nancy King reports that the overall grant rate for non-capital cases is about one in every 341 cases filed. *See* KING ET AL., *supra* note 161, at 52.

164. *See, e.g.*, Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 75–76 (2011) (discussing the history of the locally elected prosecutor in the United States); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1343–44 (1993); Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

165. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 27 (2002).

166. *See* KING ET AL., *supra* note 161, at 51 (showing that in non-capital cases, only 0.29% of all federal habeas cases brought received relief).

167. 42 U.S.C. § 1983 (2012) (giving citizens the right to bring suit against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws"); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 483–84, 486 (1982) (tracing the history of § 1983 from creation through modern Supreme Court interpretations); Steven L. Winter,

habeas remedy, § 1983 has significant limitations that prevent it from providing an incentive for constitutional compliance.[168]

To prevail on a § 1983 claim for damages, the plaintiff must show, fundamentally, that the state violated his constitutional rights and that the constitutional right was "clearly established" at the time of the alleged violation.[169] If these were the only requirements for the § 1983 remedy, it arguably could provide an incentive for state actors to comply with the Constitution because it would require that state actors be aware of constitutional law and comply with clearly established rights.[170]

But the Court has also held that a § 1983 damages remedy for unconstitutional conviction or imprisonment is cognizable only if the defendant can establish either that his conviction has been reversed on

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The Meaning of "Under Color of" Law, 91 MICH. L. REV. 323, 333–34 (1992) (attempting to define the scope of the phrase "under the color of law" within the context of § 1983).

Additionally, there is one other federal tort remedy for constitutional violations committed by federal (as opposed to state) employees. Although § 1983 does not provide a remedy for constitutional violations by federal officers, the Court has held that federal prisoners seeking redress for constitutional violations by federal officers may have a remedy. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that the petitioner stated a cause of action and was entitled to recover civil damages for federal agents' violation of his Fourth Amendment rights). The *Bivens* remedy, however, has been limited even more significantly than any remedy available under § 1983. *See* Minneci v. Pollard, 132 S. Ct. 617, 621–22 (2012) (discussing the three narrow situations in which the *Bivens* remedy extends—warrantless searches, the Eighth Amendment right to medical treatment, and alleged sexual harassment by a federal employee). *Bivens*, therefore, does not provide an incentive for constitutional compliance in criminal cases outside of very limited situations.

168. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989) (finding that "[e]xcept for the two relatively small classes of cases, voting rights and accommodations, the data show a uniformly low success rate at trial across all categories of civil rights and prisoner cases" and that "success rates for the large categories (civil rights, employment discrimination, prisoner civil rights) are far below reported trial success rates for most other litigation"); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 677 (1987) (finding based on empirical data that "constitutional tort plaintiffs do significantly worse than non-civil rights litigants in every measurable way").

169. *See* Conn v. Gabbert, 526 U.S. 286, 290 (1999) (using *Harlow*'s "clearly established" analysis in a § 1983 action); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

170. *See Harlow*, 457 U.S. at 818–19 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."); Allen H. Denson, *Neither Clear Nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 756 (2008) ("In order to achieve the socially desirable goal of deterring future violations by providing guidance to public officials, while at the same time not holding officials liable for violating constitutional rights in novel situations, constitutional rights must be recognizable in a more useful sense.").

direct appeal or has otherwise been declared invalid. As the Court put it in *Heck v. Humphrey*[171]:

> We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.
>
> . . . .[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.[172]

As discussed above, obtaining a reversal on appeal or a remedy on habeas presents serious obstacles.[173]

There is one sense in which § 1983 could provide a remedy—injunctive relief may be available to criminal defendants facing representation by public defenders with astronomically high caseloads.[174] But the outside possibility that injunctive relief may be available to criminal defendants who are not receiving adequate representation provides little incentive for jurisdictions to comply with their obligations to provide effective assistance of counsel. After all, at worst, they will be required to come into compliance with no other penalty.[175]

The § 1983 remedy, then, stands as a poor mechanism for ensuring constitutional compliance. To be sure, the Court could modify the requirement that § 1983 plaintiffs establish reversal of their convictions, thereby providing greater incentive for constitutional compliance. But the value of tort remedies, even if not subject to the limitations discussed above, in incentivizing constitutional compliance has significant

171. 512 U.S. 477 (1994).

172. *Id.* at 486–87 (internal citations omitted).

173. *See supra* Part II and Section III.A.

174. A district court in Washington recently found that injunctive relief was available in this situation. *See* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133–34 (W.D. Wash. 2013).

175. In *Wilbur*, the district court's injunctive relief included an order to hire a part-time "public defense supervisor" to oversee the offending public defenders' efforts to come into compliance with the Sixth Amendment, but no other penalty. *Wilbur*, 989 F. Supp. 2d at 1134–37.

limitations. This is so because the actors making decisions resulting in constitutional infringements generally cannot be held liable.[176] Thus, § 1983 does not, and cannot, provide an incentive for constitutional compliance.

C. *State Habeas and Tort Remedies*

Every state has a post-conviction remedy to correct federal constitutional errors.[177] As with the remedies described above, if state habeas were routinely available to correct any federal constitutional errors, it could serve as a powerful incentive for constitutional compliance. The habeas remedy in most states, however, has limitations similar to (and in some cases even more restrictive than) those applicable on federal habeas.

The Court has held that the Constitution does not require states to provide post-conviction remedies for violations of constitutional rights,[178] but the constitutions of every state afford such a remedy.[179] The habeas rules in at least some states vary from the federal rules, and the Court has held that federal habeas limitations do not necessarily prevent states from construing their habeas remedies differently.[180] That fact notwithstanding, a number of states incorporate bars to relief that are similar to the federal habeas limitations.[181] Indeed, some states have imposed more significant limitations to the habeas remedy than those

176. *See* Polk Cty. v. Dodson, 454 U.S. 312, 325 (1981) (holding that public defenders do not act "under color of law" for § 1983 purposes); Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976) (holding that absolute immunity protects prosecutors); Pierson v. Ray, 386 U.S. 547, 554–55 (1967) (holding that judges are entitled to absolute immunity from suits under § 1983).

177. Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1093 (1998). The last state to recognize a state habeas remedy was Alaska. *See* Application of House for a Writ of Habeas Corpus, 352 P.2d 131, 133, 135 (Alaska 1960) (stating that the court's habeas authority derived from the Alaska Statehood Act).

178. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 10 (1989) ("State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("States have no obligation to provide this avenue of relief . . . .").

179. Ide, *supra* note 177, at 1093.

180. *See* Danforth v. Minnesota, 552 U.S. 264, 275, 282 (2008) (holding that states are not required to follow the Court's rule barring application of new procedural constitutional rules to cases on habeas review).

181. *See, e.g.*, DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS § 3-2, at 191 (2001 ed.) (noting that at the time of writing, thirty-one states had a statute of limitations on their primary post-conviction remedy).

facing habeas applicants in federal court.[182] Thus, although the state habeas remedy may provide a slightly more significant deterrent effect than federal habeas in several jurisdictions, overall it provides little in the way of additional incentive to comply with constitutional norms beyond the deterrent value of appellate remedies.

The Court also has lauded the deterrent value of state tort remedies for federal constitutional violations.[183] But, like the § 1983 remedy, state tort remedies have demanding requirements that frequently act as a barrier to relief.[184] And as with the § 1983 remedy, states do not appear to permit recovery unless the plaintiff can establish that a court overturned his conviction on appeal or on habeas.[185] As a result, the exceedingly slim chance of a state tort remedy likely has little to no impact on the conduct of state officers.

D. *Ethical Rules Governing Lawyers and Judges*

The empirical evidence on compliance with the exclusionary rule primarily documents the responsiveness of *law enforcement officers* to remedies, while lawyers (including judges) have responsibility for ensuring compliance with *Strickland*. Lawyers, unlike law enforcement officers, have ethical obligations to follow the Constitution.[186] As a realistic matter, however, ethical rules governing lawyers and judges provide little to no additional incentive to protect defendants' constitutional right to the effective assistance of counsel.[187]

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182. *See* Ide, *supra* note 177, at 1094–97; WILKES, *supra* note 181, § 1-12, at 51 (noting that twelve states do not treat newly discovered evidence of innocence as grounds for relief under their post-conviction remedy).

183. *See* Minneci v. Pollard, 132 S. Ct. 617, 624 (2012) ("State tort law . . . can help to deter constitutional violations as well as to provide compensation to a violation's victim.").

184. *See* Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1511 (2009) (noting the inadequacy of state tort law remedies because state law claims "are subject to state common law and statutory defenses, some of which may be inapplicable or preempted in § 1983 actions").

185. WILKES, *supra* note 181, § 1-6, at 31.

186. Every state has a set of ethical rules governing the conduct of lawyers and judges. *See* AM. BAR ASS'N, STATUS OF STATE REVIEW OF PROFESSION CONDUCT RULES (2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf. The precise content of the rules varies somewhat from state to state, but all require compliance with the Constitution. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(a) (2004) (citing the duty of an attorney to support the Constitution and laws of the United States); MICH. RULES OF PROF. CONDUCT 1.2(d) (2015) ("When . . . a client expects assistance not permitted by . . . law, the lawyer shall consult with the client regarding the relevant limitations . . . ."); TEX. DISCIPLINARY RULES OF PROF. CONDUCT pmbl. 3 (2005) ("[A] lawyer should zealously pursue clients' interests within the bounds of the law.").

187. This is precisely Professor Alschuler's point. *See* Alschuler, *supra* note 68, at 374–75.

As an initial matter, although the ethical rules may provide at least some incentive for defense counsel to comply with their constitutional obligations, public defenders operating in systems in which they (and their colleagues) routinely carry overwhelmingly excessive caseloads may neither realize the ways in which their representation is deficient nor view it as out of the ordinary. Instead, those defenders operate in triage mode, simply lacking sufficient time to provide effective assistance to all of their clients.[188] To put it simply, those lawyers lack the resources to worry about ethical rules, let alone comply with them.

Even if those lawyers recognize that they lack the power to control their caseloads, legislators, not defense lawyers, decide the budgets for public defenders, and those budgets determine caseloads.[189] Indeed, some jurisdictions have passed legislation *prohibiting* public defenders from withdrawing from cases on the grounds that they have excessive caseloads.[190]

The bottom line is that none of the alternative mechanisms for ensuring constitutional compliance—state or federal habeas remedies, state or federal tort remedies, or the ethical rules—comes close to deterring unconstitutional conduct by government actors. As a result, the primary mechanism for deterrence remains the constitutional remedy at trial or on appeal.

IV. REMEDIES TO MOTIVATE CONSTITUTIONAL COMPLIANCE

The current remedial scheme does not create adequate incentives for constitutional compliance with rights that (1) can be surreptitiously violated, and (2) carry a high cost to comply. The result is systematic constitutional violations of those rights in at least some jurisdictions.[191] *Batson* and *Strickland* represent the paradigmatic examples, although others likely exist. Of course, not all jurisdictions violate these constitutional rights. Indeed, most respect them. The point is that at least some do not.

To provide an incentive for jurisdictions to comply with high-cost constitutional rights like ineffective assistance of counsel, the Court therefore should provide remedies for violations of this category of rights in cases in which the defendant can establish a pattern or custom of

188. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 821–22 (2004) (arguing that public defenders have to perform a triage function and focus only on certain cases because they lack the time to focus on all of them).

189. *See, e.g.*, Anderson, *supra* note 90, at 421–22.

190. *See id.* at 421–22, 429–30 (noting that Florida and Colorado have passed such legislation).

191. *See supra* Section II.C.

constitutional violations by the government. Thus, if a defendant can establish *both* that the state did not comply with his constitutional rights *and* that the state has a custom or pattern of intentional disregard for that particular constitutional right, the defendant would be entitled to reversal. This remedy essentially would treat patterns or customs of intentional disregard for the constitutional right as structural error, thereby relieving defendants of the obligation to establish harm from the error.[192]

The *Batson* remedy provides a helpful model in two ways. First, as the Court has recognized, although proving discriminatory intent often proves challenging, evidence that a jurisdiction had a "general policy" of excluding black venire members from juries helps establish discriminatory intent.[193] Thus, evidence that in the decade before the defendant's trial, Dallas County, Texas distributed a training document advising prosecutors of the importance of striking people of color from the jury venire provided persuasive evidence of discriminatory intent in the exercise of peremptory strikes.[194] Second, proof of intentional discrimination is structural error leading to automatic reversals regardless of the strength of evidence against the defendant.[195] Thus, prosecutors' offices have a significant incentive to avoid systematic, intentional violations of *Batson*.[196]

192. *Cf.* Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (treating as structural error claims that the state engaged in intentional discrimination in the exercise of preemptory strikes).

193. *See* Miller-El v. Cockrell, 537 U.S. 322, 334–35 (2003) (documenting the pattern or practice of discrimination in Dallas County). The standard for establishing a "policy" under *Batson* appears to be similar to that required to establish a custom of constitutional violations sufficient to give rise to municipal liability under 42 U.S.C. § 1983 (2012). *See, e.g.*, Baron v. Suffolk Cty. Sheriff's Dep't, 402 F.3d 225, 240–42 (1st Cir. 2005) (holding that a prison guard sufficiently established the county's custom of violating the First Amendment by retaliating against guards who reported colleagues through testimony that the guard was disciplined for his reports and evidence from a prison official that the prison had a "code of silence" that "could" have consequences for those who violated it). Circuits differ on the precise standard required to establish a "custom." In particular, there is a circuit split regarding whether multiple violations against the same plaintiff can constitute a custom or whether, instead, there must be instances of multiple violations against different people. *Compare id.* at 237, 239 (holding that allegations of specific violations against one plaintiff could be sufficient), *with* Palmer v. Marion Cty., 327 F.3d 588, 594–95 (7th Cir. 2003) (holding that a § 1983 plaintiff alleging failure to protect had to establish that the government had a widespread practice of failing to adequately protect inmates).

194. *See Miller-El*, 537 U.S. at 334–35. To be sure, as discussed above, proving *Batson* violations presents real challenges even with evidence of a general policy of discrimination. But that evidence certainly helps establish intentional discrimination.

195. *See* Rivera v. Illinois, 556 U.S. 148, 161–62 (noting that *Batson* errors are structural and are not subject to harmless error review).

196. *Id.*

Intentional, systematic violations of *Strickland* cry out for a similar remedy to provide incentives for constitutional compliance.[197] Jurisdictions nationwide set their budgets for public defender offices without regard to whether those lawyers can meet their constitutional obligations.[198] Because these jurisdictions recognize that courts will not reverse convictions based upon otherwise sufficient evidence, even for blatant violations of the right to the effective assistance of counsel, jurisdictions can, and at least sometimes do, gamble on the extremely unlikely probability of reversal.

Under these unique circumstances—a defendant (1) asserts a difficult to detect infringement of a high-cost constitutional right, and (2) presents evidence of an intentional custom or pattern of conduct by the state infringing on that constitutional right—the existing remedies for criminal defendants are insufficient to ensure that states comply with their constitutional obligations. Constitutional compliance therefore requires a more robust appellate remedy. Thus, courts should "presume" *Strickland* prejudice upon a showing that a jurisdiction had a practice of under-funding indigent defense so drastically that it would be impossible for lawyers to effectively represent all of their clients.[199] Of course, defendants still would have to establish deficient performance by their lawyers, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[200] But upon a showing of deficient performance, prejudice would be presumed if the defendant could establish that the jurisdiction had a custom or pattern of providing counsel who do not—and cannot—function as the counsel guaranteed the defendant by the Sixth Amendment.

Nor would such a presumption of prejudice be unprecedented. The Court already has recognized certain exceptions to the prejudice

197. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutor*s, 61 N.Y.U. ANN. SURV. AM. L. 45, 93 (2005) (observing that although the conviction reversal remedy might not provide an incentive for low-level prosecutors to comply with the Constitution, "[c]onviction reversals may be particularly appropriate in situations where the misconduct involved stems from internal policies and procedures that require modification through top-down change. For instance, where the misconduct is found to be a product of inadequate training or supervision, or where the offending prosecutor is found to have acted in accordance with internal agency policies, an inherently personal sanction will not inspire agency-wide change").

198. *See* Anderson, *supra* note 90, at 422.

199. *See supra* Section II.A (setting forth patterns of excessive caseloads in jurisdictions around the country and the difficulties arising from those caseloads).

200. Strickland v. Washington, 466 U.S. 668, 687 (1984).

requirements that focus on the blameworthiness of the state's conduct.[201] For instance, the Court has recognized that *Strickland* prejudice can be presumed where the trial court requires the defendant to proceed with a lawyer who has an actual conflict of interest,[202] and where, although the state provided a lawyer, the lawyer could not provide effective assistance.[203] Presuming prejudice from intentional patterns of constitutional non-compliance therefore has precedent.

To be sure, requiring defendants to establish a deliberate pattern of violations creates a difficult burden of proof (just as proving *Batson* discriminatory intent presents challenges). And if jurisdictions believe that there is *no* chance that a defendant will be entitled to relief, this standard will not provide an incentive for constitutional compliance. But two factors tailor this remedy to creating a stronger incentive for constitutional compliance. First, this remedy focuses almost entirely on the conduct of the state, rather than the evidence against the defendant. As a result, it provides states with incentives to ensure that their conduct falls outside of the deliberate custom standard. Second, and of particular importance, the stakes of walking too close to the constitutional line (or, in the words of the Court, "tacking too close to the wind") are incredibly high.[204] After all, once one defendant has established a pattern or custom of deliberate violations, all other defendants in that jurisdiction have a right to reversal upon a showing of a constitutional deprivation of that right. Jurisdictions therefore have an incentive to err on the side of constitutional caution.

CONCLUSION

The Court's scheme of remedies provides incentives for compliance with most constitutional rights. But for high-cost, low-risk-of-reversal rights such as *Strickland*, the Court's remedial scheme does not provide sufficient incentives to deter unconstitutional conduct. The result has been deliberate and systematic infringements on the constitutional rights of defendants in at least some jurisdictions. Unfortunately, those constitutional infringements likely will not end without some incentive

201. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 678–80 & n.9 (1985) (observing that the state's deliberate withholding of the fact that its witness has committed perjury is subject to review for harmless error rather than materiality); United States v. Cronic, 466 U.S. 648, 659–60 (1984) (recognizing that the Court can presume prejudice where, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial").

202. *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

203. *See Cronic*, 466 U.S. at 658–60.

204. *See* Kyles v. Whitley, 514 U.S. 419, 439–40 (1995) (noting in the context of *Brady* that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . [t]his is as it should be").

encouraging constitutional compliance. The Court therefore should devise a remedy focused on incentivizing constitutional compliance for these rights. The Constitution demands nothing less.