disparities.[42] A more recent study by Fischman and Schanzenbach examined the cause of increased racial disparities in federal sentences after Supreme Court decisions made sentencing guidelines discretionary. Fischman and Schanzenbach concluded that disparities were not attributable to judges' greater sentencing discretion but rather primarily to mandatory minimum sentencing statutes, which prosecutors trigger in charging decisions and that have a disparate impact on minority offenders.[43] None of these studies, however, had data that allowed researchers to examine prosecutors' initial decisions of whether and how to charge in the wake of suspects' arrests. Earlier studies (based largely on data from the U.S. Sentencing Commission) that suggested prosecutorial bias was a contributing cause to racial disparities in federal sentencing were also criticized in part for lacking data on arrests and bases for initial charge decisions.[44]

More recently, two excellent large studies addressed this deficiency. Integrating data on arrestee characteristics and initial charges, Starr and Rehavi examined federal prosecutors' choice of initial charges and found that, after accounting for case and offender characteristics, prosecutors were somewhat more likely to charge Black defendants with offenses that carried mandatory minimum sentences.[45] Those

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[42] Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 411, 413 (2010) (using data from federal cases in 2001 and finding no disparities in charge reductions, which occurred in 12% of cases, but no examination of initial charging/dismissal decisions).

[43] Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 731, 742, 757 (2012).

[44] *See* LINDA DRAZGA MAXFIELD, & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE (1998) (finding that white offenders were significantly more likely to receive substantial assistance departures than minority offenders and that white offenders also received slightly larger sentence reductions for substantial assistance); MEIERHOEFER, *supra* note 20, at 20 (finding that Black defendants were 21% more likely to be sentenced at or above a mandatory minimum sentence than white defendants in 1990); U.S. SENT'G COMM'N, *supra* note 20 (stating that 46% of whites but only 32% of Blacks sentenced below applicable mandatory minimum; concluding disparate application of mandatory minimum sentences appears to be related to defendant's race). For methodological criticisms, see Fischman & Schanzenbach, *supra* note 43, at 736–37; Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 19–23 (2013); Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the* Booker/Fanfan *Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 CRIMINOLOGY & PUB. POL'Y 1077, 1105–09 (2011).

[45] Rehavi & Starr, *supra* note 21, at 1320 (finding that case and defendant characteristics, such as criminal history, explain most but not all of the large raw racial disparity in federal sentences, but that across many offense types, Black arrestees still received sentences nearly

charging decisions contributed to the higher average sentences for Black defendants compared to whites and explained most of the Black-white sentencing disparity that was not attributable to legally relevant factors.[46] Earlier studies examining prosecutor decisions to charge under similar state mandatory sentence laws likewise found that those practices had racially disparate impacts to the detriment of nonwhite offenders.[47]

In a separate study published the same year and relying on the same data sources but with some differences in methodology, Johnson focused on somewhat different questions and reached somewhat conflicting conclusions.[48] Like Starr and Rehavi, he examined federal prosecutors' initial decisions to charge, as well as whether they later reduced the initial charges, and concluded "there is little systematic evidence of age, race and gender disparities in U.S. Attorney decisions regarding which cases are accepted and which are declined for prosecution."[49] Among defendants who were charged, Black and Hispanic defendants overall were slightly more likely to receive

10% longer than those of comparable white arrestees, and concluding that most of the disparity is explained by prosecutors' initial charging decisions, especially the choice to file charges that carry mandatory minimum sentences).

46 *Id. See also* Starr & Rehavi, *supra* note 44, at 28–29 (describing the same dataset findings and stating, "We [found] significant racial disparities in charge severity across all four charging measures. . . . [B]lack men were still nearly *twice* as likely to be charged with an offense carrying a mandatory minimum sentence. . . . The factors that could explain by far the largest components of the [B]lack-white gap were arrest offense and criminal history. But even after controlling for these and other variables, a gap of about 10% remained unexplained. . . . [I]nitial charging—especially the decision to bring mandatory minimum charges—is an important driver of these sentencing disparities. . . . [A] substantial [B]lack-white gap . . . appears to be driven largely by differences in the use of mandatory minimums.).

47 Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 441–42 (2007) (finding Pennsylvania prosecutors applied mandatory minimum sentences in about 18% of cases, and that Latino men received mandatory minimum sentences at nearly twice the rate of white men); Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 490, 497–501 (1998) (reporting that 20% of 9,690 Florida defendants sentenced to prison in 1992–1993 who were eligible for habitual-offender sentence enhancements received such enhancements, and after controlling for various relevant factors, regression analysis showed substantial racial disparities that varied with offense types—Black defendants suffered from greater disparity for drug and property crimes but less for violent and weapons-related offenses).

48 Johnson, *supra* note 21.

49 *Id.* at vi, 102. Johnson also concluded that "[r]elative to white [suspects], [B]lack suspects were also slightly more likely to have their cases declined," but that claim had a major caveat: his data did not separate Hispanics from Black and white racial classifications, so ethnicity-based disparities could undermine the inference based on racial groups alone. *Id.* at xii, 67.

subsequent charge reductions,[50] although that did not hold for all age groups: "Young, male, minority" defendants, however, were both less likely to have their cases declined and less likely to receive charge reductions."[51] And charge reductions overall are unusual—they occurred in only 12% of federal prosecutions examined.[52]

C. Bias in Jury Selection

Much the same is true for research on whether prosecutors employ peremptory strikes to remove Black people improperly from trial juries. Data in this setting is even more laborious to gather, but researchers have managed to do it in some jurisdictions. Evidence is clear that, in the aggregate, prosecutors strike Black jurors at higher rates than they do white jurors, but some do so to a greater degree than others.[53] Whether these disparities in the use of peremptory strikes are due to illicit race-based reasons rather than other, race-neutral ones—the constitutional question—is a question that researchers generally cannot answer, especially for individual cases.[54]

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50 *Id.* at xiv, xvi, 70–71, 96.

51 *Id.* at iv, 72, 96. *See also id.* at iv, 100 (finding variation in both case declinations and charging reductions across federal districts); *id.* at 48 (noting dependent variables examined—whether case initially charged or declined; whether charge later reduced; whether charge reduction affected sentence).

52 *Id.* at xiii, 63.

53 Ronald F. Wright et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1425–29 (2018) [hereinafter Wright et al., *Jury Sunshine Project*] (statewide, "prosecutors excluded black jurors at more than twice the rate that they excluded white jurors" and at three times the rate in some urban localities); Ronald Wright, *Yes, Jury Selection Is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html [https://perma.cc/M7AC-K9MC] ("[T]his racially skewed trend [of prosecutors removing potential Black jurors], played out across many cases, is persistent."); Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (reporting racial disparities in prosecutors' challenges for cause in two state court jury trial datasets with more than 14,000 prospective jurors in one jurisdiction and 4,700 in the other); Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593 (2018) (study of 13,000 peremptory strikes in Louisiana criminal trials confirming that "race continues to drive the selection of jurors"); *Statistical Proof*, *supra* note 3; *Peremptory Challenges*, *supra* note 7, at 52–53, 73 n.197 (noting that in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of Black jurors and 26% of non-Black jurors); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUM. BEHAV. 695, 698–99 (1999) (finding that in one North Carolina county, 71% of excused Black jurors were removed by the prosecution; 81% of excused white jurors were removed by the defense).

54 *See, e.g.*, Wright et al., *Jury Sunshine Project*, *supra* note 53, at 1430–31 (suggesting "intent-based" rationales for prosecutors' racially disparate peremptory strikes but noting

D. Implications for Equal Protection Litigation

The variety of findings across settings frustrates a simple, comprehensive account of prosecutors' contributions to persistent racial disparities. However, it would be a surprise if there was documentation of *uniform* patterns of racial bias or race-neutrality across several decision-making stages, over two or three decades, among hundreds of local prosecution agencies operating in many jurisdictions with diverse circumstances and professional cultures.[55] Diversity of findings also stems from researchers' different kinds and collections of data, variety of analytical methodologies, and distinct formulations of research questions. Moreover, the breadth or magnitude of race-based decision-making uncovered by researchers doesn't matter, as long as the problem seems more than negligible. The important insight is what these findings suggest, given that courts rarely find *Batson* violations and virtually never find *Armstrong* violations: they suggest that *Batson* and *Armstrong* adjudications function poorly.

Still, we can draw at least two points from this research to improve equal protection litigation. The first is straightforward: *Armstrong* inquiries should not be confined to initial charging decisions. *Armstrong* inquiries should encompass actions in prosecutors' subsequent bargaining and sentencing choices, just as they have expanded recently to pre-charge, investigation-stage actions by law enforcement agencies.[56] Second, research findings confirm the inference that prosecutor decisions contribute to racially disparate treatment of criminal suspects—although only sometimes, in some places.[57] Yet data sources for these studies are generally much broader and deeper than litigants typically present to courts; some had access to police and prosecutor files, which nearly always remain confidential during *Batson* or *Armstrong* litigation in trial courts. The broader

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that none "can explain jury selection choices in individual cases. Racial disparities in aggregate jury selection outcomes speak only about averages").

55 This counts the fifty state systems and the federal courts. One could add the military justice system, U.S. territorial jurisdictions, and the District of Columbia, which is formally part of the federal system but operates as the equivalent of a state justice system as well.

56 *See, e.g.*, Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 179, 183–84 (1987) (study charging and dismissal decisions in 33,000 single-count cases in Los Angeles County in 1977–1980, finding Black and Hispanic males more likely to be fully prosecuted).

57 Spohn & Spears, *supra* note 25, at 652–53, 672 (in a study of Detroit sexual assault cases, finding—in contrast to previous research—that "blacks charged with sexually assaulting whites were *more* likely . . . to have all charges dismissed before trial [and] . . . *less* likely to be convicted than whites charged with sexually assaulting whites").

information base—along with more sophisticated analytical tools that courts generally employ—explains in good part why scholarly studies find racial bias more often than courts do in *Batson* and *Armstrong* litigation. Information deficits lead to false negatives. Granted, some part of the explanation is that scholarly inquiries can look for prosecutor causal contributions to racial disparities without equal protection's narrow focus on prosecutorial intent. But setting aside the prospect of a change in equal protection doctrine, the task is to expand evidentiary sources that litigants can provide to courts, so that judges' factual records are closer to those analyzed by scholars. Those broader records are already cognizable in judicial equal protection analysis. *Armstrong* and *Batson* doctrines are designed as inquiries into specific actors' motivations; but courts have long inferred those motivations partly from evidence of those actors' decisions in the other cases.

II
BATSON V. *ARMSTRONG* DOCTRINE

A. Procedural Structure of Equal Protection Claims Against Prosecutors

Both *Armstrong* and *Batson* define procedures and proof burdens for adjudicating equal protection claims against prosecutor decision-making. Thus, both define a common framework.[58] Claimants must first present prima facie evidence of an official decision motivated by discriminatory purpose.[59] The burden of production then shifts to the prosecution to present evidence rebutting the inference of improper intent. The court decides whether the inference of discriminatory decision-making has been overcome.[60] Beneath that shared structure,

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[58] *Batson*'s prohibition on racially motivated peremptory challenges extends to the defense as well. Georgia v. McCollum, 505 U.S. 42, 57–59 (1992).

[59] Johnson v. California, 545 U.S. 162, 168 (2005) (summarizing *Batson* three-step analysis); Jonathan Abel, Batson*'s Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 718–19 (2018).

[60] In *Snyder v. Louisiana*, the court explained:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

552 U.S. 472, 476–77 (2008) (quoting Miller-El v. Dretke, 545 U.S. 231, 277 (2005) (Thomas, J., Dissenting)). *See also* Foster v. Chatman, 578 U.S. 488, 499 (2016) (quoting this passage and describing it as the "three-step process for determining when a strike is discriminatory").

however, *Armstrong* and *Batson* doctrines differ on significant details due to differences in the information that is publicly available for the two types of claims. Those doctrinal variations aggravate the information deficit that courts face in *Armstrong* claims.

Only a small fraction of *Batson* claims prevail, but a larger number successfully present prima facie evidence of racially motivated strikes—that's because the public nature of jury selection provides defendants and judges some information about the rationales motivating prosecutors' peremptory challenges. As the Court intended, *Batson*'s prima facie standard is fairly easy to meet.[61] *Armstrong*'s prima facie standard, on the other hand, is notoriously difficult to satisfy, likewise as the Court intended.[62] Most claims of selective prosecution end with a finding that the defendant failed to meet that initial burden. The problem is the confidential nature of the criminal charging process, which provides *Armstrong* claimants, and thus trial judges, with little or no access to essential information that would shed light on prosecutors' reasons and motives for charging.

The same problem, inaccessible evidence, is a likely cause for why *Armstrong*-type equal protection challenges almost wholly ignore prosecutor decisions *after* the initial charging. As noted above, empirical research finds racial disparities linked to prosecutorial discretion in plea bargaining, charge dismissals, and sentencing.[63] Save for challenges to death penalty prosecutions, where the charging decision also implicates sentencing,[64] nearly all of the sparse equal

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[61] The court in *Johnson* stated:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

545 U.S. at 170. Kreag, *supra* note 19, at 806 ("The Court set a low bar for establishing a prima facie case of discrimination at [*Batson*] step one."); Melilli, *supra* note 3, at 460 tbl.C-1, 467 tbl.F-3 (noting that defendants successfully met *Batson* prima facie standard in 60% of reported cases, but success rates varied greatly across jurisdictions); *Peremptory Challenges*, *supra* note 7, at 77 (finding in a study of *Batson* challenges in Pennsylvania courts that "trial courts place a prima facie case burden of proof on *Batson* and *McCollum* claimants that is not impossible to meet").

[62] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996).

[63] *See* Berdejó, *supra* note 29, at 1231–33 (describing how prosecutors' racial biases contribute to disparities in the terms of guilty plea agreements); Rehavi & Starr, *supra* note 21; Starr & Rehavi, *supra* note 44; Ulmer et al., *supra* note 47.

[64] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 309 (1987); Loza v. Mitchell, 705 F. Supp. 2d 773 (S.D. Ohio 2010) (equal protection challenge to capital charging in Butler

protection case law alleging bias to prosecutorial discretion focuses on the charging decision.[65] Equal protection doctrine reaches official conduct that precedes and follows charging, of course. In response to innovative defense challenges based on problematic law enforcement practices, a few federal courts recently have extended *Armstrong* doctrine to *pre*-charging conduct, specifically to sting operations in which investigative agencies exercise wide discretion about whom to target and arrest.[66] With better access to evidence, the same judicial scrutiny could extend to post-charging discretionary decisions.

B. The Role of Comparative Evidence

Armstrong explicitly requires that the defendant's prima facie showing must include evidence on "similarly situated" suspects who were not charged the same way the defendant was. Put differently, the inference of discriminatory intent must arise from a comparative analysis of how prosecutors treated a set of like cases distinguished only by an irrelevant feature, such as the defendants' race. Those comparison cases are exceedingly hard to identify. Sometimes those comparable suspects don't exist as "cases" on court dockets at all because no charges were filed against them. Other times, similar cases were charged in another jurisdiction, such as a state courthouse rather than federal court. Filing in other jurisdictions makes similar cases harder for defense lawyers to find; even if they do, state court records say nothing about whether the federal prosecutor assessed but declined to charge those same suspects.[67] A very small number of defense attorneys with sufficient resources have overcome these hurdles through dogged investigations, but most fail because the meaningful evidence is inaccessible: it remains in prosecutor's hands. *Armstrong* is explicit that prosecutors need not disclose anything until defendants

County, Ohio), *aff'd*, 766 F.3d 466 (6th Cir. 2014); Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597 (S.D. Ohio Sept. 27, 2007) (granting discovery in challenge alleging a pattern of racial bias in capital prosecutions by prosecuting attorney in Hamilton County, Ohio).

65 *See, e.g.*, United States v. Bass, 536 U.S. 862 (2002); *Armstrong*, 517 U.S. 456; Wayte v. United States, 470 U.S. 598 (1985).

66 *See infra* Section IV.B; Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987 (2021).

67 It is possible that differences in how similar cases were charged can appear in the docket, thus initiated by the same prosecution office. Starr and Rehavi's research finds evidence on one version of this—some drug offenders charged under statutes carrying mandatory minimum sentences and others not. *See* Rehavi & Starr, *supra* note 21. But few *Armstrong* claims seem to allege this kind of disparity in charging.

present a prima facie case of intentional bias in charging with "some evidence" that similar suspects were treated differently.

By contrast, *Batson* does not require that defendants' prima facie case include evidence that "similarly situated" venire members were treated differently by prosecutors' discretionary exercise of peremptory strikes. Quoting its decision in *Arlington Heights v. Metropolitan Housing Development Corp.*,[68] the Court said that "'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'"[69] Subsequently, the Court has made clear that lawyers can violate *Batson* with a single peremptory strike; proof of discriminatory purpose need not take the form of an inference from a pattern of strikes.[70]

Nonetheless, "comparative juror analysis" has become a well-established, but not mandatory, way for courts to infer discriminatory intent behind a peremptory strike. Judicial analyses of *Batson* claims now routinely consider an allegedly discriminatory peremptory strike in the context of other venire members removed by the prosecutor and of venire members who were not peremptorily struck.[71] Although the

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68 429 U.S. 252 (1977).

69 Batson v. Kentucky, 476 U.S. 79, 95 (1986) (quoting *Arlington Heights*, 429 U.S. at 266 n.14).

70 "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" Foster v. Chatman, 578 U.S. 488, 499 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008)).

71 Recent Supreme Court decisions employed comparative juror analysis, including inconsistently applied neutral reasons for striking jurors, to look for prosecutorial intent. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 240–41(2005) (using "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve"); *Foster*, 578 U.S. at 502–12 (finding bias in peremptory strikes through comparative analysis of prosecutors' inconsistently applied neutral reasons for peremptory strikes). State courts and lower federal courts now understand comparative juror analysis as the standard approach to *Batson* claims when such evidence is available. *See, e.g.*, United States v. Barnette, 644 F.3d 192, 201–02 (4th Cir. 2011) (addressing comparative-juror-analysis challenge); People v. Gutierrez, 395 P.3d 186, 201 (Cal. 2017) ("When a court undertakes comparative juror analysis, it engages in a comparison between, on the one hand, a challenged panelist, and on the other hand, similarly situated but unchallenged panelists who are not members of the challenged panelist's protected group."); Crittenden v. Ayers, 624 F.3d 943, 956 (9th Cir. 2010) ("Comparative juror analysis is an established tool at step three of the *Batson* analysis . . . ."); People v. Lomax, 234 P.3d 377, 411 n.14 (Cal. 2010) ("[C]omparative juror analysis 'compares panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense.'") (quoting People v. Lenix, 187 P.3d 946, 967 (Cal. 2008)). For an excellent account of comparative analysis, see Abel, *supra* note 59, at 763, 765.

Court has made clear that discriminatory use of peremptory strikes does not *have* to be proven with comparative evidence, the Court's *Armstrong* opinion—in sorting through how the *Batson* prohibition on race-based peremptory strikes should inform the prohibition on race-based decisions to prosecute—seemed to assume that *Batson* claims would typically present courts with comparisons of similarly situated venire members. "During jury selection, the entire *res gestae* take place in front of the trial judge," who is thereby "well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race."[72]

Over time, the Supreme Court made explicit that comparative evidence is not the only form of proof permitted for *Batson* claims, but that lower courts should use comparative evidence whenever it is available to help determine motivations behind peremptory strikes. By contrast, *Armstrong*'s selective prosecution doctrine retains the firm requirement that proof of discriminatory intent must include comparative evidence of similar cases charged differently.[73] Taking *Armstrong* literally, a defendant's prima facie evidence would fail even if a prosecutor confessed to charging the defendant solely out of racial animus.

C. Differential Public Access to Evidence

The important distinction between the *Armstrong* and *Batson* doctrines, however, is not whether comparative evidence is mandatory. In both contexts, the most likely form of available evidence showing discriminatory intent—for a single strike or single charge—will be that prosecutors treated similar people (jurors or defendants) differently. The critical difference is the one that the *Armstrong* opinion noted in passing: peremptory strike decisions are always made in public, during pretrial jury selection. That context provides at least some circumstantial evidence about the motivations behind the decisions.[74] But charging decisions are made in private, in the confidential setting of prosecutors' offices—a setting that deprives defendants and judges of any contextual clues about prosecutors' motivations.

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72 United States v. Armstrong, 517 U.S. 456, 467–68 (1996).

73 This doctrinal stagnation is not surprising given that the Court has taken only one selective prosecution case since *Armstrong*. *See* United States v. Bass, 536 U.S. 862 (2002) (reversing a court of appeals decision in a short *per curiam* opinion without elaborating on selective prosecution doctrine).

74 *Armstrong*, 517 U.S. at 467–68.

This contextual difference has led to divergent evidentiary practices for each kind of claim. Given the paucity of information about charging decisions, *Armstrong* defined criteria for trial judges to order discovery from prosecutors. *Batson* did not. These distinctive paths have resulted in courts having insufficient access to relevant evidence for claims under *both* doctrines.

1. The Information Hurdle Impeding Armstrong Adjudication

The problem for defendants alleging *Armstrong* violations is familiar. The lack of public information about charging means defendants must rely on judges to order discovery from the prosecutors' office. Yet *Armstrong* requires that defendants produce "some evidence" of discriminatory charging to justify such an order,[75] which might yield evidence that bolsters a defendant's prima facie case of racially motivated charging. But vanishingly few claimants can show "some evidence" of discriminatory purpose when—even if such a purpose exists—evidence of discriminatory purpose is exceedingly hard to muster from public sources. Most *Armstrong* claims end up being battles about discovery orders that defendants lose, which means courts never see the relevant evidence in prosecutors' files that judges need to determine the merits of the claim.[76]

A small but intriguing set of *successful* selective-prosecution claims suggests that this insuperable information barrier conceals some unknown number of potentially valid claims. The dismal track record of post-*Armstrong* selective prosecution claims notwithstanding, a number of similar claims have been successful when unusual circumstances provide easily accessible *public* evidence about lots of similar, uncharged offenders that prosecutors declined to charge. In perhaps three dozen state and federal cases since the 1960s,[77]

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[75] *Id.* at 469. One could describe *Batson*'s step two, in which the burden shifts to the prosecution to offer race-neutral reasons for its peremptory strikes, as a de facto discovery order: the prosecutor must disclose her private rationales for exercising peremptory strikes that, absent the defendant's prima facie case of discriminatory purpose, otherwise call for no justification. But that burden is not typically described as discovery because the judges issue no formal order compelling production of documents or testimony equivalent to those at issue in *Armstrong* litigation.

[76] Limiting courts' access to evidence diminishes the odds accurately adjudicating *Armstrong* claims, increasing the odds of "false negative" rulings. *See* McAdams, *supra* note 16, at 613–14.

[77] Perhaps significantly, most were decided before the Supreme Court decision in *Armstrong*, 517 U.S. 456. *Wayte v. United States*, 470 U.S. 598 (1985), made these claims harder to win under federal equal protection doctrine. But not all these decisions were clearly based on federal equal protection law. And an alternative explanation could be that the

defendants prevailed on selective prosecution claims. In virtually all, however, defendants could present courts with publicly available information about known offenders whom prosecutors didn't charge as well as those they did.[78]

For example, several federal cases found that prosecutors improperly targeted leaders of employee strikes, tax protests, or draft protests—all circumstances in which large numbers of uncharged strikers and protesters were easy to identify.[79] A series of state cases reached the same conclusion when the class of uncharged violators was likewise apparent from the circumstances. The occasional prosecutions for violation of once-widespread "Sunday closing" laws provide an example. These laws barred or limited business operations on Sundays. Store owners charged with violations could easily identify for courts

unusual circumstances critical in these cases—public evidence of similarly uncharged offenders—has not recurred in the years since *Armstrong*.

78 Note that they share other characteristics as well: none involved selectivity based on race, nor did any involve the familiar felonies that dominate state and federal criminal dockets—no drug, weapon, assault, or homicide offenses.

79 There are at least ten federal decisions (one unreported) that dismissed or reversed prosecutions on grounds of unconstitutional selective enforcement. Nine involve defendants targeted for political views and activities, several of whom were air traffic controllers vocally involved an illegal strike in 1981. *See* United States v. Hoover, 727 F.2d 387, 389 (5th Cir. 1984) (involving a defendant, prosecuted for participating in a strike while employed by the federal government, who was able to show that there were over 297 unprosecuted strikers in the jurisdiction); United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983) (charging defendants with tax violations who headed a "tax revolt" group—and thus knew of other violators—and showed that "[thirty-four] other members of the Michigan tax revolt group committed tax violations but were not facing prosecution"); United States v. McDonald, 553 F. Supp. 1003 (S.D. Tex. 1983) (involving dismissal based on selective prosecution; defendant air traffic controller and union member targeted for political expression); *id.* at 1008 (citing United States v. Paisley, Cr. 81-196 PHX-CLH (D. Ariz. Nov. 12, 1981) as another example of a dismissal on selective prosecution grounds); United States v. Haggerty, 528 F. Supp. 1286 (D. Colo. 1981); United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973) (en banc) (reversing conviction and remanding for hearing on whether defendant was selected for prosecution based on political views); United States v. Crowthers, 456 F.2d 1074, 1078–81 (4th Cir. 1972) (reversing convictions for disturbance on government property based on finding that government prosecuted defendants—but not participants in sixteen equally noisy political and religious ceremonies—based on their political and religious views); United States v. Steele, 461 F.2d 1148, 1152 (9th Cir. 1972) (reversing conviction for refusal to answer census questions because government prosecuted only those involved in public protest against census); United States v. Danks, 357 F. Supp. 193, 196 (D. Haw. 1973) (reversing conviction of census protester); United States v. Robinson, 311 F. Supp. 1063, 1063–64 (W.D. Mo. 1969) (dismissing charge of illegal wiretapping upon finding that federal agents had repeatedly violated the same statute and not been prosecuted). Note that five of the ten cases precede the Supreme Court decisions that imposed a strict intent requirement for equal protection claims. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Washington v. Davis, 426 U.S. 229 (1976).

other local establishments that had been open for business on Sundays and yet not charged.[80] All these cases have that critical feature in common: defendants have easy, low-cost access to "some evidence" of similarly situated offenders that raises an inference of illicit prosecutorial bias behind the charging decision, which raises the question of how often biased motivations remain concealed because the vast majority of charging contexts lack such transparency.

2. Batson*'s Missing Discovery Standard*

The evidentiary problem for *Batson* claimants is more subtle. Defendants have some evidence of prosecutors' motives for their peremptory strike decisions from the voir dire process. And like *Armstrong* claimants, *Batson* claimants are free to add other evidence of racially motivated peremptory strikes that might be publicly available, though few defendants muster any.[81] Some defendants win *Batson* claims on evidence from the voir dire process alone. But what prosecutors reveal of their motives during jury selection is often far from all, or the best, of the evidence of their motives. For both peremptory strikes and charging decisions, some evidence of prosecutor motivations remains confidential. Because the voir dire

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[80] As with petty traffic offenses, trivial, widely ignored, sometimes-obscure laws create opportunities to target a few individuals for personal idiosyncratic reasons. Unlike traffic offenses, courts for a time prohibited such selectivity as unconstitutional. For cases involving Sunday closing laws, *see, e.g.*, Simonetti v. City of Birmingham, 314 So. 2d 83, 89–90, 92–93 (Ala. Crim. App. 1975) (reversing conviction on evidence of general nonenforcement of Sunday closing laws despite widespread violations known to city and police, including many violations by commercial tenants of city; only four arrests made in one year); State v. Anonymous, 364 A.2d 244, 245–46 (Conn. C.P. 1976) (dismissing charges of violating Sunday closing law where state knowingly tolerated such offenses and profited from taxing such violations); City of Ashland v. Heck's, Inc., 407 S.W.2d 421, 422, 424 (Ky. 1966) (affirming injunction against enforcing Sunday closing laws against department store given widespread violations and no other prosecutions in twenty-five years); People v. Acme Markets, 334 N.E.2d 555, 556–57 (N.Y. 1975) (reversing conviction for violation of Sunday sales laws where prosecution "was pursued . . . against the backdrop, the history and the policy of nonenforcement" despite "massive and flagrant violations" of the law). For cases involving other petty offenses, *see, e.g.*, People v. Kail, 501 N.E.2d 979, 982 (Ill. App. Ct. 1986) (riding bike without a bell); Associated Indus. of Ala., Inc. v. State, 314 So. 2d 879, 886–90, 897 (Ala. Crim. App. 1975) (failing to file expense reports for political committee when forty other committees were not charged for same failure); State v. Vadnais, 202 N.W.2d 657, 660 (Minn. 1972) (parking a home trailer on one's land when others not charged for trailers not used as homes). For an insightful discussion of such cases with additional citations, *see* McAdams, *supra* note 16, at 662–64.

[81] The most likely sources available to defense counsel with the diligence and resources to dig them up are records of prosecutors' strikes of jurors in previous cases. Until *Batson* overturned *Swain v. Alabama*, that evidence—showing a pattern of racially motivated strikes across multiple trials—was required.

process yields enough information for some defendants to make a prima facie case and a few to prevail on *Batson* claims, the Supreme Court has never articulated a standard for—or even mentioned the possibility of—trial judges ordering discovery from prosecutors during pretrial jury selection. And no such practice seems to have developed among lower courts.

D. Conclusion

In sum, both *Batson* and *Armstrong* adjudication would benefit from mechanisms that provide courts with greater access to relevant evidence. The challenge to providing courts with more information in these two contexts arises from the countervailing interests that justify confidentiality for prosecutors' internal records prior to trial. But what equal protection doctrine has never explicitly acknowledged—particularly for selective prosecution claims, where it is more important[82]—is that prosecutors' confidentiality interests diminish over time. That means the cost-benefit calculation that justifies restricting discovery before trial changes after trial, at the appellate stage. Very few *Armstrong* claims have ever gotten that far, but many *Batson* claims have. The judgments of appellate courts in both contexts confirm the point—ordering disclosure from prosecutors is much more feasible posttrial.[83]

In the common law tradition, we traditionally think of the factual record as wholly created in the trial court.[84] Appellate courts review trial judgments based on trial court records, but they largely do not authorize and evaluate new evidence never presented to the trial court.[85] Yet as some scholars have recently highlighted, in various

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[82] By the Supreme Court's own account, prosecutors' interests in keeping information confidential are stronger in the charging context than in jury selection. The *Armstrong* decision puts great weight on prosecutors' need for nondisclosure of charging-related information. *Armstrong*, 517 U.S. at 468 (demonstrating that discovery's costs, which may include "disclos[ing] the Government's prosecutorial strategy," justifies a "rigorous standard for discovery"). The *Batson* opinion mentioned no equivalent concerns for jury selection, apparently on the assumption that much is disclosed publicly in the voir dire process. *See id.* at 467–68 ("During jury selection, the entire *res gestae* take place in front of the trial judge.").

[83] *See* Abel, *supra* note 59, at 733–55 (describing posttrial disclosure practices); *see, e.g.*, Strickler v. Greene, 527 U.S. 263, 278–79 (1999).

[84] *Cf.* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 529–38 (2012) (describing features of common law jury trial tradition).

[85] The classic account of common law tradition's approach to appellate review, in comparison to the European civil law tradition, is MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

ways appellate courts *do* expand the factual basis for decisions beyond that available in the lower court record.[86] These practices have tradeoffs. Most obviously, fuller factual records in trial courts reduce errors; later appellate correction of errors is costly. Still, this post-conviction evidence development is unavoidable for some claims, such as claims of ineffective assistance of counsel,[87] and it is familiar elsewhere, notably in post-conviction *Batson* litigation. The next Part argues that courts can improve these choices about the timing of evidence production and compelled disclosures. Post-conviction discovery familiar in *Batson* claims should be more widely used for *Armstrong* claims. Meanwhile, greater use of *pretrial* discovery orders that are an early step in *Armstrong* doctrine could improve the efficiency of adjudicating *Batson* claims. This reversal could do much to overcome the information deficits that claimants and courts face in identifying and accurately adjudicating *Batson* and *Armstrong* challenges.

III
DISCOVERY REFORM FOR *BATSON* AND *ARMSTRONG* CLAIMS

A. Timing Options for Evidence Disclosure

Take a brief step back for a broader perspective on the timing of evidence production. In the standard account of adversarial legal process, evidence is produced at trial.[88] The common law tradition had virtually no law of discovery—no obligations that parties produce evidence *before* trial.[89] That changed dramatically with modern discovery statutes, which are supplemented by modest constitutional disclosure duties for prosecutors. Pretrial evidence discovery is now routine—and, in many jurisdictions expansive—although it is focused on evidence relevant to substantive issues rather than procedural ones (*Armstrong*'s authorization for pretrial discovery

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86 Allison Larsen, in a series of articles, has explored a controversial trend in this regard. *See, e.g.*, Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014); Allison Orr Larsen, *Confronting Supreme Court Factfinding*, 98 VA. L. REV. 1255 (2012). For an excellent account of widely accepted means to expand posttrial factual records that is focused on *Batson* litigation, *see* Abel, *supra* note 59.

87 *See* Strickland v. Washington, 466 U.S. 668 (1984).

88 This contrasts with the European civil law model in which officials compile a "dossier" of evidence, and the trial court serves more as an audit of that record than the primary site for introducing evidence. For the classic account of the civil law model, *see* DAMAŠKA, *supra* note 85, at 21–27.

89 *See* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155 (2018); Langbein, *supra* note 84.

orders notwithstanding). The ability of parties to see evidence without going to trial is one reason most cases are resolved by negotiated agreements.[90] *After* trial, the law still strongly disfavors production of new evidence; however, this is much more true for evidence related to the merits, which may require a new trial, than to procedural violations, which can be heard by appellate courts.[91] Statutes in some jurisdictions provide greater access to evidence after trial; courts likewise order post-conviction for production of evidence relevant to shed light on alleged procedural violations.[92]

There is nothing exceptional any longer in courts ordering parties to produce the evidence that judges need to accurately adjudicate procedural claims. *Armstrong* (barely) authorizes pretrial discovery for selective prosecution claims,[93] and courts have, in a handful of cases, employed their general authority to order such discovery post-conviction.[94] But examples abound of appellate and habeas courts ordering disclosure of new evidence to shed light on *Batson* claims.[95] This is hardly unusual. To adjudicate other constitutional procedure claims, courts order production of new evidence, or weigh new evidence otherwise produced by parties, long after trial. By their nature, violations of *Brady v. Maryland*[96]—which requires prosecutors to

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90 Brown, *supra* note 89, at 155–58, 187–96; Langbein, *supra* note 84, at 525–26, 551.

91 *See* 3 CHARLES A. WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 583 (4th ed. 2011) (concluding from the case law that a motion for new trial based on newly discovered evidence "is not favored by the courts and is viewed with great caution" because "courts are reluctant to give him a second trial and disrupt finality").

92 *See, e.g.*, N.C. GEN. STAT. § 15A-1415(f) (stating that in post-conviction proceedings, the state "shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant").

93 United States v. Armstrong, 517 U.S. 456, 465 (1996).

94 *See, e.g.*, United States v. Jones, 159 F.3d 969 (6th Cir. 1998) (on direct appeal, reversing district court denial of pretrial discovery and ordering post-conviction discovery); Loza v. Mitchell, 705 F. Supp. 2d 773 (S.D. Ohio 2010) (granting discovery under civil rules applicable to habeas petition alleging racial bias in capital murder prosecutions), *aff'd*, 766 F.3d 466 (6th Cir. 2014); Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597 (S.D. Ohio Sept. 27, 2007); *see also* United States v. Tuitt, 68 F. Supp. 2d 4 (D. Mass. 1999) (granting pretrial discovery on selective prosecution claim).

95 In *Batson* litigation, post-conviction evidence production has provided courts with invaluable information from prosecutors' notes on jury selection, prosecution training materials on jury selection, details on use of peremptory challenges in other cases, and various extrajudicial statements that shed light on motivations for peremptory strikes. For a detailed overview, *see* Abel, *supra* note 59, at 738–51.

96 373 U.S. 83 (1963); *see also* Kyles v. Whitley, 514 U.S. 419 (1995) (specifying obligation to turn over material in possession of police agencies).

disclose exculpatory evidence to the defense before or at trial—are concealed from the defense and courts in the government's confidential files, which may come to light only after trial (if ever) through court-ordered discovery, post-conviction disclosure statutes, or otherwise.[97] The same is true for claims of ineffective assistance of counsel under *Strickland v. Washington*.[98] Only after trial (and with new defense counsel) is the attorney's full performance complete; only at that stage will courts compel defense attorneys to disclose work product and testify about reasons for decisions. And the Court in *Peña-Rodriguez* recently held unconstitutional statutes that restrict posttrial evidence of jurors' racial bias, "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[99] In that setting as well, the confidentiality interest of jurors—as with attorney work product—is strongest during trial and somewhat diminished afterward.

The point is that, especially for procedural claims, courts have well-established authority to facilitate evidence production at every stage of litigation. Exactly when they exercise these powers depends, in part, on when the parties request discovery and on the strength of countervailing interests—most notably the confidentiality interests of prosecutorial and law enforcement agencies. These powers have been underused because parties have not pressed courts to order discovery at the optimal points in the litigation timeline. The particular histories and procedural postures of the *Batson* and *Armstrong* cases, which naturally shaped the Supreme Court's holdings in both, have misled parties and courts into thinking of *Batson* discovery largely as a

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97 *See, e.g.*, Foster v. Chatman, 578 U.S. 488, 495–501 (2016) (describing evidence obtained through state Open Records Act, which state and federal courts admitted in habeas proceedings); Brief for Petitioner at 8, Smith v. Cain, 565 U.S. 73 (2012) (No. 10-8145), 2011 WL 3608728, at *12 (2011) (describing production of *Brady* material in response to discovery order from trial court hearing habeas petition and from public records act request); Miller-El v. Dretke, 545 U.S. 231, 256 n.15 (2005) (noting additional information—jury questionnaires and information cards—that became available only during habeas litigation); Strickler v. Greene, 527 U.S. 263, 278–79 (1999) (*Brady* material released in response to court order for production of police and prosecutor files); United States v. Bagley, 473 U.S. 667, 671 (1985) (material disclosed pursuant to Freedom of Information Act request after trial); State v. Larkins, 2003 WL 22510579, at *2–3, ¶¶ 11, 19 (Ohio Ct. App. Nov. 6, 2003) (police reports disclosed after trial in response to request under state public records act).

98 466 U.S. 668 (1984); *see* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.7(e) (4th ed. 2021) ("Appellate courts uniformly note that where a claim of ineffective assistance of trial counsel could be more fully developed by evidence outside the trial record, the preferable procedure is to present it initially in a setting that permits an evidentiary hearing.").

99 Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

posttrial endeavor and *Armstrong* discovery as a pretrial one. But those assumptions are backward. The balancing of interests makes *Batson* discovery much more feasible and efficient before trial (during jury selection) *Armstrong* discovery much more feasible after trial. The key reason has to do with differences in the strength of prosecutors' interests in keeping confidential their work product related to jury selection and criminal charging decisions.

B. Variations in Work Product Confidentiality

Two features of prosecutors' need for confidentiality of their internal records are relevant here. First, the need for confidentiality diminishes over time, which makes later disclosure less costly to law enforcement interests. That recognition underlies statutes that mandate much broader discovery of prosecutors' post-conviction records,[100] and more general Freedom of Information or Open Records acts that exist in every state and federal law, and which authorize release of information—including from law enforcement agencies—that either was never confidential or no longer merits confidentiality.[101] Likewise, courts compel both prosecutors (in relation to *Batson* claims) and defense lawyers (in *Strickland* claims) to disclose confidential work product materials after a criminal case has concluded in a trial judgment

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100 *See, e.g.*, N.C. GEN. STAT. § 15A-1415(f) (2009) (open-file disclosure of police and prosecutor files in all felony cases after conviction); GA. CODE ANN. § 50-18-72(4) (2016) (authorizing disclosure of records of law enforcement and prosecution agencies after an investigation or prosecution is no longer pending); State v. Atkins, 505 S.E.2d 97 (N.C. 1998) (holding state has no work product privilege under N.C. GEN. STAT. § 15A-1415(f), which requires disclosure of all felony prosecution files after conviction); Foster v. Chatman, 578 U.S. 488 (2016) (noting defendant obtained prosecution records documenting *Batson* violation under Georgia Open Records Act). The same point is confirmed by prosecutors' willingness to grant consultants and academic researchers wide access to files of closed cases. *See, e.g.*, Peterson et al., *supra* note 22.

101 *See, e.g.*, *Foster*, 578 U.S. at 493–501 (evidence obtained through request under Georgia Open Records Act); LA. STAT. ANN. § 44:3 (2021) (records of prosecution and law enforcement agencies); Brief for Petitioner at 12, Smith v. Cain, (No. 10-8145), 2011 WL 3608728 (*Brady* material uncovered in part through Louisiana Public Records Act request); United States v. Bagley, 473 U.S. 667 (1985) (material disclosed pursuant to Freedom of Information Act request after trial); State v. Larkins, 2003 WL 22510579 (Ohio Ct. App. 8th 2003) (police reports disclosed in response to request under Ohio public records law). *See generally* Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) ("[R]ecords or information compiled for law enforcement purposes [may be excepted from disclosure], but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."); David L. Ganz, *Open Public Records Act Litigation*, 128 AM. JUR. TRIALS 495 § 22 (2013; updated 2021) (describing access to law enforcement records under state and federal public records acts).

and sentencing order.[102] When courts very occasionally order prosecution disclosure in *Armstrong* litigation, they almost always do so well after conviction.[103] The diminished need for confidentiality also explains why police and prosecution agencies voluntarily give researchers access to files for cases that are no longer pending. In general, the courts' authority to facilitate disclosures throughout the litigation process not only enables them to delay disclosure orders until confidentiality interests are sufficiently low but also enables them to issue orders earlier to prevent, rather than remedy, violations. Post-conviction remedies like reversal are always more costly,[104] but they are commonly justified for a variety of reasons depending on the claim at issue,[105] including—for *Batson* and *Armstrong* claims—the confidentiality of prosecutor work product.

Second, prosecutors have a stronger confidentiality interest in information related to charging as opposed to jury selection—that is, stronger for *Armstrong* material than *Batson* material. The potential harms from pretrial disclosure of the kinds of prosecution records needed to investigate claims of selective prosecution are a primary reason cited by the *Armstrong* Court to justify the high standard defendants must meet before trial courts can order disclosure from prosecutors. The Court worried that disclosure would "unnecessarily impair the performance of a core executive constitutional function, . . . chill law enforcement . . . , and . . . undermine prosecutorial effectiveness by revealing the Government's enforcement policy."[106]

By contrast, nothing like that is at stake in in the context of alleged *Batson* violations. The information needed by courts for those claims

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102 *See, e.g.*, *Strickler*, 527 U.S. at 278–79 (posttrial order to disclose police and prosecution files); *Atkins*, 505 S.E.2d 97 (no work product privilege for prosecution records after conviction); *see* Abel, *supra* note 59, at 740–41 & nn.137–41 (discussing and citing cases of courts ordering disclosure of prosecutor work product); LAFAVE ET AL., *supra* note 98, § 11.7(e) (discussing and citing cases of courts ordering former defense counsel testify about representation strategy and disclose work product).

103 *See supra* note 95 (cases that compelled post-conviction disclosure from prosecutors).

104 *See* Arizona v. Fulminante, 499 U.S. 279, 306–10 (1991) (distinguishing "structural defects" in trials that merit automatic reversal from nonstructural "trial errors" that merit harmless-error analysis).

105 For example, the adequacy of a defense attorney's representation under *Strickland* can be investigated only after conviction and sentencing. *See* Strickland v. Washington, 466 U.S. 688 (1984). Many prosecution failures to disclose exculpatory evidence required by *Brady v. Maryland*, 373 U.S. 83 (1963), are not uncovered until after trial. And in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), the Court held that post-conviction evidence production to investigate jurors' racial bias is constitutionally protected and struck down statutes that barred impeachment of jury verdicts based on post-conviction evidence.

106 U.S. v. Armstrong, 517 U.S. 456, 465 (1996) (internal quotation marks omitted).

is much more limited and specific. It consists of prosecutors' notes and research prepared for jury selection in the present case, which includes information about venire members, expressed preferences for or against certain juror characteristics, and guiding principles for selecting favorable jurors. It includes office policy manuals or training materials on jury selection, and records of prosecutors' peremptory strikes in prior cases. To be sure, much of this is attorney work product. Some of it might provide hints on intended trial strategy. But pretrial disclosure of this kind of information does nothing to reveal prosecution charging priorities or jeopardize active law enforcement interests akin to those at stake in *Armstrong* litigation.

C. Armstrong *Disclosure Post-conviction*

All of this suggests that pretrial discovery is much more appropriate for *Batson* than *Armstrong* claims. Why then does *Armstrong* doctrine include a standard for discovery orders while *Batson* doctrine makes no mention of it? One answer seems to be simply that Mr. Armstrong and his co-defendants sought pretrial discovery (which the district court granted) while Mr. Batson didn't; the Supreme Court's decisions built on those distinct procedural paths. Subsequent litigants followed those models as well, likely because—before trial, at least—*Armstrong* claims can't get anywhere without disclosure from prosecutors while *Batson* claims occasionally can. The practical evidentiary hurdles for *Armstrong* claims prior to trial are much more formidable than in the *Batson* context. Very little about a defendant's case—and usually relatively little of the broader public record—provides much basis for inferring a racially motivated charging decision, so the first thing defendants do is seek more information from the source. *Batson* claimants, by contrast, have more public information to work with from the jury selection process. Very occasionally, they can succeed using only that source of evidence—the pattern of prosecutors' peremptory challenges in light of their voir dire questions, jurors' responses, and jurors' apparent racial identity.

Both of those approaches, however, leave courts deciding claims on evidentiary records that lack information from the best source—prosecution files. The solution is simple but different for each claim.

Armstrong claims should not be adjudicated prior to trial because the important body of evidence needed to determine violations still merits

confidentiality protection at that stage.[107] As with *Brady* claims, violations go undetected before trial because defendants can't access the evidence and present it to judges. *Armstrong* claims should be treated like *Brady* claims (and also *Peña-Rodriguez* or *Strickland* claims)[108]: the standard practice should be to adjudicate those claims post-conviction, when courts can gain access to the confidential prosecution information that they need to accurately determine a claim's validity.[109]

D. Batson *Disclosures Before Trial*

Litigation of *Batson* claims, by contrast, should be deliberately concentrated in the pretrial stage. Currently, much *Batson* litigation is effectively bifurcated: most claims are raised and initially decided based only on evidence from the public jury selection process; then (if defendants lose both the *Batson* claim and the trial) they may be relitigated on a richer evidentiary record with new information from prosecution files. Instead, courts should order pretrial discovery from prosecutors when defendants raise plausible *Batson* claims. In the *Batson* setting, *Armstrong*'s "some evidence" standard for a discovery order is one that defendants can plausibly meet based on readily available evidence from jury selection; many have met *Batson*'s prima facie case standard on that evidence. When they do so, trial judges should order the prosecution to disclose relevant material in their case files, including work product, in addition to its proffer of race-neutral

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[107] Defendants should still *raise* the claim before trial, both to preserve the claim for appeal and to adjudicate the rare case in which sufficient evidence exists without prosecution disclosures. Also, as described *infra* Section II.E, a predictable practice of post-conviction disclosure should prompt prosecutors in some cases to disclose relevant materials voluntarily prior to trial, save when countervailing law enforcement interests were truly strong enough to merit delay.

[108] Granted, the reasons posttrial consideration of *Peña-Rodriguez* and *Strickland* claims are different than for *Armstrong* claims. A selective-prosecution violation occurs before trial, whereas juror bias or ineffective assistance does not occur until the trial stage. But *Armstrong* parallels *Brady* violations in this respect: both of those violations occur prior to trial, but defendants and courts can gain access to the information that reveals them only after trial.

[109] There would be no need to retain *Armstrong*'s "some evidence" standard for discovery orders in the post-conviction stage, but if it continued to apply, defendants should more often be able to meet it because of the greater statutory entitlement to prosecution records under open records acts and post-conviction disclosure laws. *See supra* note 100 (open records acts; N.C. GEN. STAT. § 15A-1415(f) (2019)).

explanations for its strikes.[110] Compelling disclosure of jury selection materials does not infringe distinctive prosecutorial or law enforcement interests. Unlike prosecutors' charging decisions, jury selection is not a "core executive function." It is an ordinary litigation practice for all attorneys, public and private, in every jury trial. Nothing about disclosure of prosecutors' notes on prospective jurors "threatens to chill law enforcement" or to "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." On the other hand, early disclosure would be especially valuable. *Batson* claims demand difficult, fact-specific judgments about lawyers' unspoken motivations, for which evidentiary sources are limited.[111] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available."[112] For that reason, courts examine "all of the circumstances that bear upon the issue of racial animosity must be consulted."[113] Prompt disclosure of attorneys' voir dire materials, based upon a prima facie case of discriminatory motivation, would provide trial judges with the richer evidentiary basis they need to assess prosecutors' purported race-neutral explanations for their peremptory strikes.

Concentrating evidence production at the time of the initial *Batson* claim should make *Batson* adjudication much more efficient. Trial judges' initial rulings on *Batson* claims would be more accurate and reversed less often; accordingly, *Batson* violations would be prevented more often, and there would be less need for new trials. In addition, *appellate* review of *Batson* rulings should be improved as well, because appellate courts would benefit from the same, richer evidentiary records. Depending on the standard of review, more information would give appellate judges better insights about whether trial court decisions,

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110 If prosecutors make a strong argument for doing so, courts could sometimes examine disclosed documentation *in camera*—perhaps because notes contain both jury selection information and mentions of trial tactics that might justifiably be shielded from the defense.

111 Foster v. Chatman, 578 U.S. 488, 499–500 (2016) (*Batson's* third step, in which "the trial court must determine whether the defendant has shown purposeful discrimination, . . . turns on factual determinations"); Miller-El v. Dretke, 545 U.S. 231, 239 (2005) (Defendants must build the prima facie case from "'the totality of the relevant facts' about a prosecutor's conduct") (quoting Batson v. Kentucky, 476 U.S. 79, 94 (1986)).

112 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977), quoted in *Foster*, 578 U.S. at 501.

113 *Foster*, 578 U.S. at 501 (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008), and *Arlington Heights*, 429 U.S. at 266).

for a class of claims that are inevitably fact intensive, were clearly erroneous[114] or objectively unreasonable.[115]

Consider how earlier discovery would have changed *Foster v. Chatman*. When the prosecution used peremptory strikes to remove all four Black prospective jurors in his capital murder trial, Foster alleged a *Batson* violation.[116] His prima facie case was based solely on evidence that occurred in the public jury selection process. On that record, the state trial court accepted the prosecutors' race-neutral explanations for the strikes and rejected the *Batson* allegation; the state supreme court later affirmed.[117] Only in state habeas litigation years later did Foster obtain more prosecutors' trial case files.[118] Among other revealing details, on all prosecution copies of the jury venire list "the names of the black prospective jurors were highlighted in bright green," the "letter 'B' also appeared next to each black prospective juror's name," and the phrases "definite NO's" and "No Black Church" were written next to qualified Black venire members' names.[119] Needless to say, those records would have given the original trial judge a much richer information base for evaluating—and discrediting—the race-neutral explanations for striking all Black jurors that prosecutors offered in response to Foster's *Batson* challenge. Foster's first trial for capital murder could have proceeded with a jury that was selected without racial bias. Instead, the verdict of that unconstitutional jury stood for nearly three decades.[120]

E. Incentive Effects of Routine Disclosure

A more predictable, consistent practice of prosecution discovery (before trial for *Batson*, post-conviction for *Armstrong*) can be expected to prompt changes in prosecutors' trial preparation practices.

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114 *See, e.g.*, *Foster*, 578 U.S. at 500 ("[W]e defer to state court factual findings unless we conclude that they are clearly erroneous."); Foster v. State, 374 S.E.2d 188, 192 (Ga. 1988) (in direct appellate review, according trial court's *Batson* ruling "great deference" and "not clearly erroneous").

115 *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 348 (2003) (on federal habeas review of state court judgment, "petitioner must demonstrate that a state court's . . . factual determination was 'objectively unreasonable' in light of the record before the court").

116 *Foster*, 578 U.S. at 491.

117 *Id.* at 491–93.

118 *See id.* at 500 (through the Georgia Open Records Act, Foster obtained a "copy of 103 pages of the State's case file" from his 1987 trial, which was first considered by the state habeas court).

119 *Id.* at 493, 495.

120 *Id.* at 500 (noting Foster's original trial was in 1987).

Most would be more salutary.[121] For example, if prosecutors recognized that post-conviction disclosure of material relevant to *Armstrong* claims was likely, they would see advantages in voluntarily disclosing those records *before* trial, save for those circumstances when ongoing investigations would truly be compromised. Early disclosure would allow *Armstrong* claims to be adjudicated on a fuller evidentiary record sooner rather than later. That would increase the odds that the trial court would resolve claims accurately in the first place, which in turn would make convictions less vulnerable on appeal and reduce post-conviction adjudication—regardless of whether the claim succeeded at a later stage.

Predictable disclosure of prosecution materials may also affect the content of those records; prosecutors might not put in writing some information that they now include; they might record other information in more detail. Recognizing the likelihood of having to disclose their jury selection materials for *Batson* claims, for example, prosecutors ought to document less information that overtly facilitates race-based peremptory challenges of the sort seen in *Foster v. Chatman*.[122] At a minimum, that could hinder the efficacy of race-based tactics. More hopefully, it might direct lawyers to focus on somewhat different, non-race-based considerations to inform their juror selection decisions. On the other hand, in anticipation of disclosures relevant to *Armstrong* claims, prosecutors might memorialize *more* information about their charging and declination decisions, as an attempt to clearly document the non-race-based grounds for differences in their use of charging discretion. In turn, efforts to clearly document race-neutral decision-making could prompt prosecutors to more carefully and reflectively scrutinize their charging decisions, and to do so in the context of other cases. In this way, prosecutors themselves might recognize and correct any racially suspect implications from more careful record keeping that would otherwise go unnoticed.[123]

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[121] One undesirable response might be that prosecutors put less in writing, so that fewer (or less candid) records exist for disclosure. That effect would likely be modest. Lawyers put things in writing because it's necessary or useful to do so; they can hold only so much information in their heads.

[122] *Foster*, 578 U.S. 488.

[123] For a candid account by former federal prosecutors of how this can happen, *see* Lu, *supra* note 40, at 192–93. Lu recounts prosecutors' observations how bias could creep into their own case-by-case charging judgments—a black felon in possession of a firearm could be assessed an offender meriting prosecution while a white felon with a firearm could be perceived as "just a good old boy" worthy of some leniency.

IV
LEVERAGING EVIDENCE ACROSS EQUAL PROTECTION CLAIMS

A. Batson *Evidence Bolsters* Armstrong *Claims*

The previous Part focused on evidence in prosecutors' case files, to which courts could more readily gain access if *Batson* adjudication adopted *Armstrong*'s pretrial discovery practice and *Armstrong* claims followed the tradition of *Batson* litigation in post-conviction prosecution disclosure. This Part identifies another overlooked information source that lies wholly outside of prosecutors' confidential files and the public record: evidence of prosecutors' racially motivated conduct across the full range of criminal litigation decision-making in prior cases.

Of course, there is nothing novel in equal protection litigants producing evidence from other cases and contexts to support an inference of racially motivated decision-making by the same decision maker in the present case. Prior to *Batson*, a defendant was *required*, under *Swain v. Alabama*, to produce evidence from a prosecutors' race-based decisions in prior cases in order to prove race-based use of peremptory strikes in his own case.[124] *Batson* overturned the *Swain* requirement for multi-case evidence, but parties may still present such evidence when they have it. Courts also rely on evidence like patterns of decision making that are indicative of prosecutorial intentions, such as office policies and training materials.[125] And the Court's opinion in *Armstrong* still resembles *Swain* in that it effectively mandates that defendants present evidence of prosecutors' charging and non-charging decisions in other cases as a basis for inferring racial motivations in the defendant's case.[126] Across equal protection contexts, the Supreme Court has consistently said that, in light of the difficulty of proving the discriminatory purpose element of equal protection claims, parties can present, and courts must consider, all relevant evidence from any source.[127] Yet claimants in *Batson* and *Armstrong* challenges seem

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[124] *See* Swain v. Alabama, 380 U.S. 202, 226–27 (1965). Such evidence is still permissible under *Batson*, which held only that claimants could prevail using solely evidence arising from their own case.

[125] *See* Miller-El v. Dretke, 545 U.S. 231, 264–66 (2005) (evidence from Dallas County district attorney's office training manual); *see also* Miller-El v. Cockrell, 537 U.S. 322, 334–35 (2003). *See* discussion *infra* notes 145–47.

[126] *See* United States v. Armstrong, 517 U.S. 456, 467–68 (1996).

[127] Snyder v. Louisiana, 552 U.S. 472, 478 (2008) (when courts address *Batson* claims, "all of the circumstances that bear upon the issue of racial animosity must be consulted."); Johnson v. California, 545 U.S. 162, 169–70 (2005) ("[*Batson*] held that a prima facie case

never to proffer evidence of race-based decision-making in one stage of litigation to support an inference of race-based actions in another. As a consequence, the decisions that apply both doctrines never acknowledge evidence from other litigation stages as relevant to either inquiry.

Yet there is no reason to confine evidence of *Armstrong* violations only to prosecutors' *charging* decisions. Evidence that other, non-charging decisions by the same prosecutors were racially motivated is also probative, including evidence of racially motivated peremptory strikes.[128] In other words, evidence of *Batson* violations is probative of an alleged *Armstrong* violation.[129] Unlike the reforms described in Part III, this strategy can be leveraged by claimants who seek out and produce this evidence, without depending on judges to compel disclosure. As far as I have found, this evidentiary strategy has been wholly overlooked. None of the few reported *Armstrong* decisions give any indication that a defendant relied on *Batson* evidence to support of a selective prosecution claim,[130] nor have I seen such evidence cited in a sampling of briefs raising *Batson* or *Armstrong* claims.[131] In the complete absence of this resource, *Armstrong* litigation has reflected an unduly narrow conception of the relevant, available evidence to support those claims. A partial explanation, however, is that most

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of discrimination can be made out by offering a wide variety of evidence . . . [so that] the trial judge would have the benefit of all relevant circumstances . . . before deciding whether it was more likely than not that the challenge was improperly motivated."); Batson v. Kentucky, 476 U.S. 79, 96 (1986) (in addition to evidence of the race of venire members removed by a prosecutor, defendants can offer "any other relevant circumstances [to] raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.").

128 See *supra* note 125 and accompanying text.

129 The reverse is true as well—evidence of race-based charging supports an inference that the same officials were racially motivated in peremptory strikes. But evidence of *Armstrong* violations in court decisions is nearly nonexistent.

130 Note that *Batson* evidence would not be relevant to the substantial portion of selective prosecution claims (mostly the successful ones) based on allegations of bias against a defendant's political speech, activism, or other prohibited non-race-based criterion. Most *Batson* claims raise allegations of racial bias, although some allege that strikes were based on ethnicity, religion, or gender.

131 Admittedly, my sampling hardly amounts to an empirically sound survey. No one could feasibly review all litigant briefs merely for *Batson* claims (and many initial *Batson* motions are recorded only in trial transcripts). That inquiry awaits artificial intelligence tools that can answer such questions in large volumes of documents.

litigants, especially criminal defendants, operate under significant resource constraints.

B. Sources of Batson *Violation Evidence*

1. Published Decisions

Published decisions affirming *Batson* violations are easy sources to locate but are relatively rare. Some courts, as well as most scholars, frankly concede that the *Batson* doctrine has been "ineffectual in addressing the discriminatory use of peremptory challenges"[132] and catches only the most "unapologetically bigoted or painfully unimaginative attorney."[133] As one example, the North Carolina Supreme Court has never held that a state prosecutor violated *Batson*,[134] although a large-scale empirical study of prosecutors' peremptory strike practices in the state found widespread evidence of racial disparities in prosecutors' uses of those strikes.[135] As another example, a twenty-six-year study of peremptory strikes by one

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132 State v. Holmes, 221 A.3d 407, 411 (Conn. 2019) ("From its inception, . . . *Batson v. Kentucky* . . . has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors."); *id.* at 250 (creating "Jury Selection Task Force" to address "systemic considerations"); *id.* at 254 (Mullins, J., concurring) ("As the majority opinion cogently sets forth, the *Batson* framework has proven to be wholly inadequate to address the discriminatory use of peremptory challenges."); *see also* People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (criticizing *Batson*'s effectiveness because "pat race-neutral reasons for exercise of peremptory challenges" successfully rebut prima facie evidence of racial motives, and speculating whether "new prosecutors are given a manual, probably entitled 'Handy Race-Neutral Explanations'," or "'20 Time-Tested Race-Neutral Explanations.'").

133 Bellin & Semitsu, *supra* note 3, at 1075–78.

134 The court's first *Batson* decisions in defendants' favor to any degree occurred in 2020, when the court remanded *Batson* claims by two defendants for further trial court analysis. *See* State v. Hobbs, 841 S.E.2d 492 (2020) (remanded for *Batson* step-3 analysis); State v. Bennett, 843 S.E.2d 222 (2020) (remanded for *Batson* steps 2–3 analysis); *see also* State v. Alexander, 851 S.E.2d 411 (N.C. App. 2020) (failure of trial court to conduct comparative juror analysis or weigh evidence of racial discrimination in ruling on *Batson* challenge warranted remand); Pollitt & Warren, *supra* note 4, at 1961, 1984 (reporting conviction reversals for *Batson* prosecution *Batson* violations in appellate courts of five southern states); EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 19 (2010) (reporting conviction reversals for *Batson* prosecution *Batson* violations in appellate courts of several southern states), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/5FMZ-9D5Q].

135 Wright et al., *Jury Sunshine Project*, *supra* note 53, at 1410; Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012).

prosecution office—in Mississippi's fifth judicial district—found that the district attorney's office struck Black venire members more than four times as often as it struck whites, removing half the eligible Black jurors but only 11% of whites.[136]

An exasperated Washington Supreme Court in 2013 concluded that "[t]wenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection."[137]

Still, this relatively rare source of evidence is not insignificant. Courts have found hundreds of *Batson* violations.[138] And the weakness of *Batson* doctrine is a silver lining: confirmed *Batson* violations provide especially strong evidence of intentional racial bias among individual prosecutors and sometimes prosecutorial offices as a whole. Such compelling evidence carries some probative value for inquiries into whether the same officials acted with similar motivations in other stages of litigation—decisions about charging, dismissals, plea bargain terms, and sentencing. Thus, at a minimum, *Armstrong* claimants should search for prior *Batson* violations, by the same prosecutors or prosecution office, that would bolster the prima facie case of purposeful selective prosecution.[139] In addition, given that information on racially

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136 *In the Dark, S2 E8: The D.A.*, AM. PUB. MEDIA (June 12, 2018), https://www.apmreports.org/episode/2018/06/12/in-the-dark-s2e8 [https://perma.cc/EJQ9-QWYY] [hereinafter APM] (referring to accompanying report and data). Another study of Louisiana jury trials in 2011–2016 reported similar findings. *See* Jeff Adelson et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, THE ADVOCATE (Apr. 1, 2018, 8:05 AM), https://www.nola.com/news/courts/article_8e284de1-9c5c-5d77-bcc5-6e22a3053aa0.html [https://perma.cc/LB6G-9GFU]; Jeff Adelson, *Download Data Used in The Advocate's Exhaustive Research in 'Tilting the Scales' Series*, THE ADVOCATE (Apr. 1, 2018, 8:00 AM), https://www.theadvocate.com/new_orleans/news/courts/article_6f31d456-351a-11e8-9829-130ab26e88e9.html [https://perma.cc/J6PV-U8MM].

137 State v. Saintcalle, 309 P.3d 326, 329 (Wash. 2013) ("Twenty-six years after *Batson*, a growing body of evidence shows that racial discrimination remains rampant in jury selection. . . . We conclude that our *Batson* procedures must change."). In *Saintcalle*, the court commented:

> In over 40 cases since *Batson*, Washington appellate courts have never reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge. . . . [Of] 42 Washington *Batson* cases, all . . . affirm a trial court's denial of a *Batson* challenge. Of those 42 cases, 28 involve the prosecution removing every prospective juror of the same race as the defendant . . . . In only six of these cases were minority jurors permitted to serve . . . . This is rather shocking . . . . [I]t is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories.

Id. at 335.

138 *See* Melilli, *supra* note 3, at 459–60.

139 The same is true in the other direction—evidence of purposeful discrimination in charging is relevant to whether a discriminatory purpose motivated peremptory strikes. But

motivated charging decisions is difficult for defendants to obtain without discovery, a prior *Batson* violation can also help to identify potential *Armstrong* claims; it provides litigants another data point at an early stage, when information on which to infer charging motivations is especially thin.

2. Prima Facie Case Evidence

Evidence of racially motivated peremptory strikes exists in sources other than *Batson*-violation judgments, although some are costlier to produce. In the large number of *Batson* claims that do not prevail—many of which are published and thus easy to locate—litigants present strong prima facie evidence of racially motivated strikes.[140] Those claims fail when courts accept prosecutors' race-neutral rebuttals of that evidence.[141] But those decisions are not findings that peremptory strikes were not motivated by race. They are findings that the claimant failed to meet the standard of proof. Like all proof standards, the *Batson* standard allocates errors, and it does so in favor of type-2 "false negative" errors: conclusions that racial bias was not proven when it may in fact exist. The prima facie evidence from such cases can still contribute to a broader evidentiary record, drawn from multiple cases, that leads to a different conclusion. Again, this is the kind of evidence that *Swain* once required and *Batson* still permits. Evidence of a pattern of race-based strikes over several cases need not be convincing evidence of *Batson* violations in *each* of those cases in order to contribute to a body of convincing evidence of racially motivated decisions in a specific, subsequent case. The probative value of evidence changes depending on the context and the accompanying evidence. This is also a premise of *Swain* and survives under *Batson*: courts can make different inferences about the motivation for a particular peremptory strike at one time, with a limited body of evidence, than they do at a later time when that same evidence is part of a larger body of evidence from other cases. The prima facie evidence

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that source of evidence is almost nonexistent; the set of successful *Armstrong* challenges against prosecutors who are still in practice is too small to matter.

[140] *See* State v. Holmes, 221 A.3d 407, 411–12 (Conn. 2019).

[141] *Id.* at 439 (Mullins, J., concurring) ("As the majority opinion cogently sets forth, the *Batson* framework has proven to be wholly inadequate to address the discriminatory use of peremptory challenges."); People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996) (lamenting "pat race-neutral reasons for exercise of peremptory challenges" successfully rebut prima facie evidence of racial motives, and speculating whether "new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'").

from earlier, unsuccessful *Batson* challenges can still carry significant weight later as more evidence of racially motivated decisions by the same officials.

Moreover, this practice of finding probative value in evidence that failed to meet a standard of proof in an earlier litigation is hardly novel in criminal adjudication. Courts rely on evidence of failed claims on other issues, most notably (or notoriously) under federal sentencing law, which allows judges to increase a defendant's sentence for one crime based on evidence that he committed other crimes of which he was acquitted, or with which he was never charged.[142] If a defendant's sentence can be increased based on evidence for charges of which he was acquitted, surely new evidence supporting the validity of past *Batson* allegations of which prosecutors were "acquitted" remains relevant when investigating racial motivations in their subsequent litigation decisions.

3. Courthouse Records

Much more evidence exists that parties never presented to courts in support of peremptory strikes. Evidence of how prosecutors (and defense attorneys and civil litigants) used peremptory strikes in previous cases can be found in courthouse records. This information is precisely what *Swain* once expected defense attorneys to uncover—records of how prosecutors used peremptory strikes in previous cases regardless of whether those strikes had been challenged on equal protection grounds. This is the largest potential trove of evidence that could aid courts in the question of whether racial motivations infected peremptory strikes, criminal charge decisions, and other discretionary choices in criminal litigation. But for defendants raising *Batson*, *Armstrong*, or other equal protection claims—and for courts that would benefit from a richer evidentiary record—it remains a largely untapped resource because it is, for practical purposes, inaccessible. For ordinary litigants, this evidence is simply too time-consuming and expensive to discover and produce.

The same is true for academic researchers, but some nonetheless have the time and resources to overcome those hurdles. Laborious

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[142] *See* Witte v. United States, 515 U.S. 389, 401–06 (1995) (no double jeopardy violation for courts to consider defendant's uncharged criminal conduct when determining a sentence under federal sentencing guidelines); David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 272 (2005); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 531 (1993).

academic and journalistic investigations document just how rich this wealth of information can be. For example, in a recent study of 1,300 felony trials in North Carolina involving 30,000 prospective jurors, prosecutors removed Black jurors at more than twice the rate that they removed white jurors.[143] In some counties the disparity was greater.[144] Throughout the period covered by this study, criminal defendants in state courts appealed more than one hundred *Batson* claims.[145] But the North Carolina Supreme Court never reversed a single conviction on the basis of a prosecutor's *Batson* violation; the state's court of appeals did so only once, when the prosecution failed to offer *any* race-neutral reasons for some of its peremptory strikes.[146] In a different, broader study that examined 173 death penalty prosecutions from which researchers compiled a dataset of 7,400 potential jurors, the data revealed that prosecutors struck 56% of Black venire members but only 24.8% of all other venire members.[147] Individual defendants seeking such data would face the much smaller task of uncovering such information in courthouse files solely in the local jurisdiction of the prosecutor who filed their charges. But for most attorneys, this task is still prohibitively burdensome. This is an example of the still-significant problem of nonexistent or inaccessible data in this big data era.[148] Extremely probative data exists in publicly accessible records. But, even in an era when briefs and forms are routinely filed digitally with courts, *this* information still resides only in paper records. That

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143 Wright et al., *Jury Sunshine Project*, *supra* note 53, at 1409, 1426. For two labor-intensive journalistic investigations that compiled similar jury selection data from courthouse records, see APM, *supra* note 136 and Adelson, *supra* note 136.

144 Wright et al., *Jury Sunshine Project*, *supra* note 53, at 1428–29.

145 *See* Alyson Grine, *Reverse* Batson *Challenge Sustained*, N.C. CRIM. L.: A UNC SCH. OF GOV'T BLOG (Apr. 19, 2016, 12:35 PM), https://nccriminallaw.sog.unc.edu/reverse-batson-challenge-sustained/ [https://perma.cc/HG5S-M5FP].

146 *See* State v. Wright, 658 S.E.2d 60, 64 (N.C. Ct. App. 2008) (holding that prosecutor failed to offer race-neutral explanation for each peremptory challenge against prospective jurors in trial for assault and burglary, and ordering new trial).

147 Grosso & O'Brien, *supra* note 135, at 1543, 1548.

148 *See* Kreag, *supra* note 19, at 781–84 (criticizing the Supreme Court's focus on "small data" when assessing prosecutors' conduct and arguing "*Batson* represents an example of small data constitutional analysis, and this small data focus has impeded the reach of analytics in the criminal justice system."). Across criminal procedure contexts, most scholarly attention to the utility and implications of "big data" relate to the settings in which large datasets exist and are increasingly used, notably in policing, investigations, and predictive algorithms. *See, e.g.*, ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING (2017); Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System*, 15 OHIO STATE J. CRIM. L. 573 (2018).

means, as a practical matter, that it might as well not exist when courts adjudicate equal protection claims.

4. Broad Relevance of Prior-Case and Office-Based Evidence

Regardless of which form of *Batson* evidence claimants can produce, only those from the specific prosecution office are likely to be relevant. Evidence of the same prosecutor's racially motivated conduct is especially probative, but in many circumstances *Batson* evidence can have some probative value in shedding light on other prosecutors in the same office. Courts already acknowledge this point.[149] Evidence from prior cases sheds light on the professional culture and norms of a particular prosecution office, which in turn can be probative of the motivations of particular attorneys in that office.[150] From such evidence, judges might infer something about the tactics and values that colleagues share, reinforce, or condone within an office. Training materials are even more probative; they are *intended* to shape the conduct of the attorneys exposed to them, which is why courts have weighed such evidence in both *Batson* and *Armstrong* contexts. In *Miller-El*, key evidence included a longstanding training manual used in the Dallas district attorney's office, as well as testimony from former prosecutors in the office about jury selection norms and practices in the office.[151] And the *Armstrong* decision itself—in crafting its prohibitively difficult evidentiary threshold for discovery—insisted

149 One example is the inference drawn from prosecutor training materials in *Miller-El v. Dretke*, 545 U.S. 231, 264–66 (2005) and *Miller-El v. Cockrell*, 537 U.S. 322, 334–35 (2003).

150 Evidence of prosecutor's explicitly race-based office polices and training materials for jury selection appears in a disturbing number of *Batson* cases. *See* Abel, *supra* note 59, at 745–46; s*ee, e.g.*, CASSANDRA STUBBS, ACLU CAPITAL PUNISHMENT PROJECT, STRENGTHENING BATSON CHALLENGES WITH THE RJA-MSU STUDY FOR DURHAM-AREA PRACTITIONERS 7 (2016); Wilson v. Beard, 426 F.3d 653, 655 (3d Cir. 2005) (describing training videotape for Philadelphia D.A.'s office in which an assistant district attorney advocates race-based techniques for selecting jurors); Watkins v. Klopotoski, No. 08-5802, 2009 WL 6593918, at *4 n.4 (E.D. Pa. Dec. 11, 2009) (same); Cochran v. Herring, 43 F.3d 1404, 1412 (11th Cir. 1995) (citing informal policy by prosecutors of race-based peremptory strikes).

151 *Dretke*, 545 U.S. at 264–66 (describing training manual in Dallas County DA office and noting testimony of "former assistant district attorney . . . [who] testified that he believed the office had a systematic policy of excluding African-Americans from juries"); *see also Cockrell*, 537 U.S. at 334–35 (quoting passage from Dallas County DA manual as "Do not take Jews, Negroes, . . . or a member of any minority").

that defendants must marshal evidence of charging patterns by the prosecution office over a significant range of cases.[152]

Moreover, *prosecutors* acknowledge this point, at least in reference to offices outside their own. Consider the guidelines for charging business organizations in the *Justice Manual*, the handbook for federal prosecutors.[153] The manual recognizes that "corporate culture" matters—it may either "discourage[] or tacitly encourage[]" wrongdoing.[154] And whether a firm has a culture that fosters wrongdoing can be revealed by actions of people throughout the organization: "A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds. . . ."[155] And the existence of a "compliance program, even one that specifically prohibited the very conduct in question," doesn't necessarily prevent wrongdoing by corporate actors nor excuse the firm from responsibility for wrongdoing.[156]

How much weight this kind of evidence carries in determining an official's motivation in a specific case will vary with typical considerations: which officials were involved, the time from prior violations to the present case, and the nature and clarity of racial motivation evidence. But assessing the weight of evidence is a core judicial competency. Providing courts with access to all relevant evidence should only improve the accuracy of judicial judgments.

5. Evidence of Racial Bias in Other Litigation Conduct

The discussion has focused on *Batson* and *Armstrong* claims. But it should be clear that evidence of equivalent value can be found in the litigation of other due process and equal protection limitations on race-based litigation conduct. Prosecutors and other trial attorneys are prohibited from making remarks throughout the trial process—from voir dire and witness examinations through closing arguments—that

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152 *See* United States v. Armstrong, 517 U.S. 456, 465–68 (1996) (explaining an "absolute requirement that there be a showing of failure to prosecute similarly situated individuals" who were not prosecuted).

153 U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.000 (2020).

154 *Id.* § 9-28.500 cmt.

155 *Id.* § 9-28.600 cmt.

156 *Id.* § 9-28.800 cmt. ("While . . . no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.").

improperly refer to race in ways likely to appeal to juror prejudice or otherwise compromise a fair trial. Reported cases of such conduct are scarcer than are *Batson* decisions, but where they exist some appear especially probative of racial bias likely to carry over to a lawyer's other conduct.[157] And all three sources of evidence described above for *Batson* claims exist for this kind of misconduct as well. As in *Batson* cases, evidence presented for losing claims can still be probative, especially when courts expressly hold that racial remarks were improper but for various reasons do not merit reversal or mistrial.[158]

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[157] *See, e.g.*, People v. Robinson, 459 P.3d 605, 611 (Colo. App. 2017) (ordering new trial because jury could have been influenced by prosecutor's racially prejudiced comments during trial). Bennett v. Stirling, 171 F. Supp. 3d 851, 857, 862, 866 (D.S.C. 2016) (noting prosecutor referred to African American defendant as "King Kong," a "monster," a "caveman," and a "beast of burden," and elicited testimony referencing "[B]lack Indian[s]," which the court concluded "play[ed] upon a racist stereotype of the bestial Black savage that seems calculated to animate and excite the all-white . . . jury."); State v. Thompson, 163 So. 3d 139, 186–87 (La. Ct. App. 2015) (prosecutor's mischaracterization of defendant as alleging he was harried by "white people" improperly injected race into trial and justified mistrial); State v. Kirk, 339 P.3d 1213, 1216 (Idaho Ct. App. 2014) (prosecutor's closing argument reference to Confederate anthem "Dixie" and lyrics about "the land of cotton" violated due process and equal protection rights of Black defendant charged with sexual battery of a minor, rejecting prosecutor's claim that references merely urged jury to "look away"); State v. Monday, 257 P.3d 551, 557 (Wash. 2011) (reversing conviction because prosecutor's use of "po-leese" for "police" in witness examination, and references to alleged African American anti-snitching code, improperly injected race into trial); State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005) (murder conviction reversed because prosecutor's closing arguments improperly injecting race to the trial); People v. Deal, No. H023960, 2003 WL 22094433, at *2 (Cal. Ct. App. Sept. 3, 2003) (reversing for prosecutorial misconduct after prosecutor referenced defendant's race when questioning a witness and in closing argument); *cf.* State v. Farokhrany, 312 P.3d 584, 587 (Or. Ct. App. 2013) (Prosecutor's comments during voir dire for trial on drug charges about Sharia law as it related to rape in "Iran or Saudi Arabia" was misconduct). *See generally* McCleskey v. Kemp, 481 U.S. 279, 309, n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments."); Debra T. Landis, *Prosecutor's Appeal in Criminal Case to Racial, National, or Religious Prejudice as Ground for Mistrial, New Trial, Reversal, or Vacation of Sentence—Modern Cases*, 70 A.L.R.4th 664 (1989); Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 330–31, 338–44 (2006) (analyzing case law on racial references in trial and arguing courts are unclear or inconsistent in distinguishing permissible from prohibited references to race); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1751–59 (1993) (describing cases addressing various racial references during trials).

[158] *See, e.g.*, Calhoun v. United States, 568 U.S. 1206, 1206 (2013) (Sotomayor, J., statement respecting denial of certiorari) ("I write to dispel any doubt whether the Court's denial of certiorari should be understood to signal our tolerance of a federal prosecutor's racially charged remark [in cross-examination of defendant]. It should not."); Darden v. Wainwright, 477 U.S. 168, 178–83 (1986) (finding prosecutor's trial statements, such as referring to Black defendant as an "animal," to be improper but not prejudicial enough to merit reversal); Miles v. State, 799 So. 2d 367, 371 (Fla. Dist. Ct. App. 2001) (deciding that the prosecution's repeated references to defendant's race were improper, but did not

C. An Example: Hamilton County, Ohio

Not many defendants will find meaningful evidence of racially motivated peremptory strikes—or other racially biased conduct—by asking the prosecution office that they now suspect of racial bias. But such evidence exists in some localities, and it could provide significant support—especially at the initial stage of *Armstrong* claim when confidentiality shields much of the relevant materials that courts need. Consider one example, which is based solely on easily accessible appellate reports—not trial court orders nor jury selection data laboriously dug out of courthouse records: the prosecuting attorney's office for Hamilton County, Ohio, has twice been ordered by courts to produce discovery on the basis of defendants' initial evidence of racial bias in prosecutors' decisions to seek the death penalty.[159] Neither claim ultimately succeeded, but both claims lacked evidence of prior race-based uses of peremptory strikes by lawyers in that office. In the years preceding those discovery orders, Ohio appellate courts twice found *violations* of *Batson* by Hamilton County prosecutors,[160] and in two additional cases, courts held that defendants presented prima facie evidence of *Batson* violations.[161] Defendants compiled a more detailed prima facie case for bias than many do; they pointed to evidence of racially biased patterns of peremptory strikes by Hamilton County prosecutors in at least thirty cases during the same era. Still, as in most cases under *Batson*'s lax standard, courts ultimately accepted

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diminish fairness of trial, so as to require a mistrial, where trial court observed that none of the jurors seemed affected by the comments and defendant declined opportunity to voir dire jurors).

159 *See* Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597, at *8 (S.D. Ohio Sept. 27, 2007) (granting discovery); Smith v. Mitchell, 348 F.3d 177, 211 (6th Cir. 2003) (noting district court granted discovery on petitioner's claim of racially discriminatory intent in charging decision). Both *Hill* and *Smith* arose from federal habeas petitions challenging defendants' state court convictions, so the discovery standard was defined by federal rules applicable to habeas claims rather than the *Armstrong* standard.

160 *See* State v. Richardson, No. C-030453, 2005 WL 323684, at *4 (Ohio Ct. App. Feb. 11, 2005) (finding prosecution's reasons for striking a Black venire member was not race-neutral); State v. Walker, No. C-010400, 2002 WL 834179, at *3 (Ohio Ct. App. May 3, 2002) (reaffirming earlier holding in State v. Walker, 742 N.E.2d 1173, 1176 (Ohio Ct. App. 2000), that prosecutor committed a *Batson* violation and clarifying that trial court must proceed with new trial).

161 State v. Kiner, 778 N.E.2d 144, 148 (Ohio Ct. App. 2002) (finding defendant presented prima facie evidence of *Batson* violation and remanding for prosecution rebuttal); State v. Dockery, No. C-000316, 2002 WL 63437, at *4 (Ohio Ct. App. Jan. 18, 2002) (same). On remand, trial court in *Dockery* found the race-neutral explanations sufficient, which the Ohio appellate court later affirmed. *See* State v. Dockery, No. C-000316, 2002 WL 944917, at *3 (Ohio Ct. App. May 10, 2002).

prosecutors' ostensibly race-neutral justifications (such as striking a Black venire member due to his "street justice mentality").[162] But the cumulative effect of this evidence is more suggestive than any one instance may be in isolation, especially given the continuity in the office's leadership, and likely its training and professional culture. The same elected chief prosecutor has run the office for twenty-four of the last twenty-eight years (and began in the office a decade earlier).[163]

Hamilton County is neither representative nor unique. Scholars, journalists, and advocates have identified other local jurisdictions, such as Caddo Parish, Louisiana,[164] where evidence of repeated race-based decision-making is strong. An award-winning journalists' investigation painstakingly compiled evidence of a decades-long pattern of racially disparate peremptory strikes by the district attorney's office in

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[162] *See, e.g.*, State v. Stonestreet, No. C-040264, 2005 WL 2045451, at *2 (Ohio Ct. App. Aug. 26, 2005) (explaining that the prosecution struck five Black venirepersons; prospective Black juror's "street justice mentality" accepted as race-neutral reason); State v. Lowery, 826 N.E.2d 340, 348–49 (Ohio Ct. App. 2005) (explaining that the prosecution used all three peremptory strikes to strike Black venire members); Franklin v. Anderson, 267 F. Supp. 2d 768, 784–86 (S.D. Ohio 2003) (explaining that the prosecutor struck two Black venirepersons); State v. Washington, No. C-040518, 2005 WL 927011, at *1 (Ohio Ct. App. Apr. 22, 2005) (explaining that the prosecution struck three Black venire persons); State v. Gowdy, 727 N.E.2d 579, 586–87 (Ohio 2000) (explaining that the prosecutor struck Black venireperson because he wore a cross). Additionally, three cases subsequent to the *Hill* and *Smith* death-penalty challenges, noted *supra*, are State v. Johnson, 45 N.E.3d 208, 216–18 (Ohio 2015) (explaining that the prosecutor struck two Black women for their views on the death penalty even though they both said they would enforce it); State v. Pickens, 25 N.E.3d 1023, 1039–44 (Ohio 2014) (explaining that the prosecutor struck three Black venirepersons); and Rosemond v. Warden, Ohio Reformatory for Women, No. 1:10-cv-254, 2011 WL 5520939, at *1, *3 (S.D. Ohio Nov. 14, 2011) (explaining that the prosecution struck three Black venire persons).

[163] *See Biography of Joseph T. Deters*, HAMILTON CNTY. PROSECUTING ATT'Y'S OFF., https://hcpros.org/about-the-prosecuting-attorneys-office/biography-of-joseph-t-deters/ [https://perma.cc/WDJ8-4JK8] (stating Deters served as an assistant prosecutor 1982 to 1986, then as head prosecuting attorney from 1992 to 1998 and again from 2004 to present).

[164] *See* URSULA NOYE, REPRIEVE AUSTRALIA, BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE 7–10 (2015) (in study of Caddo Parish prosecutors' peremptory strikes in 332 criminal trials from 2003–2012, finding prosecutors struck prospective Black jurors three times as often as whites—46% of Blacks versus 15% of whites); *id.* at 7 (noting 83% of defendants were Black and parish adult population was 44% Black); State v. Coleman, 970 So. 2d 511, 516 (La. 2007) (holding that "the prosecutor clearly and unmistakably indicated that the decision to strike [Black venire member] was motivated by this prospective juror's race"); FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 21–22 (2016) (noting Caddo Parish prosecutor's unusually high number of death penalty prosecutions in 2011–2015). The "Jury Sunshine Project" study of North Carolina prosecutors also has county-level peremptory strike data, although in most cases only for one or two years. *See* Wright et al., *Jury Sunshine Project*, *supra* note 53, at 1421.

Mississippi's Fifth Judicial District.[165] There will surely be wide variation among all localities with regard to evidence in the form of reported cases or courthouse records, and in the continuity among office staffing and leadership that affects the relevancy of such evidence. But the example illustrates how probative evidence, although it may exist, can be unavailable to courts adjudicating *Armstrong* or other difficult equal protection claims, both (1) because litigants have overlooked the relevance that evidence from one litigation stage has for allegations of racial motivations in another, and (2) because of the practical inaccessibility of non-digital evidentiary sources beyond reported court judgments. The first cause is more easily addressed than the latter.

D. Incentive Effects of Better Racial Bias Evidence

Upon making prosecution discovery in this domain routine, a widespread institutionalizing of the practice of considering evidence of racial bias across equal protection claims—using *Batson* violation evidence to support *Armstrong* claims—should have broad, positive incentive effects. Prosecutors would become aware that, case by case, every instance of conduct that constitutes prima facie evidence of race-based decision-making incrementally strengthens the prospect that courts will infer illicit racial bias behind future litigation conduct at any stage—charging, jury selection, plea bargaining, or statements in trial.

Prior *Batson* evidence helps defendants to meet *Armstrong*'s "some evidence" standard for prosecution disclosure. But even if this additional resource is insufficient to overcome that restrictive standard for discovery *before* trial, the evidence remains part of the claimant's evidence on appeal, where the evidentiary record should be more expansive if litigants press for, and courts order, post-conviction disclosure from prosecutors.[166]

For all but extreme cases of blatant or repeat offenders, this effect likely will be modest—but those offenders are where we most need better equal protection enforcement. And the additional evidence will matter only for prosecutorial decisions that give rise to some suspicion of improper motivation even without this prior-case information—perhaps decisions like that in *Armstrong*: charges against Black

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165 *See* APM, *supra* note 136.

166 It is possible also that a defendant would have more *Batson* evidence at the appellate stage than he did before trial, if the prosecution committed *Batson* violations in his case or in others that occurred since his pretrial *Armstrong* claim was decided.

defendants for offenses such as drug crimes for which there plausibly is also a pool of more leniently charged white offenders, or decisions like a series of peremptory challenges against Black venire members. Currently prosecutors can be confident that the odds of a *Batson* allegation succeeding in that scenario are negligible and the odds of an *Armstrong* allegation succeeding are nonexistent. Broader use of prior-claim evidence should change that, at least marginally, for prosecutors with the worst track records.

Note the desirable deterrent effects. Prosecutors (and offices) whose records include notable evidence *Batson* violations (including only prima facie evidence from prior cases) or racially tinged statements in trial are put on notice. They should recognize that this past-act evidence triggers greater scrutiny of purported race-neutral reasons for subsequent decisions. That recognition, we can hope, will prompt lawyers to take a second look at their decisions—in the context of comparable cases—to ensure they have, and can articulate, race-neutral reasons for those decisions. Those self-evaluations—or better yet, oversight by supervisors—are low-cost endeavors, and they prevent judicial scrutiny. The motivation for them, and the rigor with which they are conducted, should increase in inverse relation to the negative evidentiary track record of a particular prosecutor or office. Ideally, that awareness prompts the avoidance of some race-based prosecution decisions and the adjustment of some decisions that would have contributed to racial disparities in criminal justice administration. And there is little downside to putting prosecutors on notice, encouraging more caution on this front. Given the tradition of judicial deference in this realm, the odds seem vanishingly small that courts will make false-positive judgments about those decisions by too readily inferring racial motivations where none exist, and thereby tempt prosecutors to "overcorrect" through the unduly lenient charging of Black suspects.

CONCLUSION: ADDRESSING THE SCARCE-DATA PROBLEM

Putting aside the criticism that equal protection doctrine is too constrained to effectively address racial disparities from state actors' criminal justice decision-making, the failure of *Batson* and *Armstrong* doctrine is in large part an information problem: courts lack access to the evidence they need to infer, accurately, whether particular prosecutor decisions were motivated by race. Courts lack it because litigants cannot access it: much information exists, somewhere and in some form, but it remains effectively out of reach. In this era of big data, this is an example of the "scarce-data" or inaccessible-data

problem that still characterizes many domains. Case filings, case dispositions, judicial opinions, and some litigant briefs are digitized and accessible. That is much less true for voir dire and trial transcripts, and for many interlocutory state trial court orders, such as initial dispositions on *Batson* and *Armstrong* motions. It is rarely true for the best evidence on which courts could detect race-based decision-making in peremptory challenges or prosecutorial charging, plea bargaining, and sentencing discretion. No jurisdiction has digital records of lawyers' peremptory strikes in jury selection, much less with the context of jurors' demographic information. The same is true for prosecutors' non-charging decisions, which provide critical context for assessing bias in charging decisions, and for improper statements by prosecutors during trial. Bruce Green has recognized this problem, noting that judges sometimes "rebuke" lawyers for improper arguments or questions, sometimes as a remedy short of mistrial. But even rebukes on a trial record are effectively lost; bar discipline boards have no database of rebukes with which to identify repeat offenders. Green proposes creation of "rebuke banks"—databases documenting such incidents.[167]

"Scarce data" in these contexts operates as a kind of privacy protection. Some information is purposely shielded by confidentiality, like declination decisions. But much occurs, momentarily, in public, such as peremptory challenges. It is the inaccessibility of any record of those actions that provides them with a functional cloak of privacy. Attorneys can be confident that decisions in past cases are exceedingly unlikely to reappear as context for subsequent actions. The effect of this privacy-by-data-inaccessibility (or data-scarcity) is the opposite of transparency's effect. It makes improper actions easier to do and harder to detect. It reduces incentives for lawyers to err on the side of race neutrality and to self-monitor their actions in the context of their own track records. It reduces incentives for office policies in which supervisors scrutinize staff attorneys' decisions for racial bias, and the ease by which they could do so.

A technological solution is easy to envision. It requires no technical innovation to create digital records about citizens who appear for jury selection processes, and to digitally record attorneys' uses of peremptory strikes. It would take only a slight additional effort to

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[167] Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797, 814–18 (2019) (proposing creation of a digital "rebuke bank" that documents judicial reprimands of prosecutors for improper courtroom conduct, which now is left unrecorded, as a means to improve discipline of lawyers for repeated misconduct).

institute digital records of the declination as well as charging decisions by a prosecution office, concealing sensitive personal information but preserving suspect demographic and alleged-offense information. All this information exists now—at least on paper. Some of it is digitized in a law office's case management software. But courts and prosecution offices are largely underfunded for technology, and creating easy digital access to this kind of information rarely appears in the many organizational efforts working on improving criminal justice data and courthouse technology.[168]

Until that changes, the best strategy is for third parties—academic researchers, policy reform groups, and advocacy organizations—to compile data in forms intended for use by litigants rather than public education, policy analysis, or systemic insights. Many organizations generate and analyze data on these issues.[169] But few, if any, consistently orient this work toward the aim of providing it to the criminal defense bar.[170] Such a project would gather data and provide analysis in forms accessible to practicing attorneys, which they could

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168 Two of the leading institutions doing valuable work on this front are the National Center for State Courts, see NCSC, https://www.ncsc.org/ [https://perma.cc/8TN9-B273], and Measures for Justice ("MFJ"), see MEASURES FOR JUSTICE, https://measuresforjustice.org/ [https://perma.cc/PT7Q-G376]. NCSC hosts the Court Statistics Project, which focuses on state caseload measures but is expanding efforts to include at least racial data about parties. *See* Kathryn Genthon & Diane Robinson, *Collecting Race and Ethnic Data*, CSP (Oct. 18, 2021), https://www.courtstatistics.org/__data/assets/pdf_file/0036/69678/Race_Ethnicity_Data_Collection_3.pdf [https://perma.cc/9ZJL-V6G7]. And NCSC pays attention to racial justice issues. *See National Roundtable on Racial Justice*, NCSC, https://www.ncsc.org/conferences-and-events/events-calendar/2021/feb/national-roundtable-on-racial-justice [https://perma.cc/N6GD-8NG8]. MFJ works to make state and county-level data accessible on dozens of "measures" of criminal justice institutions' performance, such as pretrial conditions of release, misdemeanors filed, time to disposition, trials, and guilty pleas. *See Data Portal*, *Measures*, MEASURES FOR JUSTICE, https://measuresforjustice.org/portal/measures [https://perma.cc/F6HY-LCAN]. Some of MFJ's measures, such as data on decisions not to charge, could be useful for *Armstrong* inquiries if integrated with data on race. But neither organization describes plans to collect the kind of data on peremptory strikes and jurors' race essential to *Batson* inquiries.

169 *See, e.g.*, Wright et al., *Jury Sunshine Project*, *supra* note 53; Noye, *supra* note 164; PUBLIC SAFETY LAB, https://publicsafetylab.org/ [https://perma.cc/UL8S-2EGW] (research and policy analysis on, inter alia, prosecutorial misconduct); ACLU MASS: WHAT A DIFFERENCE A D.A. MAKES [hereinafter ACLU MASS], http://dadifference.org/ [https://perma.cc/7WQM-MWZY] ("public education campaign" about elected prosecutors in Massachusetts); PROSECUTORIAL ACCOUNTABILITY PROJECT, https://www.prosecutorialaccountability.com/ [https://perma.cc/B3CZ-5JAE] (collecting news reports, court decisions and research on prosecutor misconduct); *see also* MEMPHIS TRUTH COMMISSION, https://memphistruth.org/prosecutor/ [https://perma.cc/E8J6-75L4] (publicizing local prosecutor misconduct).

170 For one example of such an effort—although it appears not to be an *ongoing* data-gathering project for litigators—see Stubbs, *supra* note 148.

readily draw upon when they encounter potential *Batson* or *Armstrong* violations.[171] The difference in orientation is substantial. Scholarly inquiries designed to generate important insights—such as racial disparities linked to prosecutorial decision-making[172]—can aid litigants, especially when the work depends on laborious collection of inaccessible data. The same goes for valuable studies by investigative media and advocacy groups that are primarily intended to educate the public and policymakers about problematic practices in criminal justice.[173] That reorientation would be no easy undertaking. Litigants need current, updated data that is specific to their local jurisdictions and prosecution offices, in forms they can readily present to courts, within litigants' tight time frames. Most advocacy groups and academics don't have the capacity (nor the professional incentives) to be ongoing data-gathering services remotely comparable to, say, the Bureau of Justice Statistics (much less to commercial players like jury consultant firms that leverage proprietary databases). Nonprofit institutions that *are* designed as ongoing data projects, such as the National Center for State Courts, are limited to the data that state and local governments provide. The same goes for new commercially available data science products marketed to practicing lawyers. They provide information and insights on many topics that were not available until recently,[174] but data

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171 To be sure, there are first-rate examples of academic researchers who carried out high-quality empirical studies in close coordination with litigants challenging racial bias in criminal justice administration. But these efforts tend to be major studies in support of litigation seeking large-scale systemic reforms, rather than supporting ordinary litigants in ordinary claims. A now-legendary example is the Baldus study that was central to petitioner's equal protection challenge to Georgia's administration of capital punishment rejected by the Supreme Court in *McClesky v. Kemp*, 481 U.S. 279 (1987). *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 572–74 (S.D.N.Y. 2013) (describing the empirical evidence supporting plaintiffs' claims).

172 *See, e.g.*, Starr & Rehavi, *supra* note 44, at 28–31.

173 *See, e.g.*, APM, *supra* note 136; ACLU MASS., *supra* note 169; EQUAL JUST. INITIATIVE, *supra* note 134.

174 *See, e.g.*, the legal analytics and data services products now offered by LexisNexis. "Lex Machina" is marketed "to law firms and companies, enabling them to craft successful strategies [and] win cases." *See What We Do*, LEX MACHINA, https://lexmachina.com/about/ [https://perma.cc/FMP3-2XPG]. And "Context" provides data analysis on judges and expert witnesses. *Context*, LEXISNEXIS, https://www.lexisnexis.com/en-us/products/context.page#:~:text=Context%20Company%20Analytics%20use%20advanced,topic%20and%20the%20related%20lawsuits [https://perma.cc/M8Y7-EN9R]. WestLaw's "Litigation Analytics" service provides similar data and analysis. *See Litigation Analysis*, WESTLAW EDGE, https://legal.thomsonreuters.com/en/products/westlaw-edge/litigation-analytics [https://perma.cc/94V9-CTBC].

limitations mean they are still largely irrelevant for auditing prosecutorial compliance with *Batson* and *Armstrong*.

The strategies and reforms described here accept the confines of established equal protection doctrine as well as judicial practices for government discovery. The premise should be uncontroversial: equal protection enforcement is hindered by huge information deficits. Better access to evidence would improve *Batson* and *Armstrong* adjudication by improving judicial fact-finding. Much like evidentiary privileges, which exclude relevant evidence in service of policy goals at some cost to adjudicative accuracy, some information barriers are justified, or so a firm consensus takes them to be.[175] But courts lack much useful information for more prosaic reasons, including antiquated technology and failures of imagination. Surmounting those hurdles is not quite low-hanging fruit, but with some effort it is within reach.

[175] *See* United States v. Ruiz, 536 U.S. 622, 631–32 (2002); United States v. Armstrong, 517 U.S. 456, 465 (1996).