COMMENT

BEYOND STRICKLAND PREJUDICE: WEAVER, BATSON, AND PROCEDURAL DEFAULT

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A Batson violation—racially discriminatory jury selection—is a structural error, “not amenable” to harmless error review on direct appeal. By definition, structural errors evade traditional prejudice analysis. But, when a petitioner argues on collateral review that their trial counsel provided ineffective assistance by failing to object to a Batson violation, a number of circuits require a showing of Strickland prejudice. As some of these courts recognize, they demand the impossible.

In 2017, the Supreme Court in Weaver v. Massachusetts suggested that structural errors that “always result in fundamental unfairness” should not undergo a prejudice analysis. Instead, courts should presume that these errors cause prejudice. Though often misread, Weaver marked an important shift in Strickland doctrine. I argue that, since Batson violations always result in fundamental unfairness, they merit a presumption of Strickland prejudice.

But many ineffective assistance of counsel claims arise on federal habeas corpus review, and the Weaver Court had no occasion to apply its ruling to the habeas context. Habeas doctrine features its own prejudice standard: if a claim has procedurally defaulted in state court, a habeas court will refuse to hear it unless the petitioner demonstrates “cause” for the failure to raise the claim in state court, and “prejudice” suffered from the violation of the federal right. If it continues to demand a showing of prejudice, procedural default threatens to preclude federal review of the newly viable but procedurally defaulted Batson-IAC claims for which Weaver clears the way.

I investigate Weaver’s impact on one pathway around procedural default: the one carved by Martinez v. Ryan. Martinez held that ineffective assistance of initial-review postconviction counsel should provide “cause” for the failure to raise a substantial ineffective-assistance-of-trial-counsel (IATC) claim in state court. Martinez elevated procedural fairness over formal roadblocks; it insisted that a substantial IATC claim must receive at least one airing, in one court. A stubborn insistence that a Batson-IAC victim show prejudice would construct another formal roadblock at the expense of procedural fairness. Where a habeas petitioner successfully invokes Martinez to provide cause, I argue, the habeas court should presume prejudice.

The habeas court should thus reach the claim’s merits: did racial discrimination infect jury selection?

INTRODUCTION

An attractive but untrue mantra holds that every right has a remedy.1 In fact, the “harmless error” doctrine permits a criminal conviction to survive

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appeal if the prosecution proves beyond a reasonable doubt that a guilty verdict was unattributable to the error.2

But some types of error evade harmless error analysis because their harm is too abstract or opaque to calculate.3 These are “structural errors,” and their victims need not demonstrate their harm in order to obtain relief: an appellate court will automatically vacate a conviction rather than demand that definitionally impossible showing.4 Racial discrimination in jury selection—known as Batson error—is universally treated as one such error.5

Some courts are less understanding when the Batson error arises in the context of an ineffective assistance of counsel (IAC) claim—channeled through an argument that trial counsel provided ineffective assistance by failing to object to racially discriminatory jury selection—instead of on direct appeal. Strickland v. Washington governs IAC claims and requires the defendant to show that trial counsel performed “deficiently” and that the deficient performance “prejudiced” the trial’s outcome.6 Like in the harmless error context, the prejudice showing is impossible. Accordingly, some circuits waive the requirement and presume prejudice resulting from a structural error like Batson.7 Others, despite recognizing the impossibility of the task, do not.8

Given the difficulty of satisfying Batson, a defendant will already struggle to show deficient performance resulting from the failure to raise a Batson objection.9 But the circuits that demand an additional prejudice showing insulate Batson-IAC claims from review entirely, in part because of the opacity of jury deliberations and in part because of the “Batson paradox”: the Court’s

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2 Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); see also Daniel Epps, Harmless Errors and Substantial Rights, 131 HARV. L. REV. 2117, 2125 (2018) (“The relevant question is not, and can’t be, whether, if the error had not occurred, some other jury in an alternate universe might have still reached the same verdict. It is instead . . . whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” (internal quotation marks omitted)).

3 See John H. Blume & Stephen P. Garvey, Harmless Error in Federal Habeas Corpus after Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163, 185 (1993) (explaining the difference between trial errors, which are definite and subject to harmless error analysis, and structural errors, which are neither).

4 See, e.g., id. at 186-87 (“[R]ights [violated by structural errors] can only be protected and enforced by shielding them with a rule of automatic reversal.”).

5 See infra note 37.


7 See infra note 52 and accompanying text.

8 See infra notes 50–51 and accompanying text.

9 See, e.g., Kenneth J. Melilli, Batson in Practice: What We Have Learned About Batson and Peremptory Challenges, 71 NOTRE DAME L. REV. 447, 459, 593 (1996) (describing the success rate of Batson claims as “manifestly unimpressive” and concluding that Batson is “almost surely a failure” at preventing discriminatory peremptory challenges); People v. Randall, 671 N.E.2d 60, 65-66 (Ill. App. Ct. 1996) (calling the Batson process a “charade” and listing facially race-neutral reasons for striking jurors that can hardly “be given without a smile”).
refusal to acknowledge the impact of race on jury verdicts means that, as a formal matter, racially discriminatory jury selection error can never cause prejudice.\textsuperscript{10}

In 2017, a Supreme Court case called \textit{Weaver v. Massachusetts} considered whether courts should presume prejudice arising from a different structural error: courtroom closure during jury selection.\textsuperscript{11} In concluding that they should not, the Court broadened the \textit{Strickland} prejudice inquiry beyond its traditional bounds. The usual \textit{Strickland} analysis asks merely whether competent attorney performance, absent the errors, would have led to a “reasonable probability” of a different result.\textsuperscript{12} But in \textit{Weaver}, the Court indicated that structural errors that “always result[] in fundamental unfairness” merit a presumption of \textit{Strickland} prejudice, regardless of their impact on the trial’s outcome.\textsuperscript{13} I argue that \textit{Batson} violations belong in this category: racially discriminatory jury selection always results in fundamental unfairness.\textsuperscript{14}

If the \textit{Batson} victim seeks to vindicate his rights on federal habeas corpus review, rather than state postconviction review, a second, distinct prejudice requirement awaits. Under the “procedural default” doctrine, a federal court will refuse to consider a claim that state courts ignored for procedural reasons unless the habeas petitioner demonstrates “cause” for the failure to raise it timely in state court and “prejudice” resulting from the alleged violation of a federal right.\textsuperscript{15} Though this prejudice requirement is often thought identical to \textit{Strickland}’s, the two requirements have different origins, and therefore an argument for a presumption of prejudice in one context may not persuade—depending on the circuit in which one lives\textsuperscript{16}—in the other. Whereas \textit{Strickland} interprets constitutional mandates, procedural default doctrine simply reflects the Court’s attempt to balance competing equitable interests: a petitioner’s interest in a federal forum to vindicate federal rights against states’ interests in finality, federalism, and comity.\textsuperscript{17} That is, the procedural default question is not whether a federal court sitting in habeas may hear a claim that the state court refused to hear, but whether it should.\textsuperscript{18}

In this situation, it should. Equitable principles—and a proceduralist vision of habeas corpus—in mind, I argue that my interpretation of \textit{Weaver} opens a door to habeas review of \textit{Batson-IAC} claims that procedural default’s

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\textsuperscript{10} See \textit{infra} notes 120–123 and accompanying text.

\textsuperscript{11} \textit{Weaver v. Massachusetts}, 137 S. Ct. 1899, 1907 (2017).


\textsuperscript{13} \textit{Weaver}, 137 S. Ct. at 1908; cf. Eve Brensike Primus, \textit{Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness}, 72 STAN. L. REV. 1581, 1649 (2020) (describing the \textit{Weaver} Court’s attention to fairness, rather than only outcome, as “potentially revolutionary”).

\textsuperscript{14} See \textit{infra} Section II.B.


\textsuperscript{16} See \textit{infra} notes 190–193, 202.

\textsuperscript{17} See \textit{infra} notes 178–182 and accompanying text.

\textsuperscript{18} Id.
prejudice requirement might otherwise close. The door is cracked open by *Martinez v. Ryan*, an equitable decision intended to sidestep procedural default where unfairness, in the form of refusal to consider a substantial IAC claim, would otherwise result.¹⁹ Where a petitioner invokes *Martinez* for “cause” to excuse the default of a substantial IAC claim—that is, where he demonstrates that his state initial-proceeding postconviction counsel was ineffective for failing to raise the *Batson*-IAC claim—the habeas court should presume prejudice.²⁰ It should not demand the impossible.²¹

Part I outlines the problem and the *Weaver* solution in brief. Part II mounts the argument that *Weaver* instructs courts to presume prejudice for *Batson*-IAC claims. Part III advocates extending that presumption to procedural default on habeas, in the circuits in which it is necessary, and addresses objections. A conclusion follows.

I. THE PROBLEM, AND A SOLUTION, SKETCHED

Not all rights receive a remedy.²² In fact, in criminal cases, even constitutional violations—which once required reversal of any conviction they tainted²³—might be left undisturbed on appeal if deemed “harmless.” The harmless error doctrine²⁴ permits a criminal conviction to stand if the government proves beyond a reasonable doubt that the guilty verdict was unattributable to the error.²⁵ Though harmless error doctrine inspires much debate, the central idea is straightforward: not all errors, even constitutional ones, demand an appellate remedy.²⁶

The doctrine exempts some types of error, however, from harmless error analysis. These errors, called “structural,” require appellate reversal without a harmlessness determination.²⁷ Structural errors differ from “trial” errors because their harm evades calculation. A trial error, like mistakenly admitted evidence,

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²⁰ See id. at 14 (creating an exception to the procedural default bar where ineffective assistance of postconviction counsel defaulted a substantial trial IAC claim, and where the state requires trial IAC claims to be brought on collateral review); *infra* Section III.B.
²¹ See *infra* Section III.B.
²² See Jeffries, Jr., supra note 1, at 87.
²³ Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast that Swallowed the Constitution*, 25 T. MARSHALL L. REV. 45, 49 (1999) (“For many years, a fairly clear distinction was made between constitutional errors and nonconstitutional or statutory errors, with constitutional errors considered presumptively prejudicial simply because of the nature of the right of which the party was deprived.”).
²⁴ The canonical constitutional harmless error case is *Chapman v. California*, 386 U.S. 18, 22 (1967).
²⁵ Sullivan v. Louisiana, 508 U.S. 275, 279 (1993); see also Epps, supra note 2, at 2125.
²⁶ Indeed, most do not receive one. See Epps, supra note 2, at 2120 n.2 (listing sources indicating that the vast majority of errors are found to be harmless).
²⁷ See *Arizona v. Fulminante*, 499 U.S. 779, 310 (1991) (articulating how structural defects that affect the framework of the trial, instead of errors in the trial itself, are not subject to harmless error analysis).
causes practical damage that is, by hypothesis, easy enough to calculate; it has “a
definite, discrete and identifiable effect on the quantum of evidence presented
to the trier of fact.”[28] By contrast, a structural error infects the trial from start to
finish, rendering it illegitimate in full rather than in part.[29] A structural error—
like a biased judge,[30] or a misleading reasonable doubt instruction[31]—
dermines the entire proceeding in a way that “def[ies] analysis by harmless-
error standards.”[32] If demanded, a specific showing of harm would be practically
impossible; indeed, courts and scholars often define the category by the futility
of demonstrating prejudice.[33] And although some structural errors undermine a
feature that is generally thought irrelevant. Instead, as John Blume and Stephen Garvey put it, the “nature of a structural error is to
undermine a reviewing court’s ability to evaluate with any precision the impact
of the error on the verdict.”[34] Or, per Pamela Karlan: structural errors “so taint
the framework within which a trial proceeds, that, in an important sense, there
has been no trial.”[35] Because structural errors evade harmless error analysis, they
require automatic reversal.[36]

Though the Supreme Court has never officially held racial discrimination
in jury selection to be a structural error, it has always treated it as one, and
nearly every federal court to address the question has agreed.[37] Where racial

[28] Blume & Garvey, supra note 3, at 185.
[29] See, e.g., Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (“[T]he defining feature of a
structural error is that it ‘affect[s] the framework within which the trial proceeds,’ rather than being
‘simpl[y] an error in the trial process itself.’” (quoting Fulminante, 499 U.S. at 310)).
[32] Fulminante, 499 U.S. at 399 (internal quotation marks omitted).
[33] See, e.g., United States v. Gonzalez-Huerta, 403 F.3d 727, 734 (10th Cir. 2005) (“[I]f, as a
categorical matter, a court is capable of finding that the error caused prejudice upon reviewing the
record, then that class of errors is not structural.”).
[34] Blume & Garvey, supra note 3, at 185.
[36] See, e.g., id. at 186-87 (“These rights can only be protected and enforced by shielding them
with a rule of automatic reversal.”).
[37] See Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017) (“This Court . . . has granted
automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the
selection of the petit jury, though the Court has yet to label those errors structural in express terms.”
reversal precedent[.]”); Crump v. Chappell, 804 F.3d 998, 1003 (9th Cir. 2015) (“It is well
established that a Batson violation is structural error.”); see also Eric L. Muller, Solving the
Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 Yale L.J. 93, 95
(1996) (“In keeping with its view that Batson error is serious business, the Supreme Court has
assumed, but never formally ruled, that the appropriate appellate remedy is automatic reversal of the
conviction.”); Jonathan Abel, Batson's Appellate Appeal and Trial Tribulations, 118 Colum. L.
Rev. 713, 724 n.56 (2018) (citing cases to that effect). This conclusion, which should be
controversial, is bolstered by the Supreme Court’s holding that racial discrimination in grand jury
selection is a structural error. See Vasquez v. Hillery, 474 U.S. 254, 264 (1986). The Vasquez Court
discrimination infects the jury selection process, a conviction cannot survive appeal no matter the weight of the prosecution’s case. In other words, a Batson violation is “structural error” that necessitates reversal on direct review.38 An appellate court that finds a Batson violation will not conduct a futile harmless error analysis to determine whether the violation affected the trial outcome. To do so would, as Jonathan Abel has put it, “mire” the court in the “impossible question” of whether “the presence or absence of any particular juror affected the outcome.”39 Instead, the court vacates the conviction and grants a new trial.40

A problem arises, however, where trial counsel failed to object to the discriminatory jury selection. The “structural error” categorization dictates reversal only where trial counsel objected, preserving the issue for appeal.41 But if trial counsel remained silent, a state’s contemporaneous objection rule generally precludes an appellate court from entertaining the Batson claim on direct appeal.42 By failing to raise the issue at trial, the defendant waived it altogether.43

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38 “Batson error” or “Batson violation” is generally used as shorthand for racial discrimination in jury selection, and I use it in this way throughout this Comment. See Batson, 476 U.S. at 86 (holding that racial discrimination in jury selection violates the Fourteenth Amendment’s Equal Protection Clause).

39 Abel, supra note 37, at 765.

40 See Weaver, 137 S. Ct. at 1903 (“[W]hen a structural error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm.”).

41 Id.

42 See Justin F. Marceau, Embracing a New Era of Ineffective Assistance of Counsel, 14 U. Pa. J. CONST. L. 1161, 1194 (2012) (“If . . . a defendant fails to raise a Batson violation prior to the empanelment of the jury, the claim is almost universally deemed to have been forfeited or waived.”).

The *Batson* victim can revive the claim and vindicate his right to trial by a properly selected jury by arguing on collateral (or “postconviction”) review that his trial attorney provided ineffective assistance of counsel. By failing to object when the prosecutor struck jurors on the basis of race, the defendant contends, the trial attorney fell short of the Sixth Amendment’s guarantee of effective assistance of counsel.44

*Strickland v. Washington* governs a claim that trial counsel provided constitutionally ineffective assistance.45 *Strickland* demands two showings: first, that counsel’s representation fell below an objective standard of reasonableness (the “deficient performance” prong) and, second, a “reasonable probability” that the deficiency altered the trial’s outcome (the “prejudice” prong).46 Though the two standards differ,47 *Strickland’s* prejudice prong exists for similar reasons as harmless error review, and some commentators describe it as an “internal” harmless error test.48 Just as some constitutional errors are harmless, the argument goes, so are some deficiencies in representation. An attorney has not rendered constitutionally ineffective assistance, then, unless the deficiency “prejudiced” the defendant.49

Despite the recognition that harmless error doctrine exempts a *Batson* violation as structural, some federal circuits do not extend that solicitude to

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44 Defense attorneys can themselves exercise peremptory strikes in violation of the Equal Protection Clause, as *Batson* does not apply to prosecutors alone. See Georgia v. McCollum, 505 U.S. 42, 59 (1992) (extending *Batson* to peremptory challenges by defense counsel). And *Batson* has a gender-based parallel. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-31 (1994) (holding that gender discrimination in jury selection is unconstitutional). Though an examination of prejudice in these contexts would raise similar (but not identical) issues and is a worthy project, here I address the paradigmatic *Batson* scenario in which the prosecutor strikes venire people on the basis of race.


46 Id. at 687.

47 In particular, the burden shifts. To establish an error as “harmless” on direct appeal, the government must show that it was “harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24 (1967). By contrast, a *Strickland* petitioner must “affirmatively” show a “reasonable probability” that, but for the error, the trial would have reached a different result. *Strickland*, 466 U.S. at 693-94; see also David McCord, *Is Death “Different” for Purposes of Harmless Error Analysis? Should It Be? An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1159 (1999) (describing the burden shift and the difference between the two tests).


Strickland’s prejudice prong. Even when trial counsel provided concededly deficient assistance in failing to object to discriminatory jury selection, these courts demand a showing of prejudice: not only that a Batson objection likely would have succeeded, but also that a fairly selected jury likely would have arrived at a different verdict (or, in capital cases, sentence).50 This is, as some courts themselves recognize, an impossible task.51

These circuits insulate Batson-based IAC claims from appellate remedy. Because a petitioner will fail to demonstrate that he suffered prejudice from a structural error, a successful showing that racial discrimination infected jury selection means nothing if brought in the context of an IAC claim.

Other circuits employ, I suggest, a much more sensible scheme. These circuits presume prejudice so long as the defendant has shown a reasonable probability that a Batson objection, if made at trial, would have prevailed, resulting in a trial by a fairly selected jury.52

50 See, e.g., Young v. Bowersox, 161 F.3d 1159, 1160-61 (8th Cir. 1998) (rejecting a Batson-based Strickland claim because petitioner “[could not] satisfy the prejudice requirement and [did] not attempt[ ] to do so”); Virgil v. Dretke, 446 F.3d 598, 607 (5th Cir. 2006) (“[W]e do not hold that a structural error alone is sufficient to warrant a presumption of prejudice in the ineffective assistance of counsel context . . . .” (footnote omitted)); Ashley C. Harrington, Note, Batson ff

51 See Young, 161 F.3d at 1160-61 (acknowledging that its ruling placed the petitioner in the “impossible position of showing how the outcome of the trial would have been different in the absence of a structural defect”); Owens v. United States, 483 F.3d 48, 65 (1st Cir. 2007) (“We will not ask defendants to do what the Supreme Court has said is impossible.”); Vansickle v. White, 166 F.3d 953, 960 (9th Cir. 1999) (Reinhardt, J., dissenting) (“Without explaining how . . . any . . . litigant could possibly make such a showing, the majority . . . overrides our well established rule that prejudice as to the result need not, indeed cannot, be shown in jury composition cases. By doing so, it renders it virtually impossible for any defendant to vindicate his right to due process if his attorney has committed a procedural default in such a case.”).

52 See, e.g., Winston v. Boatwright, 649 F.3d 618, 622 (7th Cir. 2011) (“Prejudice, in other words, is automatically present when the selection of a petit jury has been infected with a violation of Batson or J.E.B.”); Davis v. Sec’y for the Dep’t of Corr., 341 F.3d 1310, 1317 (11th Cir. 2003) (establishing that where there is a “reasonable probability” that a Batson challenge would have prevailed on appeal had trial counsel preserved it, appellant has demonstrated prejudice). But see Purvis v. Crosby, 451 F.3d 734, 739 (11th Cir. 2006) (narrowing Davis to apply only where trial counsel raised a Batson challenge but failed to preserve it for appeal, noting, “those are not the words we used in Davis, but it is what we meant”). At least one circuit even has what one might think of as an intra-circuit split. The Eighth Circuit generally presumes Strickland prejudice for structural error but not for a Batson error, without acknowledging Batson’s default status as a structural error. Compare McGurk v. Stenberg, 163 F.3d 470, 475 (8th Cir. 1998) (“[W]e hold that when counsel’s deficient performance causes a structural error, we will assume prejudice under Strickland.”), with Young, 161 F.3d at 1160-61 (declining to presume Strickland prejudice for Batson errors). The two cases, decided six days apart, have created a divergence between Batson and non-Batson structural errors—which is especially unfortunate since the Young panel mistakenly considered itself “controlled” by Wright v. Nix, a Swain v. Alabama—not Batson—case that did not reach prejudice. See Young, 161 F.3d at 1161; Wright v. Nix,
In 2017, the Supreme Court provided guidance on this circuit split in the context of a different structural error. Weaver v. Massachusetts addressed whether courts should presume Strickland prejudice where the alleged ineffectiveness was counsel’s failure to object to an improper courtroom closure during jury selection. Like a Batson violation, a violation of the right to a public trial is structural error. But the Court declined to afford that status any “talismanic significance,” instead cabining structural error, as a category, to the direct appeal context. In an IAC claim, the Court explained, what matters is not whether a type of error is structural, but the reason it is structural. The Court suggested that errors that are structural because they “always result[] in fundamental unfairness” should be exempt from a Strickland prejudice analysis. Because a public trial violation during jury selection does not always result in fundamental unfairness, a petitioner must take the normal route to Strickland relief, no matter how challenging: He must demonstrate that the courtroom closure caused him prejudice.

The open-courtroom-during-jury-selection right failed Weaver’s test. But some lower courts have read the case to preclude relief for IAC claims resulting from a failure to raise any structural error at trial. This is a mistake.
Beyond Strickland Prejudice

The Court’s reasoning, taken seriously, widens the availability of IAC relief because it detaches Strickland prejudice from counterfactual trial outcome. It instructs courts to presume prejudice for constitutional errors that result in fundamental unfairness—even unfairness that does not undermine the verdict’s factual reliability. One such error, I suggest, is Batson. When a petitioner seeks postconviction relief on the grounds that their trial attorney provided ineffective assistance of counsel by failing to object to discriminatory jury selection, Weaver instructs that they need demonstrate only deficient performance. Just as on direct appeal, prejudice is presumed.

But presuming Strickland prejudice does not solve the impossibility problem in full. A convicted person whose attorneys failed to raise the Batson-IAC claim timely in state court may turn to federal habeas corpus review. If
the state courts relied on state procedural rules to refuse to hear a claim, the procedural default doctrine precludes federal habeas review.64

Procedural default features its own, analytically distinct, prejudice requirement: a federal habeas court will excuse procedural default if the petitioner shows “cause” for failure to present a claim to the state courts and “actual prejudice” resulting from the underlying error.65 This prejudice showing will evade Batson victims in federal habeas much as it did in state proceedings.

A number of factors complicate Weaver’s application to federal habeas review. For one, Weaver reached the Supreme Court in an odd procedural posture, on direct appeal from the Massachusetts Supreme Judicial Court’s denial of petitioner’s motion for a new trial.66 It presented the Court no opportunity to address the more common scenario in which federal courts address Strickland prejudice: habeas petitioners seeking relief from state sentences.67 Second, habeas’s federalism implications add complexity to the otherwise pure Strickland question. As Amy Knight Burns has pointed out, Strickland prejudice and procedural default prejudice need not be identical, despite the verbal similarity, and despite courts’ propensity to collapse them.68 Thus, an argument for presuming prejudice in one context might not persuade in the other.

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64 See Coleman v. Thompson, 501 U.S. 722, 750 (1991) (reasoning that concern for federalism, comity, and finality precludes federal habeas review after a litigant defaulted on their claims pursuant to state procedures); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (holding that a failure to challenge a defendant’s confession at trial according to state procedural rules precludes federal habeas review).

65 Sykes, 433 U.S. at 84-85, 87. I refer colloquially to this prejudice standard as “Sykes prejudice.”

66 Weaver, 137 S. Ct. at 1906-07. Lower courts have differed on how to characterize Weaver’s procedural posture. Compare Williams v. Burt, 949 F.3d 966, 978 (6th Cir. 2020 (“Weaver was a direct review case.”), with Report and Recommendation at 39 n.4, Lewis v. Sorber, No. 18-1376 (E.D. Pa. Feb. 1, 2021) (“Weaver has been described as having been decided on direct, rather than collateral, review. I would not characterize the case in that way.” (citation omitted)). Regardless, it did not arise on traditional habeas corpus review. One scholar describes Weaver as a “direct-collateral-review case.” Z. Payvand Abdout, Direct Collateral Review, 121 COLUM. L. REV. 159, 191 (2021).


68 See Burns, supra note 50, at 748 (“The prejudice inquiry of Strickland is . . . analytically distinct from the prejudice inquiry in Sykes.”); Zinzer v. Iowa, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995) (“We note that the ‘prejudice’ component of ‘cause and prejudice’ is analytically distinct from the Strickland prejudice we examined above.”); Jackson v. Herring, 42 F.3d 1350, 1361 (11th Cir. 1995) (“[W]e bear in mind that the prejudice prong of Strickland is not co-terminous with the more general prejudice requirement of Wainwright v. Sykes . . . .”); See also Ambrose v. Booker, 801 F.3d 367, 578 (6th Cir. 2015) (“The ‘actual prejudice’ inquiry [for procedural default purposes] was intended to mirror the inquiry required by Strickland . . . .”); Burns, supra, at 748 (“While these two requirements are technically separate, and need not use the same standard, most courts evaluating such claims
I advocate the extension of Weaver’s presumption of prejudice to the procedural default context in at least one set of circumstances. In Martinez v. Ryan, the Supreme Court created an equitable exception to the procedural default bar where ineffective assistance of postconviction counsel caused the default of a substantial trial IAC claim, in states that require trial IAC claims to be brought on collateral, rather than direct, review.\(^6^9\) Under Martinez, ineffective assistance of postconviction counsel provides “cause” to excuse the default; Weaver should provide “prejudice.” In some circuits—ones that do not demand a distinct prejudice showing of petitioners proceeding under Martinez—this extension will be unnecessary.\(^7^0\) In others,\(^7^1\) it means the difference between dismissal on procedural grounds and a federal forum for the constitutional claim.

The case for presuming prejudice in the Martinez context is fairly straightforward. Martinez was an equitable decision that aimed to guarantee a habeas petitioner one “full and fair review of his constitutional claims, either in state or federal court,” even if it meant sweeping aside procedural bars.\(^7^2\) Insisting on an impossible demonstration of “actual prejudice” after a petitioner successfully invokes Martinez to supply “cause” insulates meritorious Batson claims from review at any level.\(^7^3\) That insistence would impose an impossible-to-meet procedural bar to a defaulted Batson-IAC claim. It would contravene Martinez’s core commitment.

Presuming prejudice in the procedural default context is both the fair and efficient thing to do. Rather than twist itself in knots determining whether it can hear a claim at all, a federal habeas court should look straight to the merits.\(^7^4\) The efficiency argument holds special weight given the posture in

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\(^6^9\) Martinez v. Ryan, 566 U.S. 1, 9, 14 (2012).

\(^7^0\) See infra notes 190–193.

\(^7^1\) See infra note 202.

\(^7^2\) Justin F. Marceau, Is Guilt Dispositive? Federal Habeas After Martinez, 55 WM. & MARY L. REV. 2071, 2131 (2014). Marceau has described Martinez as the culmination of the “new era of federal habeas” dedicated to proceduralism. Id. at 2132, 2136-37; see also Eve Brensike Primus, Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions, 61 ARIZ. L. REV. 291, 321 (2019) (“[O]ne important overarching goal of federal habeas review is to ensure that prisoners have one full and fair chance to have their federal claims considered.”).

\(^7^3\) Even courts demanding such a showing have acknowledged as much. See, e.g., Young v. Bowersox, 161 F.3d 1159, 1160-61 (8th Cir. 1998) (acknowledging that its ruling placed the petitioner in the “impossible position of showing how the outcome of the trial would have been different in the absence of a structural defect”). These courts should not be so indifferent in the wake of Martinez and Weaver.

\(^7^4\) Cf. Amsterdam, supra note 49, at 409 (“[Habeas procedure is] intricately labyrinthine, and so confusing that courts today devote ten times as much labor, intelligence, and prose to deciding whether they can hear a convicted person’s constitutional claims at all as they devote to considering
which such claims will generally reach a federal court on habeas; where \textit{Martinez} supplies cause, the procedural default analysis also provides answers for the underlying IAC and \textit{Batson} claims. The habeas labyrinth collapses into one question: did trial counsel perform deficiently by failing to raise a meritorious \textit{Batson} objection? Where the answer is “yes,” state postconviction counsel was similarly ineffective for failing to raise the trial IAC claim, so \textit{Martinez} supplies “cause” for procedural default purposes.\textsuperscript{75} And again, where the answer is “yes,” a federal court should presume prejudice for both \textit{Strickland} and procedural default purposes.

Academic literature and courts alike have mostly overlooked \textit{Weaver}'s potential implications.\textsuperscript{76} A number of academic works have identified \textit{Batson}'s problematic application to \textit{Strickland}.\textsuperscript{77} A 2012 note by Amy Knight Burns skillfully explicated the interaction between IAC and procedural default, with particular attention to \textit{Batson}-related difficulties.\textsuperscript{78} But the few articles and cases to address \textit{Weaver} since it came down in 2017 have mostly focused on its (important) implications for \textit{Strickland} doctrine, without reference to any potential habeas consequences.\textsuperscript{79} If anybody has grappled with \textit{Weaver}'s

\textsuperscript{75} A petitioner need not have had counsel in state postconviction proceedings for \textit{Martinez} to attach, so I use “state postconviction counsel” loosely to include pro se litigants. See \textit{Marceau}, supra note 72, at 2143 n.343.

\textsuperscript{76} Cf. Eve Brensike Primus & Justin Murray, \textit{Redefining Strickland Prejudice after Weaver v. Massachusetts}, HARV. L. REV. BLOG (May 22, 2018), https://blog.harvardlawreview.org/redefining-strickland-prejudice-after-weaver-v-massachusetts [https://perma.cc/FDE2-NXSY] (“\textit{Weaver} has gone largely unnoticed by both the defense bar and academics outside the context of public-trial violations—an oversight we hope to see corrected.”). Professors Primus and Murray, along with Susan Yorke, see infra note 113, are notable exceptions to the general academic dismissal of \textit{Weaver}.

\textsuperscript{77} See, e.g., Harrington, supra note 50, at 1010-12 (mentioning the circuit split and articulating why a demonstration of \textit{Strickland} prejudice is “complex and onerous”—and perhaps impossible without “heavy reliance on racialized assumptions”—in the \textit{Batson} context); Abel, supra note 37, at 765 (“Forcing a defendant to show prejudice to show prejudice would . . . mire the doctrine in the impossible question of demonstrating that the presence or absence of any particular juror affected the outcome.”).

\textsuperscript{78} Burns, supra note 50, at 728-30.

\textsuperscript{79} See Primus & Murray, supra note 76 (“Although \textit{Weaver} lost his claim, the majority’s willingness to entertain expansion of \textit{Strickland}’s prejudice test to include a fundamental unfairness inquiry—separate from the traditional focus on whether deficient performance affected the outcome—represents an important doctrinal shift.”); Primus, supra note 13, at 1648 (“Justin Murray and I have proposed that, after \textit{Weaver}, criminal defendants should argue (and courts should recognize) that an attorney’s episodic deficient performance is ‘prejudicial when counsel’s errors rendered the trial process fundamentally unfair’ even if those errors probably did not alter the trial’s outcome.”); see also Brooks v. Gilmore, No. 15-5659, 2017 WL 3475475, at *7 (E.D. Pa. Aug. 11, 2017) (presuming \textit{Strickland} prejudice for a faulty reasonable doubt instruction because \textit{Weaver} “carves out an exception” to, rather than supplants, the general rule that courts presume \textit{Strickland} prejudice for structural errors).
procedural default implications, no consensus has emerged and the argument remains rare.\textsuperscript{80} But let’s begin with Strickland.

II. \textit{WEAVER AND THE CASE FOR PRESUMING STRICKLAND PREJUDICE FOR BATSON ERROR}

\textit{Weaver} shifted Strickland’s thrust away from outcome and toward fairness. A structural error causes prejudice, \textit{Weaver} held, if the error “always results in fundamental unfairness.”\textsuperscript{81} This is a categorical, not case-by-case, inquiry: the question is whether the error is of the sort that always causes fundamental unfairness. Because racially discriminatory jury selection always causes fundamental unfairness, courts should not demand an impossible prejudice demonstration before granting Strickland relief.

A. Weaver’s Shift

\textit{Strickland}’s prejudice inquiry generally focuses on the trial’s likely result absent the error that constituted deficient performance. The classic \textit{Strickland} formulation requires an appellant to show a reasonable probability that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”\textsuperscript{82} It thus demands an “outcome-based” determination: the question is not whether an error occurred, or (as on harmless error review) whether that error \textit{contributed} to the conviction.\textsuperscript{83} Instead, the question is whether, absent the error, the verdict would have been different.

As Eve Brensike Primus and Justin Murray have argued, \textit{Weaver} shifts \textit{Strickland} prejudice away from a focus on counterfactual outcome.\textsuperscript{84} After

\textsuperscript{80} The Sixth Circuit addressed and dismissed an argument that \textit{Weaver} instructs that procedural default prejudice should be presumed for IAC claims resulting from the failure to object to a fair-cross-section violation. See Parks v. Chapman, 815 F. App’x 937, 944-45 (6th Cir. 2020) ("\textit{Weaver} does not support [defendant’s] contention that he need not prove actual prejudice solely because a fair-cross-section violation is structural error."). A concurring judge acknowledged in a footnote that “[t]here may be substantial merit ” to the argument but declined to adopt it. See id. at 954 n.13 (Donald, J., concurring in the judgment).

\textsuperscript{81} \textit{Weaver v. Massachusetts}, 137 S. Ct. 1899, 1908 (2017).


\textsuperscript{83} See Blume & Garvey, supra note 3, at 180 (contrasttheing the prevailing "outcome-focused" \textit{Strickland} approach favored by Chief Justice Rehnquist with Justice Stevens’s "error-focused approach").

\textsuperscript{84} Primus & Murray, supra note 76. Primus and Murray speak in terms of "reliability," but I think "outcome-based" is more accurate, since errors that changed a trial’s outcome generally satisfy \textit{Strickland} prejudice, even if they made the outcome more factually reliable. See King, supra note 62, at 122 ("P]rejudice tests provide relief for violations of both ‘truth-obstructing’ rights . . . and ‘truth-furthering’ rights.").

It would be an oversimplification to suggest that \textit{Weaver} singlehandedly introduced a new understanding of \textit{Strickland} prejudice. Writing in 2012, five years before \textit{Weaver}, Justin Marceau highlighted the longstanding “divergent understandings” of \textit{Strickland} prejudice: a reliability-based
Weaver, courts should presume prejudice whenever a defendant demonstrates that their counsel’s deficient performance resulted in a structural error that always causes fundamental unfairness. In Section II.B., I argue that the failure to object to racial discrimination in jury selection is such an error. But first let’s solidify our understanding of Weaver.

Writing for the Court in Weaver, Justice Kennedy began by noting the federal circuit and state high court split as to “whether a defendant must demonstrate prejudice in a case like this one—in which structural error is neither preserved nor raised on direct review but is raised later via a claim alleging ineffective assistance of counsel.”\(^85\) The Court withheld a categorical “yes” or “no”; instead, it decided that some types of structural error demand a showing of actual prejudice to prevail on an IAC claim, while suggesting that others do not.\(^86\) Different errors are structural for different reasons, the Court explained, and “the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error.”\(^87\)

The Court identified three general categories of structural error. The first, which includes the right to conduct one’s own defense, “is not designed to protect the defendant from erroneous conviction but instead protects some other interest.”\(^88\) These rights are structural—and therefore exempt from harmless error analysis on direct review—because “harm is irrelevant” to them.\(^89\) The second category is structural purely because of the impossibility

\[^{85}\] Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017).
\[^{86}\] Id. at 1907-08.
\[^{87}\] Id.
\[^{88}\] Id. at 1908.
\[^{89}\] Id.
of ascertaining the precise harm caused. Since on direct review the burden of showing harmlessness lies with the government,\(^9^0\) impossibility weighs in the defendant's favor: “Because the government will . . . find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' the efficiency costs of letting the government try to make the showing are unjustified.”\(^9^1\) The Court offered the denial of the right to select one's own attorney as this sort of structural error.\(^9^2\) Finally, some errors are structural because they "always result[] in fundamental unfairness."\(^9^3\) These errors include the denial of the right to an attorney and a misleading reasonable-doubt jury instruction.\(^9^4\) Only the final category—errors that are structural because they always result in fundamental unfairness—merits a presumption of Strickland prejudice.\(^9^5\)

The Court noted that these categories are “not rigid” and may overlap; some errors may be structural for multiple reasons.\(^9^6\) Thus, an error's presence in multiple categories does not preclude it from a presumption of prejudice. But "one point is critical: An error can count as structural even if the error does not lead to fundamental unfairness in every case."\(^9^7\) Only an error that always results in fundamental unfairness merits the presumption.

With this foundation laid, the Court turned to the structural error at hand: the violation of the right to an open courtroom during jury selection. To determine whether to presume Strickland prejudice or to demand its demonstration, the Court asked “whether a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason.”\(^9^8\) A few considerations convinced the Court that a public trial violation does not always lead to fundamental unfairness. First, since the Constitution permits courtroom closure during jury selection in some circumstances, the right “is subject to exceptions,” which “suggests that not every public-trial violation results in fundamental unfairness.”\(^9^9\) Second, the Court explained that the right is structural for reasons other than

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\(^9^0\) This contrasts with the IAC context, where the petitioner bears the burden of demonstrating prejudice. See supra note 47.

\(^9^1\) Weaver, 137 S. Ct. at 1908 (citation omitted).

\(^9^2\) Id.

\(^9^3\) Id.

\(^9^4\) See id. (first citing Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963), and then citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

\(^9^5\) Id. ("[T]he question is whether a . . . violation counts as structural because it always leads to fundamental unfairness or for some other reason.").

\(^9^6\) Id.

\(^9^7\) Id.

\(^9^8\) Id.

\(^9^9\) Id. at 1909. I must admit to doubts. The fact that a courtroom may sometimes be closed to the public constitutionally says nothing about whether it is fundamentally unfair when it is done unconstitutionally. Nonetheless, I intend to take the Weaver Court at its word and apply the decision to Batson error, rather than challenge Weaver (itself a worthy undertaking).
fundamental unfairness; for instance, the Court’s previous discussions of the right centered on the “difficulty of assessing the effect of the error” rather than the unfairness it causes.  

Finally, though the Court conceded that the public trial right protects the accused, it noted that it “also protects some interests that do not belong to the defendant,” namely access to courts for the public and press.  

Taken together, those considerations “confirm the conclusion the Court now reaches that, while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial will still be fundamentally fair from the defendant’s standpoint.” And it concluded that in the specific case at issue, the violation did not cause fundamental unfairness because it “did not pervade the whole trial.”

Some courts have read Weaver to demand a showing of prejudice whenever a petitioner alleges IAC resulting in any structural error. For instance, the Sixth Circuit has characterized Weaver as announcing as a categorical matter “that prejudice is not presumed in cases involving claims of ineffective assistance of counsel that result in structural error[].” This is wrong. Most straightforwardly, it is wrong because the Court explicitly cabined its decision, emphasizing that Weaver resolves the disagreement about presuming prejudice “specifically and only in the context of trial counsel’s failure to object to the closure of the courtroom during jury selection.” It leaves treatment of other structural errors for future cases, and lends guidance—in the form of the fundamental unfairness inquiry—to lower and future courts.

It is also wrong because it confuses what the Weaver Court held with what it assumed. The Sixth Circuit interpreted Weaver to assume the “fundamental unfairness” possibility arguendo but not to decide whether it exists. It is true that Weaver did not decide that a defendant seeking IAC relief can show

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100 Id. at 1910 (first citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006), and then citing Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984)).
101 Id.
102 Id.
103 Id. at 1913.
104 Carter v. Lafler, No. 17-1409, 2017 U.S. App. LEXIS 27968, at *10 (6th Cir. Aug. 30, 2017); see also Parks v. Chapman, 815 F. App’x 937, 944 (6th Cir. 2020) (“Weaver stands for the idea that finality and judicial economy can trump even structural error; so, when a defendant raises a structural error on collateral review rather than on direct review, he must prove actual prejudice . . . .”).
105 Weaver, 137 S. Ct. at 1907.
106 Wellborn v. Berguis, No. 17-2076, 2018 WL 4372196, at *2 (6th Cir. May 16, 2018) (“After Weaver, [Wellborn] contends, a petitioner can show Strickland prejudice by establishing either the reasonable probability of a different outcome or fundamental unfairness. Not so. The Court in Weaver assumed, for analytical purposes only, that the petitioner could show Strickland prejudice by establishing that counsel’s errors rendered his trial fundamentally unfair. The Court did not, however, decide whether this interpretation was correct.” (citation omitted)).
either actual prejudice or fundamental unfairness resulting from the specific error at hand. It simply assumed the possibility “for [] analytical purposes.”107 But Weaver addressed two distinct “fundamental unfairness” inquiries and attached the “assumption” disclaimer only to one. The first is categorical and focuses on the type of error: whether “a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason.”108 The other is particular and focuses on the specific instance of the error: whether, in this case, “the convicted person shows that attorney errors rendered the trial fundamentally unfair . . . .”109 Though the Court could have done a better job distinguishing the two, it eventually became clear that they are independent questions:

[N]ot every public-trial violation will in fact lead to a fundamentally unfair trial. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or, as the Court has assumed for these purposes, to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.110

The Court applied the “assumption” disclaimer only to the particular argument, not the categorical one. While Weaver implicitly opened the door to specific fundamental unfairness claims,111 it explicitly opened the door to

107 Weaver, 137 S. Ct. at 1911 (“Petitioner . . . argues that under a proper interpretation of Strickland, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair. For the analytical purposes of this case, the Court will assume that petitioner’s interpretation of Strickland is the correct one. In light of the Court’s ultimate holding, however, the Court need not decide that question here.”).
108 Weaver, 137 S. Ct. at 1908 (emphasis added).
109 Id. at 1911.
110 Id. (citations omitted).
111 Eve Brensike Primus has been the most forceful advocate of this approach. See Primus, supra note 13, at 1648-49 (arguing that under Weaver, Strickland petitioners need only show “that the proceedings were fundamentally unfair,” regardless of the right’s categorical status); Primus & Murray, supra note 76 (arguing that people who suffer from a public-trial violation, which Weaver decided does not always cause fundamental unfairness, should nonetheless argue that the violation at hand rendered their trial fundamentally unfair). At least one court has assumed this argument’s viability. See United States v. Aguiar, 894 F.3d 351, 356 (D.C. Cir. 2018) (relying on Weaver to deny an IAC claim based on failure to object to a voir dire courtroom closure because petitioner offered no evidence that the closure caused a different outcome “or that the voir dire proceedings were fundamentally unfair”).
categorical fundamental unfairness claims.\footnote{112} It is difficult to read the decision any other way: in determining whether to presume prejudice, “the question is whether a public-trial violation counts as structural because it always leads to fundamental unfairness or for some other reason.”\footnote{113}

To recap, the Weaver Court held that 1) an IAC claim based on trial counsel’s failure to object to a public-trial-in-jury-selection right demands a showing of actual prejudice because not every violation of the right causes fundamental unfairness; 2) not every such violation causes fundamental unfairness because the right is subject to exceptions, discussions of its structural status have focused on the impossibility of harm calculation rather than the omnipresence of harm, and it protects rights other than the defendant’s.

### B. Applying Weaver to Batson

Every Batson violation is fundamentally unfair to the defendant. The Weaver Court nearly acknowledged as much by listing Batson, its sister

\footnote{112} Professor Primus advocates this approach as well. See Primus & Murray, supra note 76 (“For Batson violations and other errors that qualify as structural on the ground that they always result in fundamental unfairness, defendants should argue based on Weaver that a finding of deficient performance stemming from a failure to object to these structural errors causes prejudice per se as a matter of federal (and possibly state) constitutional law.”).

\footnote{113} Weaver, 137 S. Ct. at 1908; see also Report and Recommendation at 38, Lewis v. Sorber, No. 18-1576 (E.D. Pa. Feb. 1, 2021) (“[Weaver] reads very much like a holding that a showing of fundamental unfairness would have entitled petitioner to a new trial.”); Susan Yorke, Jury Nullification Instructions as Structural Error, 95 WASH. L. REV. 1441, 1464, 1466 (2020) (explaining that after Weaver’s “much-needed guidance,” when an error “is raised through an ineffective assistance of counsel claim in federal habeas proceedings, the availability of automatic reversal depends on whether the error at issue in fact rendered the trial fundamentally unfair. . . . Only those that satisfy the third rationale—fundamental unfairness—result in automatic reversal in contexts other than direct appellate review” (footnote omitted)). The significance of the “fundamental unfairness” language did not escape Justices Thomas and Alito, who wrote separate concurrences, both joined by Justice Gorsuch, denouncing that portion of the opinion. See Weaver, 137 S. Ct. at 1914 (Thomas, J., concurring) (“Because the Court concludes that the closure during petitioner’s jury selection did not lead to fundamental unfairness in any event, no part of the discussion about fundamental unfairness is necessary to its result.” (citations omitted)); id. at 1915 (Alito, J., concurring in the judgment) (lamenting the majority’s focus on fundamental fairness rather than reliability). But the majority opinion commanded the votes of four justices who joined no skeptical concurrences, and the two dissenters—Justices Breyer and Kagan—would surely agree that prejudice can be presumed for structural errors resulting in fundamental unfairness, since they would presume prejudice for all structural errors. See id. at 1917-18 (Breyer, J., dissenting) (“[J]ust as structural errors are categorically insusceptible to harmless-error analysis on direct review, so too are they categorically insusceptible to actual-prejudice analysis in Strickland claims. A showing that an attorney’s constitutionally deficient performance produced a structural error should consequently be enough to entitle a defendant to relief.”). I thank Daniel Silverman for alerting me to the Lewis v. Sorber case and for providing the magistrate judge’s Report and Recommendation.
Beyond Strickland Prejudice

J.E.B.,\textsuperscript{114} and its cousin Vasquez\textsuperscript{115} as structural errors that categorically “cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process.”\textsuperscript{116} But that comment addressed direct appeal, not IAC on collateral review.\textsuperscript{117} And the quote’s second part—“or by pervasive undermining of the systemic requirements of a fair and open judicial process”—carves out the possibility that Batson errors do not always lead to fundamental unfairness for Strickland purposes. We know because the Weaver Court considered the public trial right’s protection of public and press access irrelevant to the Strickland prejudice analysis. Instead, the fundamental unfairness inquiry must be conducted “from the defendant’s standpoint.”\textsuperscript{118} If Batson error is publicly, but not personally, unfair, Weaver does not demand that Strickland prejudice be presumed. According to Weaver, Strickland is indifferent to extra-defendant harms, including those to jurors. To merit a presumption of prejudice, Batson needs to protect defendants—not jurors or the system—from fundamental unfairness.

Thus, Batson errors will merit a presumption of Strickland prejudice only if they 1) always render a trial fundamentally unfair 2) to the defendant.

It is not obvious that they do. Batson is generally thought to protect, as Eric Muller has described it, “a package of equal protection rights: rights of the defendant to a fair trial free of the stigma of racial prejudice, and rights of prospective jurors both to be free of that stigma and to participate fully in the criminal justice system.”\textsuperscript{119}

Even worse, it is not altogether clear, as a doctrinal matter, that a defendant suffers any concrete harm from racially discriminatory jury selection. Muller calls this the “Batson paradox.”\textsuperscript{120} Rather than the superior reliability of a racially representative jury, or the impact that race might have on a juror’s view of the criminal legal system and therefore their propensity to convict or acquit, Batson rested its holding on race blindness. Whereas pre-

\begin{itemize}
  \item \textsuperscript{114} J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994) (extending Batson to claims of gender discrimination).
  \item \textsuperscript{115} Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986) (holding that racial discrimination in grand jury selection is structural error).
  \item \textsuperscript{116} Weaver, 137 S. Ct. at 1911.
  \item \textsuperscript{117} See id. at 1911-12 (“The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.”).
  \item \textsuperscript{118} Id. at 1910.
  \item \textsuperscript{119} Muller, supra note 37, at 95; see also Abel, supra note 37, at 716 (“Batson was the Court’s official acknowledgement that discrimination in jury selection was an assault on defendant, juror, and justice alike.”); Coke, supra note 62, at 338 (“[T]he Supreme Court’s jury discrimination cases display considerable ambivalence as to just where the constitutional harm of race-conscious jury selection inures.”).
  \item \textsuperscript{120} Muller, supra note 37, at 96.
\end{itemize}
Batson decisions “stated openly what . . . seemed obvious: the racial composition of a black person’s jury could well affect the verdict in his or her case,” after Batson, “[r]ace and gender became not just impermissible but flatly irrational predictors of juror perspective.” But if race is irrelevant, the exclusion of members of a given race from jury service cannot possibly impact a verdict. Batson thus “managed the incoherent task of creating a type of error that is, by definition, harmless in every case.”

Despite the Batson paradox, the Court has continued to assume that Batson errors require reversal on direct appeal. Still, the paradox might present an additional challenge in this context, since extra-defendant harms may be relevant on direct appeal but not on collateral review of an IAC claim. Another reason to worry: the Court in Allen v. Hardy held that Batson did not apply retroactively on collateral review, in part because, though Batson protects “a criminal defendant’s interest in neutral jury selection procedures,” a violation does not have “such a fundamental impact on the integrity of factfinding as to compel retroactive application.” Does Allen suggest that Batson error causes no fundamental unfairness?

1. Batson Violations Cause Unfairness to Defendants

Whatever extra-defendant harm a Batson violation causes, the Supreme Court has been clear that it causes a defendant some harm as well. As recently as 2019, the Court wrote that “Batson sought to protect the rights of defendants”

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121 Coke, supra note 62, at 339.
122 Muller, supra note 37, at 101; see also id. at 102 (“In Edmonson, the Court said more clearly what it had hinted at in Batson: Classifications based on race are not just impermissible as a matter of law but are also irrational as a matter of fact.”). Not all members of the Court insisted on colorblindness: perhaps ironically, the conservative justices, who wished to do away with Batson altogether, thought it silly. As Muller recounts:

By the time of J.E.B., the dissenters were openly and stridently endorsing the theory of difference. Chief Justice Rehnquist stated categorically that “[t]he two sexes differ, both biologically and, to a diminishing extent, in experience.” “It is not merely stereotyping,” he continued, “to say that these differences may produce a difference in outlook which is brought to the jury room.” Justice Scalia, joined by the Chief Justice and Justice Thomas, mocked Justice Blackmun’s majority opinion for its “farfetched defense of the proposition il n’y a pas de différence entre les hommes et les femmes.” Justice O’Connor said it most simply of all: “We know that like race, gender matters.”

Id. at 104 (alteration in original) (footnotes omitted).
123 Id. at 96.
125 Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) (“Batson sought to protect the rights of defendants and jurors, and to enhance public confidence in the fairness of the criminal justice system.” (emphasis added)).
and in 2005 it wrote that “[d]efendants are harmed, of course,” when they suffer a Batson violation.126 Similar language pervades discussions elsewhere.127

Besides, a defendant would lack standing to raise a Batson claim at all if racially discriminatory jury selection caused him no harm.128 For comparison, in the Fourth Amendment context, somebody convicted using evidence obtained in violation of a third party’s constitutional right against unreasonable search and seizure lacks standing to invoke the exclusionary rule.129 Because “Fourth Amendment rights are personal rights that may not be asserted vicariously,” a defendant may not challenge the introduction of unconstitutionally obtained evidence unless he himself suffered the violation.130

If the Court believed that Batson violations do not harm defendants, it would deny standing in a similar fashion.131 The Court sometimes resorts to vicarious standing in Batson cases, but it has only felt the need to address the issue where the defendant and struck juror are of different races.132 By implication, where the prosecutor strikes venirepeople of the defendant’s race, the defendant has traditional standing and need not invoke that of a third party.133 Further, even vicarious standing requires that the person invoking it suffer cognizable injury, a requirement the defendant in Powers

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127 See, e.g., Powers v. Ohio, 499 U.S. 400, 411 (1991) (“The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury.”); Batson v. Kentucky, 476 U.S. 79, 85 (1986) (“[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded.”). This was clear to the Court even pre-Batson. See, e.g., Peters v. Kiff, 407 U.S. 504 (1972) (plurality opinion) (recognizing the “strong interest of the criminal defendant in avoiding [the] harm” that is “latent in an unconstitutional [racially discriminatory] jury-selection system”).
128 Justice Thomas—but only Justice Thomas—has pointed to the Batson paradox to advocate for denying Batson victims standing to challenge racial discrimination in their jury selection. Flowers, 139 S. Ct. at 2270 (Thomas, J., dissenting) (“Flowers should not have standing to assert the excluded juror’s claim[] . . . [because he] has suffered no legally cognizable injury.”). Justice Gorsuch joined the rest of Justice Thomas’ dissent but pointedly left his name off of this part. Id. at 2252.
130 Rakas, 439 U.S. at 133; see also Payner, 447 U.S. at 731-32 (“[R]espondent lacks standing under the Fourth Amendment to suppress the documents illegally seized from [a third party].”).
131 Cf. Coke, supra note 62, at 342 (“If, in fact, the principal harm of peremptory abuse inures to jurors, one wonders why it should be that defendant benefits from a new trial when an appellate court finds a Batson violation and reverses the conviction.”).
132 See Powers, 499 U.S. at 409, 415 (holding that a white defendant may object to the prosecution’s peremptory challenges of Black venirepersons under Batson because he has standing to object to the violation of the juror’s right “not to be excluded from [a jury] on account of race”).
133 The inference did not escape Justice Scalia in dissent. Id. at 423 (Scalia, J., dissenting) (“In an apparent attempt to portray the question before us as a novel one, the Court devotes a large portion of its opinion to third-party standing—as though that obvious avenue of rendering the Equal Protection Clause applicable had not occurred to us in the many [prior] cases.”).
satisfied because racial discrimination in jury selection “places the fairness of a criminal proceeding in doubt.”

So the defendant suffers some harm, in the form of unfairness, when his jury is selected in a discriminatory manner. The questions remain whether that unfairness is “fundamental,” and whether it occurs “in every case” infected with Batson error.

2. Batson Violations Cause That Unfairness “In Every Case”

Unlike a public trial violation, Batson allows no exceptions. Indeed, Batson’s absoluteness marked the fundamental shift from the pre- to post-Batson era. Under Swain v. Alabama, Batson’s predecessor, a defendant had to show that a prosecutor had systematically discriminated “in case after case” to sustain a claim. Batson rejected Swain’s permissiveness and made clear that one “single invidiously discriminatory governmental act” of racial discrimination violates the Equal Protection Clause. The Court reiterated the same in 2019: “In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.” Whereas a judge may close a courtroom without violating the Constitution, the Constitution never permits a lawyer to exercise a peremptory strike based on race. Whatever harm results from racially discriminatory jury selection, it results “in every case.”

3. Batson Violations Cause Fundamental Unfairness

Both jury and race implicate notions of fundamental fairness in the U.S. legal system in a way that few other concepts do. In holding that the jury trial is inherent to due process, the Supreme Court celebrated the right to trial by jury as “fundamental to the American scheme of justice” and an “inestimable safeguard against the corrupt or overzealous prosecutor and

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134 Id. at 411 (majority opinion) (explaining that in order to invoke third party standing a litigant must have 'suffered an injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, and holding that the white defendant in the case had suffered such an injury because of the doubt discrimination casts on the integrity and fairness of the criminal proceeding); see also id. at 404 ("[A] defendant has . . . the right to be tried by a jury whose members are selected by nondiscriminatory criteria." (citation omitted)).
137 Batson v. Kentucky, 476 U.S. 79, 95 (1986); see also Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019) ("[T]he Batson Court rejected Swain’s insistence that a defendant demonstrate a history of racially discriminatory strikes in order to make out a claim of race discrimination.").
138 Flowers, 139 S. Ct. at 2241.
139 Cf. Weaver, 137 S. Ct. at 1968.
140 Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the right to trial by jury against the states).
against the compliant, biased, or eccentric judge.” More recently, it called the jury “a central foundation of our justice system and our democracy” and “a fundamental safeguard of individual liberty,” essential to “fair and impartial verdicts.” An exhaustive account of the lofty language the right to a jury has inspired is unnecessary to drive home the point: the jury protects fundamental fairness.

The Court has been particularly concerned with eliminating racial bias from juries and has decided that the Constitution requires unique procedural steps to accomplish that goal. For instance, the Court decided in Peña-Rodriguez that the Constitution required a racial bias exception to the deeply rooted common law and statutory rule forbidding jurors from testifying about jury deliberations. No constitutionally mandated exception had ever been found—not even for inebriated or explicitly biased jurors—and only the “gravest and most important cases” would require one. Racial animus in the jury room rose to that level. The Court cited the “particular threat” that “racial discrimination in the jury system pose[s]” to “the integrity of the jury trial”; a history of “[a]ll-white juries punish[ing] black defendants particularly harshly;” and the jury’s role as “a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice.’”

In all, the “unique historical, constitutional, and institutional concerns” implicated by racial bias in the criminal jury meant that the Sixth Amendment required an exception to the “no-impeachment” rule.

And the unfairness that racially discriminatory jury selection causes does not dissipate once a jury is empaneled. A Batson violation infects all the proceedings that follow. The Powers Court explained a Batson violation’s impact:

A prosecutor’s wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. . . . The influence of the voir dire process may persist throughout the whole course of the trial

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141 Id. at 156. The Court cited Blackstone, who extolled the requirement that “every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.” Id. at 151-52 (internal quotation marks omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 349 (Cooley ed. 1899)).
143 Id. at 863, 869.
144 Id. at 865-66 (citing United States v. Reid, 53 U.S. 361, 366 (1852)).
145 Id. at 867.
146 Id.
147 Id. at 868.
148 Id. at 868, 869.
proceedings. . . . The composition of the trier of fact itself is called in
question, and the irregularity may pervade all the proceedings that follow.\(^{149}\)

Few things are quite so fundamentally unfair as permitting the “especially
pernicious”\(^{150}\) influence of racial discrimination to shape the fact-finding body,
let alone the defendant’s, jurors’, and public’s view of the proceedings. And
whereas race-blind equal protection jurisprudence insists that jurors are
racially fungible in terms of factual reliability,\(^{151}\) it does not insist that a trial
tainted with racial discrimination from the outset can be “fair” in a more
general sense—just the opposite.\(^{152}\) The discrimination undermines the
fairness of the tribunal and indicates that similar constitutional disdain may
persist throughout the trial. These consequences must amount to
fundamental unfairness.\(^{153}\)

It is true that *Allen v. Hardy* concluded that *Batson* should not apply
retroactively to final convictions because a violation has no “fundamental
impact on the integrity of factfinding.”\(^{154}\) But factfinding accuracy and
fairness are distinct concepts. While the defendant, and not just the public,
must experience the fundamental unfairness, the unfairness need not go to
factfinding reliability; an error that undermines reliability can simply be
analyzed under the classic “actual prejudice” standard, without resort to the
“fundamental unfairness” inquiry. In this way, *Weaver* detaches prejudice
from outcome and permits a focus on a more expansive notion of the fairness
we may demand from our criminal legal system. Surely that fairness includes
jury selection uncontaminated by racism.

The unique importance of race and jury has not been entirely lost on
jurists considering whether racial discrimination in jury formation causes
fundamental unfairness. Faced with the argument that *Weaver* requires a
presumption of prejudice where the ineffective assistance of counsel resulted
from a failure to object to a racially unrepresentative jury pool, the Sixth

\(^{149}\) Powers v. Ohio, 499 U.S. 400, 412-13 (1991) (citations omitted); see also id. at 411 (“The jury
acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The
intrusion of racial discrimination into the jury selection process damages both the fact and the
perception of this guarantee.” (citation omitted)).

\(^{150}\) Peña-Rodriguez, 137 S. Ct. at 868.

\(^{151}\) See Coke, supra note 62, at 349 (“[T]he Court has been constrained to disclaim any
connection between race and juror perspective in a given case. One is hard pressed to imagine that
the Court really believes this, since the public obviously does not.”).

\(^{152}\) Cf. Smith v. Texas, 311 U.S. 128, 130 (1940) (“For racial discrimination to result in the
exclusion from jury service of otherwise qualified groups not only violates our Constitution and the
laws enacted under it but is at war with our basic concepts of a democratic society and a
representative government.” (footnote omitted)).

\(^{153}\) Accord Abel, supra note 37, at 758 (“*Batson* violations . . . undermine the fairness of the jury
verdicts on which everything else relies.”).

Circuit’s Judge Bernice Donald concluded in a concurring opinion that a racially unrepresentative jury pool “fails to provide the impartiality necessary to sustain a judicial system” and therefore “involv[es] a greater level of fundamental unfairness” than the temporary courtroom closure in *Weaver.* But the argument has not yet prevailed.

Recall the *Weaver* Court’s reasons for concluding that public trial violations do not cause fundamental unfairness in every case: the right is subject to exceptions, discussions of its structural status focus on the impossibility of harmless error calculation rather than the omnipresence of harm, and it protects rights other than the defendant’s. As explained above, *Batson* permits no exceptions. The other two reasons, however, do apply to *Batson:* its harm evades definition, and its protection extends beyond the defendant.

That should not cause worry. *Weaver* was quite clear that its structural error categories overlap, and that “more than one of [the] rationales may be part of the explanation for why an error is deemed to be structural.” And because structural errors by definition defy harm calculation, every structural error shares this trait. So long as an error always causes fundamental unfairness, *Weaver* demands the presumption of prejudice, even if the error is *also* impossible to quantify and extends beyond the defendant.

Furthermore, the right to courtroom access during jury selection may have been a uniquely poor candidate to pass *Weaver*’s test. The right is undeniably important. But, as a formal matter, it has no impact on the trial’s substance. Unlike many structural errors, including racially discriminatory jury selection, it does not shape the factfinding body. It is thus both more

155 Parks v. Chapman, 815 F. App’x 937, 954 n.13 (6th Cir. 2020) (Donald, J., concurring in the judgment). Judge Donald believed that the argument that *Weaver*’s fundamental unfairness analysis should excuse a prejudice showing for a fair cross-section jury claim had “substantial merit,” but concluded that the panel could not overrule circuit precedent absent a Supreme Court opinion on point or a decision of the circuit sitting en banc. *Id.*

156 See supra notes 98–102 and accompanying text.

157 See, e.g., Muller, supra note 37, at 95 (“The *Batson* ‘right’ is actually a package of equal protection rights: rights of the defendant to a fair trial free of the stigma of racial prejudice, and rights of prospective jurors both to be free of that stigma and to participate fully in the criminal justice system. . . . Where it is the defendant who is injured by the discrimination, the Court may believe that the effects of the injury are so diffuse as to make harmless error analysis impossible.”); *Abel,* supra note 37, at 765.


159 See supra notes 27–36; *Weaver,* 137 S. Ct. at 1907–08.

160 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .”).

161 *But see* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World,* 127 HARV. L. REV. 2173, 2176 (2014) (arguing that the criminal court audience “can and should be a central constitutional mechanism for popular accountability in modern criminal justice” in part because “audiences affect the behavior of government actors inside the courtroom, helping to define the proceedings through their presence”).
external to the defendant and more nebulous in its harm than a Batson violation. Indeed, of the commonly cited structural errors—the right to an unbiased judge,\textsuperscript{162} to self-representation,\textsuperscript{163} to an accurate reasonable-doubt jury instruction,\textsuperscript{164} and more—the right to an open courtroom during voir dire is perhaps the least likely to pass Weaver’s test.

Not so for racial discrimination in jury selection: since Batson error always causes fundamental unfairness, it merits a presumption of prejudice.

III. HABEAS IMPLICATIONS: EXCUSING PROCEDURAL DEFAULT

Federal habeas relief is exceedingly rare,\textsuperscript{165} so Part II’s proposal might make the most difference in state postconviction proceedings. Still, states’ pervasive underfunding of public defense\textsuperscript{166} and the difficulty of complying with state habeas preservation and exhaustion requirements\textsuperscript{167} means that many claims are not timely raised in state court and can only be vindicated in federal court, where they “run head-on” into habeas’s procedural default bar.\textsuperscript{168}

A habeas petitioner can overcome procedural default by showing “cause” for the failure to raise a claim in state court and “actual prejudice” suffered as a result of the claimed violation.\textsuperscript{169} The latter requirement may sound familiar.

\textsuperscript{162} Tumey v. Ohio, 273 U.S. 510, 535 (1927).
\textsuperscript{165} See Nancy J. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis, 24 FED. SENT’G REP. 308, 310 (2012) (estimating that just 0.8% of non-capital federal habeas petitioners receive relief).
\textsuperscript{168} Eve Brensike Primus, Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures, 122 YALE L.J. 2604, 2609 (2013) (“The first realistic opportunity that most defendants have to raise an ineffective assistance of counsel claim is on collateral review. However, most states do not provide defendants with the assistance of effective counsel for postconviction review. As a result, many defendants fail to preserve their ineffective assistance of trial counsel claims in state court and face procedural defaults when they attempt to challenge the effectiveness of their trial attorneys in federal habeas proceedings.”); cf. Marceau, supra note 72, at 2114 (“Procedural default is one of the most common barriers to relief in modern habeas practice.”).
This Part explores one path past procedural default: the one Martinez v. Ryan carved in 2012. Martinez permits ineffective assistance of postconviction counsel to serve as "cause" to excuse the procedural default of a "substantial" ineffective-assistance-of-trial-counsel (IATC) claim. Martinez is of particular interest here because it instructs habeas courts to prioritize fairness and pragmatism over formal procedural barriers to IAC claims. Martinez's focus on procedural fairness makes it a good candidate to recognize the absurdity of turning away habeas petitioners who cannot make the impossible demonstration that a Batson violation caused their convictions. Where Martinez supplies cause to revive a Batson-IAC claim, I argue, courts should presume actual prejudice.

* * *

Somebody seeking to challenge a state conviction must exhaust his state court remedies before turning to federal habeas. Accordingly, the federal court will refuse to consider any claim not presented to the state courts. If the state courts invoked an "independent and adequate" state procedural ground to refuse to hear a claim, the federal court considers the claim "procedurally defaulted" and refuses to hear it.

A narrow exception provides hope to habeas petitioners whose claims the state courts ignored on procedural grounds. The Supreme Court has instructed federal courts sitting in habeas to excuse procedural default—and therefore reach a claim's merits—where the petitioner shows cause and actual prejudice: roughly speaking, an external reason for the failure to timely present a claim in state court (cause), and harm suffered as a result of the underlying violation of federal law (actual prejudice). I refer to this requirement as the "Sykes standard"—embracing "Sykes cause" and "Sykes prejudice"—after Wainwright v. Sykes. This is interchangeable with the "Coleman standard," after Coleman, 501 U.S. at 722, which adopted Sykes's standard to all habeas contexts. Id. at 750.

Courts facing procedurally defaulted IAC claims on habeas often collapse the two prejudice inquiries, and as a result a similar circuit split plagues the

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170 See infra notes 216–224.
171 28 U.S.C. § 2254(b)(1); see also Rose v. Lundy, 455 U.S. 509, 510 (1982) (holding that federal habeas petitioners bringing both exhausted and unexhausted claims must either drop unexhausted claims or return to state court to assert them).
172 Coleman, 501 U.S. at 732.
173 Id. at 750.
174 Wainwright v. Sykes, 433 U.S. 72, 87 (1977). This is interchangeable with the "Coleman standard," after Coleman, 501 U.S. at 722, which adopted Sykes's standard to all habeas contexts. Id. at 750.
175 See, e.g., Ambrose v. Booker, 801 F.3d 567, 577-78 (6th Cir. 2015) (holding that a petitioner must show Strickland prejudice to excuse procedural default); Johnson v. Sherry, 586 F.3d 439, 447 n.7 (6th Cir. 2009) (collapsing the two prejudice inquiries), abrogated by Weaver v. Massachusetts,
presumption of prejudice for procedural default as for Strickland, to the extent courts recognize the issue at all.\textsuperscript{176}

But, despite the parallel language, Strickland prejudice and Sykes prejudice need not mirror each other. Strickland and Sykes prejudice are “analytically distinct.”\textsuperscript{177} They differ mainly in their origin and therefore their flexibility: one is constitutional and the other prudential.\textsuperscript{178} Whereas Strickland interprets the Sixth Amendment’s requirements, Sykes simply represents the Court’s attempt to weigh the petitioner’s interest in habeas review against respect for federalism, comity, and finality.\textsuperscript{179} These differences might help or hinder attempts to bypass procedural default. On the one hand, Sykes’s basis in federalism has led some courts to require a more convincing showing of Sykes than Strickland prejudice.\textsuperscript{180} On the other, those same prudential origins grant the Court flexibility in fashioning a fair Sykes prejudice doctrine. Because procedural default does not deprive a federal habeas court of jurisdiction,\textsuperscript{181} the procedural default question is not whether a federal court

\textsuperscript{176} Zinzer v. Iowa, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995) (“The ‘actual prejudice’ required to overcome the procedural bar must be a higher standard than the Strickland prejudice required to establish the underlying claim for ineffective assistance of counsel.”); United States v. Dale, 140 F.3d 1054, 1056 n.3 (D.C. Cir. 1998) (“It is not clear whether the showing of prejudice required to cure procedural default is identical to—or greater than—the showing required to establish ineffective assistance of counsel . . . .”); Burns, supra note 50, at 756-58 (explaining the split in the Strickland context, and noting that few courts acknowledge the potential difference). The Eighth Circuit has recognized that different panels of its court have reached different conclusions—another illustration that these distinctions often go unnoticed. See Armstrong v. Kemna, 590 F.3d 592, 606 (8th Cir. 2010).

\textsuperscript{177} Burns, supra note 50, at 748; see also Zinzer, 60 F.3d at 1299 n.7 (“We note that the ‘prejudice’ component of ‘cause and prejudice’ is analytically distinct from the Strickland prejudice we examined above.”); Jackson v. Herring, 42 F.3d 1350, 1361 (11th Cir. 1995). But see Ambrose, 801 F.3d at 578 (“The ‘actual prejudice’ inquiry [for procedural default purposes] was intended to mirror the inquiry required by Strickland . . . . “ (citations omitted)).

\textsuperscript{178} See, e.g., Drekte v. Haley, 541 U.S. 386, 392-93 (2004) (“[W]hile an adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court’s judgment, it provides only a strong prudential reason, grounded in ‘considerations of comity and concerns for the orderly administration of criminal justice,’ not to pass upon a defaulted constitutional claim presented for federal habeas review.”).

\textsuperscript{179} Strickland is flexible, too; the decision itself warned that it did not “establish mechanical rules,” and instead encouraged an “ultimate focus . . . on the fundamental fairness of the proceeding.” Strickland v. Washington, 466 U.S. 668, 696 (1984). Still, its standards define the contours of a constitutional right, while Sykes merely aims at comity and finality. See infra note 181.

\textsuperscript{180} Supra note 176.

\textsuperscript{181} See, e.g., Wainwright v. Sykes, 433 U.S. 72, 83 (1977) (noting that procedural default is “a matter of comity but not of federal power”).
sitting in habeas may hear a claim that the state court refused to hear, but whether it should.182

In *Martinez v. Ryan*, the Court exercised that flexibility to excuse the procedural default of a new class of claims. Traditionally, attorney error that does not violate the constitutional guarantee to effective counsel cannot provide cause for procedural default.183 And because the Constitution does not guarantee an attorney in postconviction proceedings, a postconviction attorney’s deficiencies cannot trigger constitutional concern and therefore cannot serve as cause.184

*Martinez* created an exception to that rule.185 *Martinez* and its progeny held that in states that require—as a legal or practical matter186—appellants to raise claims of ineffective assistance of trial counsel on collateral review rather than direct appeal, ineffective assistance of initial-review postconviction counsel can serve as “cause” to excuse procedural default that would otherwise bar federal review of a “substantial” trial IAC claim.187 *Martinez* relied on the intuition that a state should not be able to shield trial counsel’s ineffectiveness from federal review by moving ineffective-assistance claims from direct appeal (where an appellant enjoys a constitutional right to effective assistance of counsel) to postconviction proceedings (where he does not).188

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182 See, e.g., Francis v. Henderson, 425 U.S. 536, 538-39 (1976) (“There can be no question of a federal district court’s power to entertain an application for a writ of habeas corpus in a case such as this. The issue . . . goes rather to the appropriate exercise of that power.” (citation omitted)); McQuiggin v. Perkins, 569 U.S. 383, 402-03 (2013) (Scalia, J., dissenting) (“[T]he doctrine of procedural default . . . is not a statutory or jurisdictional command; rather, it is a ‘prudential’ rule grounded in considerations of comity and concerns for the orderly administration of criminal justice. And what courts have created, courts can modify.” (citations omitted)); Martinez v. Ryan, 566 U.S. 1, 13 (2013) (“The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court’s discretion.”); Dretke, 541 U.S. at 397 (Stevens, J., dissenting) (“The Court’s . . . determination in this case rests entirely on a procedural rule of its own invention. But having also invented the complex jurisprudence that requires a prisoner to establish ‘cause and prejudice’ as a basis for overcoming procedural default, the Court unquestionably has the authority to recognize a narrow exception . . . .”); cf. Burns, supra note 50, at 759 (“[T]he Supreme Court seems to suggest that in a clash, the procedural default rule ought to yield . . . [i]n justice trumps comity.”).


184 Id. at 757 (“Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman’s claims in state court cannot constitute cause to excuse the default in federal habeas.”).


186 See Trevino v. Thaler, 569 U.S. 413, 417 (2013) (extending *Martinez* to states that technically permit appellants to raise IAC claims on direct appeal, but whose “system[s] in actual operation . . . make it ‘virtually impossible’ to do so).

187 *Martinez*, 566 U.S. at 7, 9; see also Marceau, supra note 72, at 2136-37 (“The Supreme Court . . . establish[ed] an exception to Coleman: ‘Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.’”).

Martinez is susceptible to two readings and has accordingly generated a relevant circuit split. Under the first reading, Sykes prejudice effectively disappears. Under the second, it remains—but it should not, I argue, bar consideration of a Batson-IAC claim.

A. Reading No. 1: Cause Subsumes Prejudice

One interpretation—prevalent in, for instance, the Third, Fourth, Seventh, and Ninth Circuits—holds that Martinez covers both Sykes prongs: cause and actual prejudice. Where this approach prevails, no prejudice issue arises.

In these circuits, the analysis proceeds as follows. To establish cause, a petitioner must show that postconviction counsel was ineffective under Strickland's standards. This, in turn, requires demonstrating a) postconviction counsel's deficient performance; and b) a reasonable probability that, absent the deficient performance, postconviction proceedings would have reached a different result. Both of those inquiries turn on the strength of the underlying IATC claim.

Here is where these circuits' analysis diverges from the alternative: Sykes cause subsumes Sykes prejudice. To establish Sykes prejudice, the petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit." This "substantial" claim inquiry displaces the traditional prejudice inquiry.

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189 See infra notes 190–193, 202.
191 Fowler v. Joyner, 753 F.3d 446, 461 (4th Cir. 2014).
193 Ramirez v. Ryan, 937 F.3d 1230, 1241 (9th Cir. 2019), cert. granted sub nom. Shinn v. Ramirez, 141 S. Ct. 2620 (2021) (granting certiorari on a different issue); Clabourne v. Ryan, 745 F.3d 362, 377 (9th Cir. 2014), overruled on other grounds by McKinney v. Ryan, 813 F.3d 798 (9th Cir. 2016) (en banc).
194 Martinez v. Ryan, 566 U.S. 1, 14 (2015). The petitioner can also show that the state simply failed to provide him with postconviction counsel, forcing him to proceed pro se. Note that the failure to appoint postconviction counsel is not a constitutional violation. But, in Martinez's words, it "is not without consequences for the State's ability to assert a procedural default in later proceedings." Id. at 13. Regardless, this route is fairly straightforward, so I focus on the ineffective-assistance-of-postconviction-counsel route.
195 See Ramirez, 937 F.3d at 1241 (laying out this analysis); Clabourne, 745 F.3d at 377 (same).
196 Martinez, 566 U.S. at 14; accord Ramirez, 937 F.3d at 1241 ("The analysis of whether both cause and prejudice are established under Martinez will necessarily overlap, 'since each considers the strength and validity of the underlying ineffective assistance claim.'" (quoting Djerf v. Ryan, 931 F.3d 870, 880 (9th Cir. 2019))).
This Russian nesting doll of ineffectiveness bears diagramming:

The habeas labyrinth is no longer so labyrinthine. Each obstacle simply demands a different level of confidence in the IATC claim’s strength. Once a petitioner has shown that his postconviction counsel performed deficiently by omitting a meritorious IATC claim, he has necessarily shown 1) a “reasonable probability” of a successful IATC claim and 2) the existence of a “substantial” IATC claim—one with “some merit.” And, since (as I argue) Weaver instructs us to presume prejudice resulting from a failure to raise a Batson objection, the only remaining question is whether a meritorious Batson objection existed at trial—that is, whether racial discrimination infected jury selection.197

On this telling, Sykes cause subsumes Sykes prejudice. Thus the Ninth Circuit has concluded that if a petitioner has established cause under Martinez—in the form of postconviction counsel’s deficient performance and resulting prejudice—“he will necessarily have established that there is at least

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197 Though it exceeds the scope of this Comment, I assume that the failure to raise a meritorious Batson objection at trial constitutes deficient performance. See supra note 63. This may not always be true if, for instance, counsel had some strategic reason for the waiver. See Mitcham v. Davis, 103 F. Supp. 1091, 1108 (N.D. Cal. 2015). But see Parks v. Chapman, 815 F. App’x 937, 946 (6th Cir. 2020) (Donald, J., concurring in the judgment) (“[B]ecause even a strategic decision to forgo challenging the discriminatory use of a peremptory challenge nevertheless fails to provide the defendant with a fair trial, I would hold that the failure to raise a meritorious Batson challenge is outside the range of reasonable trial strategy.”). It may also not be true if the factual basis for the Batson claim emerged post-trial and therefore trial counsel could not have known its viability.
'some merit’ to his claim that he suffered ineffective assistance of trial counsel,” and he has therefore established prejudice as well.

To be sure, Martinez contains language that supports this interpretation. After Martinez lays out the formula for establishing cause, it continues: “To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one . . . .” Because “overcom[ing] the default” requires both cause and prejudice, that phrasing seems to imply that the “substantial” IATC claim alone will satisfy prejudice. Plus, the opinion says that where ineffective assistance of postconviction counsel caused the procedural default of a substantial IATC claim, procedural default “will not bar” a federal habeas court from hearing it. This language once again supports the Ninth Circuit’s interpretation.

And the Court continued its opaque language in its subsequent decision in Trevino v. Thaler, where it explained that Martinez created an exception “allowing a federal habeas court to find ‘cause,’ thereby excusing a procedural default”—implying that Martinez may disappear the Sykes prejudice requirement altogether.

B. Reading No. 2: Presuming Prejudice (Again)

But Martinez arguably lends itself more easily to a different interpretation, one that leaves the “prejudice” obstacle in a petitioner’s path. On this reading, which the Sixth Circuit has adopted, Martinez supplies cause, but says nothing about prejudice.

On its own terms, Martinez addressed the question “whether there is cause for an apparent default” and held that the petitioner could use his postconviction attorney’s ineffectiveness “to establish ‘cause.’” Even more tellingly, the Court instructed the lower court on remand to consider cause and prejudice separately: “[T]he Court of Appeals did not determine whether Martinez’s attorney in his first collateral proceeding was ineffective or

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198 Clabourne, 745 F.3d at 382.
199 Martinez, 566 U.S. at 14.
200 Id. at 17.
202 See Atkins v. Holloway, 792 F.3d 654, 660 (6th Cir. 2015) (holding that a petitioner establishes cause by demonstrating postconviction counsel’s ineffectiveness and the existence of a substantial IATC claim, and that the court may not address the claim’s merits without an additional prejudice showing); Woolbright v. Crews, 791 F.3d 628, 637 (6th Cir. 2015) (same). Judge Nguyen in the Ninth Circuit has advocated this same approach. See Detrich v. Ryan, 740 F.3d 1237, 1260-61 (9th Cir. 2013) (en banc) (Nguyen, J., concurring) (“I disagree that Martinez modifies the prejudice showings required to establish ineffective assistance of counsel under Strickland v. Washington, and to overcome a procedural default under Coleman v. Thompson.” (citations omitted)).
203 Id. at 15 (emphasis added).
204 Id. at 17.
whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.”

On this reading, a second prejudice analysis remains: the court must determine whether the petitioner was prejudiced, for Sykes purposes, by his trial counsel’s ineffective assistance—that is, by his trial counsel’s failure to object to racially discriminatory jury selection. Martinez’s substantiability requirement becomes internal to the Sykes cause analysis, and Sykes prejudice remains unchanged: the petitioner must show that “the errors at his trial . . . worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”

The key point here is that a court could logically (if not, in my view, wisely) presume that the petitioner was prejudiced for Strickland purposes—satisfying the procedural default cause prong—without indulging the same presumption for Sykes purposes—obstructing the procedural default prejudice prong. Many courts treat Strickland and Sykes prejudice identically, and a court that does so will likely either presume both—if it adopts my reading of Weaver—or presume neither, if it does not. But a court may opt to analyze the two prejudice inquiries separately.

The Sixth Circuit, for instance, followed this path in Jones v. Bell, in which it presumed Strickland prejudice for a structural error but then held that “[h]abeas petitioners must additionally show ‘actual prejudice’ to excuse their default—even if the error that served as the ‘cause’ is a structural one.” Because the Sixth Circuit “do[es] not presume actual [Sykes] prejudice even when the counsel’s error resulted in Strickland prejudice,” it excuses procedural default only if the petitioner demonstrates that, absent the structural error, “the outcome of the trial would have been different.”

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205 Id. at 18.


208 Supra notes 68 & 175.

209 Jones v. Bell, 801 F.3d 556, 563 (6th Cir. 2015).

210 Id.; see also id. at 564 (“Jones [and] . . . the district court . . . conflate Strickland prejudice with procedural-default ‘actual prejudice.’ They are distinct. And as Ambrose makes clear, a meritorious structural claim does not necessarily lead to actual prejudice to excuse procedural default. Lacking any evidence of actual prejudice, Jones has not made the requisite showing to excuse his procedural default, even if Strickland were met.”).
So Sykes prejudice presents the same problem in the federal habeas context that Strickland prejudice presented in the state postconviction context. But it is not necessarily amenable to the same solution. Weaver offered guidance in the specific IAC context, with IAC principles as a backdrop. That guidance may not transfer into the habeas context. For one, a court might reasonably conclude that considerations of comity and federalism instruct that a petitioner must make an additional showing to obtain federal habeas rather than state postconviction relief. For another, as explained above, the two contexts differ in their origin and therefore their flexibility: one is constitutional and the other prudential. This means the Court has added flexibility in determining when to excuse procedural default—flexibility that it exercised in Martinez.

Martinez embodies a proceduralist vision of habeas law, one that insists, as one commentator put it, that a petitioner “must be given one opportunity for ‘a full and fair review of his constitutional claims, either in state or federal court.’” Functional fairness, rather than formalist logic, motivated the Martinez Court, which reasoned:

When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner’s claim. . . . And if counsel’s errors in an initial-review collateral proceeding do not establish cause to

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211 At least one valiant attempt to demonstrate Sykes prejudice resulting from a racially disproportionate jury venire was rebuffed. In Ambrose v. Booker, 801 F.3d 567, 575–76 (6th Cir. 2015), the Sixth Circuit reversed a district court’s finding of actual prejudice based on the testimony of “the nation’s foremost expert in . . . the influence of race on social perception and judgment; ‘the relationship between race and legal decision-making,’ and ‘the psychology of intergroup relations and racial bias.’” The expert testified, among other things, that research demonstrated that “more diverse juries are less likely to convict” and that the presence of non-white jurors in racially charged cases can encourage white people to “be more conscious of biases and try to counteract [them].” Id. at 576 (internal quotation marks omitted). On appeal, the Sixth Circuit reversed, holding, among other things, that the expert’s testimony “relie[d] on impermissible racial stereotypes.” Id. at 579; cf. Burns, supra note 50, at 740 (“[R]equiring proof of a different outcome would entail the court doing exactly what it has forbidden the lawyers to do: making an inference about how jurors would decide a case based on their race.”).

212 Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (noting that “the two doctrines” involved in the case—structural error and ineffective assistance of counsel—“are intertwined”).

213 See, e.g., Jones, 801 F.3d at 563.

214 See supra notes 178–182.

215 Martinez v. Ryan, 566 U.S. 1, 13 (2012) (“The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court’s discretion.”).

216 Marceau, supra note 72, at 2131 (quoting Justin F. Marceau, Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudication, 62 HASTINGS L.J. 1, 8 (2010)); cf. Primus, supra note 72, at 304 (“[W]hen federal courts, including the Supreme Court, bypass procedural and substantive obstacles to review, they often cite concerns about ensuring that criminal defendants are able to have their federal claims fairly considered by at least one court.”).
excuse the procedural default in a federal habeas proceeding, no court will review the prisoner’s claims.\footnote{Martinez, 566 U.S. at 10-11; see also id. at 14 (describing the Martinez ruling as acknowledging, “as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim”).}

The Martinez Court could not countenance the idea that, as Primus has put it, “the more ineffective lawyers a state prisoner had, the less likely he was to obtain federal habeas review.”\footnote{Primus, supra note 168, at 2611.} Martinez’s central concern for procedural fairness made it the “most important case” in the Supreme Court’s 2010s “proceduralist turn” in habeas jurisprudence.\footnote{Marceau, supra note 72, at 2141 (“The final and most important case in the [proceduralist] trilogy is Martinez v. Ryan.”).}

Martinez’s proceduralism became even more evident in Trevino v. Thaler.\footnote{569 U.S. 413 (2013).} In Trevino, the Court interpreted the Martinez exception to extend to states that technically permit appellants to raise IAC claims on direct appeal, but whose “system[s] in actual operation . . . make it ‘virtually impossible’” to do so.\footnote{Id. at 417.} The Trevino Court worried that it “would create significant unfairness” to bar federal habeas review of IAC claims arising from states that channel, as a practical matter, trial IAC claims into collateral review and then provide deficient (or no) counsel in those collateral proceedings.\footnote{Id. at 425.} To one commentator, “Trevino . . . mark[ed] an unabashed reading of Martinez as endorsing the proceduralist vision of habeas that requires, at the very least, a full and fair opportunity to litigate each constitutional challenge to one’s sentence or conviction.”\footnote{Marceau, supra note 72, at 2151.} It signaled “a need to adhere to the spirit of Martinez” in the face of “formalistic limitations on the right to full and fair review.”\footnote{Id. at 2154; see also Raker, supra note 206, at 1199 (arguing that, after Martinez and Trevino, habeas’s central concern, especially with regard to procedural default, is “whether a prisoner had a meaningful opportunity to raise an issue of prosecutorial misconduct . . . before at least one court, state or federal”).}

The proceduralist arc is not an uninterrupted one, and today’s Supreme Court appears unlikely to continue it.\footnote{A pending Supreme Court case, Shinn v. Ramirez, will address additional practical implications of Martinez and will reveal much about the current Court’s attitude towards habeas proceduralism. See 141 S. Ct. 2620 (2021).} Still, even non-proceduralist cases nod to Martinez’s proceduralism. In Davila v. Davis, decided the same term as Weaver, the Court declined to extend the Martinez exception to permit
postconviction IAC to excuse a defaulted claim of appellate IAC. To some, *Davila* marked the end of habeas proceduralism. But *Davila* distinguished *Martinez* on pragmatic, proceduralist grounds. *Martinez* addressed the possibility that procedural default would insulate trial errors from review altogether, by any court. By contrast, petitioners seeking to excuse procedural default of appellate IAC claims “do not [face] the same risk.” If trial counsel preserved the issue, the trial court addressed it; and if trial counsel failed to preserve the issue, then *either* appellate counsel was not ineffective for failing to raise it (and no relief would obtain anyway) or trial counsel was ineffective for failing to raise it—in which case *Martinez* supplies cause. The *Davila* Court concluded that a new route around procedural default was “thus unnecessary for ensuring that trial errors are reviewed by at least one court.”

*Davila* could simply have said that *Martinez* represents a narrow, equitable exception to the otherwise-applicable procedural default bar, declined to extend the exception, and left it at that. Instead, the Court felt compelled to justify its reasoning in proceduralist terms. And, of course, this Comment addresses the situation in which a trial error—the deficient failure to object to racial discrimination in jury selection—has not been addressed by any court. *Martinez*, then, instructs that federal courts should not marshal procedural default to block substantial claims of trial IAC where those claims have not yet been presented to any court. Many petitioners find themselves in that precise situation: having failed to raise trial IAC on collateral review, the

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227 Marceau had warned, pre-*Davila*, that such a decision would undermine *Martinez’s* “procedural preoccupation with ensuring a minimally full state process.” Marceau, supra note 72, at 2156. Marceau identified a 2013 Sixth Circuit case, *Hodges v. Colson*, which reached the same conclusion as *Davila*. Id. at 2155. Marceau worried that because its reasoning privileged trial counsel’s innocence-protecting function over appellate counsel’s fairness-protecting function, the decision, if adopted broadly, would forfeit “the most promising guarantee of a procedural fairness orientation in federal habeas” for “a continued preoccupation with innocence.” Id. at 2158; see *Hodges* v. *Colson*, 711 F.3d 589, 602 (6th Cir. 2013). Writing for the Court in *Davila*, Justice Thomas espoused precisely the sort of trial IAC exceptionalism against which Marceau warned, explaining that “[t]he criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not.” *Davila*, 137 S. Ct. at 2066.
228 *Davila*, 137 S. Ct. at 2067.
229 Id.
231 *Davila*, 137 S. Ct. at 2068.
232 *Davila* is emphatically an anti-proceduralist decision. It places enormous faith in trial judges’ split-second legal decisions. See id. at 2073 (Breyer, J., dissenting). Still, its procedural distinctions are significant.
Where the petitioner can mount a “substantial” case that trial counsel was ineffective, Martinez sweeps aside the cause barrier. But the prejudice barrier remains, and it is, if interpreted as requiring “actual prejudice,” impenetrable.

Let us recap what the petitioner has shown to reach this point, assuming a world that has adopted my proposed reading of Weaver for Strickland purposes. To establish cause, the petitioner has made a “substantial” case that his trial counsel provided constitutionally ineffective assistance under Strickland—that is, trial counsel performed deficiently by failing to raise a meritorious Batson objection and, per Part II, presumptively prejudiced the petitioner by doing so. The remaining question before reaching the merits is whether to demand the impossible prejudice showing for procedural default purposes, despite waiving it for IAC purposes. The equitable concerns of Martinez and Trevino counsel against that insistence.

Up to this point in the case, no court has addressed the constitutional question: did racial discrimination infect jury selection? For the proceduralist, that is unacceptable. The thrust of Martinez is that courts should not marshal procedural default to make redemption of fundamental trial rights practically impossible. That is what requiring Sykes prejudice would do. Having allowed Part II’s prejudice presumption to satisfy cause, a federal habeas court should not turn around and demand an impossible Sykes prejudice showing before it will consider remedying a violation that caused fundamental unfairness.

C. Objections: Habeas Exceptionalism

The Supreme Court has already, explicitly, refused to presume procedural default prejudice arising from Batson-type errors. In Francis v. Henderson, the Supreme Court determined that a federal court should not hear a claim

233 And since Martinez and Trevino apply not only to ineffective counsel but also to no counsel, the group includes the many federal petitioners who litigated their state postconviction proceedings pro se. See Martinez, 566 U.S. at 14; Marceau, supra note 72, at 2143 n.343 (“[A]rguments that a procedural default should be excused under Martinez are no less strong if the failure to litigate a claim can be attributed to the state’s failure to appoint counsel, as opposed to the ineffectiveness of counsel.”).

234 See supra notes 65 & 197.

235 He has also shown that postconviction counsel was ineffective for failing to raise the IATC claim, but that is tangential to this point.

236 Recall that showing “cause” in this scenario involves proving ineffective assistance of trial counsel, which Part II addressed. See supra Part II.

similar to the one I raise here—exclusion of Black jurors from a grand jury—absent a showing of cause and prejudice.238

The context in which Francis arose helps us understand its inapplicability here, where the claim arises via IAC. The Supreme Court decided Francis a year before Wainwright v. Sykes, in which it abandoned Fay v. Noia’s “deliberate[] bypass[]”239 default excuse in favor of the much less forgiving “cause and actual prejudice” standard.240 As Robert Cover and T. Alexander Aleinikoff outline, Francis therefore emerged during a fundamental shift in the Court’s thinking about procedural default.241 Indeed, Justice Brennan—author and firm proponent of Fay—dissented in Francis, denouncing the shift it portended: “I, for one, do not relish the prospect of being informed several Terms from now that the Court overruled Fay this Term . . . .”242

Where Fay viewed the criminal defendant as an autonomous actor who retains his constitutional rights absent intelligent waiver, the Court in Sykes came to view him as responsible for his lawyer’s mistakes. But this shift posits “a combative, adversary criminal system with defendant and prosecutor competently representing their respective positions.”243 When counsel provides inadequate representation and therefore the “requisites of the system”244 are absent, Sykes’s justification falls apart. Attorney performance that falls short of the constitutional minimum is “imputed” to the state rather than the defendant.245 And where the state bears the blame for failing to provide constitutionally adequate counsel, the prudential considerations underpinning the cause and prejudice standard—that it would be “unseemly” for the federal court to disrespect state court process246—diminish. For similar reasons, courts permit federal habeas review of IAC claims where they would not have permitted habeas review of the underlying claim.247 Martinez

240 Sykes, 433 U.S. at 87 (internal quotation marks omitted).
241 Cover & Aleinikoff, supra note 238, at 1072-80.
242 Francis, 425 U.S. at 547 (Brennan, J., dissenting).
243 Cover & Aleinikoff, supra note 238, at 1078; see also id. at 1079 (“Crucial to the functioning of this process is the provision of defendant with adequate counsel.”).
244 Id. at 1080.
246 Coleman, 501 U.S. at 731.
247 See Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) (holding that IAC claims for failure to object to a Fourth Amendment violation are cognizable on federal habeas review, even though Fourth Amendment claims themselves are not, because “the two claims have separate identities and reflect different constitutional values.”).
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itself recognized this distinction: “A prisoner’s inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel.”

That insight relates to the broader objection that meets nearly every expansion of habeas availability: habeas exceptionalism. A not-uncommon view of federal habeas doctrine holds that habeas relief should be exceedingly uncommon and must be more difficult to obtain than state court relief. Extending the prejudice presumption to procedural default does the opposite: it removes a barrier to habeas relief and equalizes the type of review a state court would have performed (had it not refused) with the type of review a federal habeas court performs. Especially offensive, a federal court will address the claims at issue here de novo, rather than through the restrictive § 2254(d) (“AEDPA deference”) prism, because no state court has addressed them on the merits. The simplicity of the collapsed prejudice analyses will thus repel rather than attract some courts and commentators.

But Martinez stands for the proposition that states cannot shield their constitutional violations from state court review and then enjoy federal deference in the form of procedural default. In our hypothetical case, the state: discriminated by race in jury selection; provided inadequate counsel that failed to object to such discrimination; and provided no or inadequate postconviction counsel that failed to argue trial IAC for that failure. These errors rest with the state, not the petitioner. It is an unattractive system in

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249 See, e.g., Harrington v. Richter, 562 U.S. 86, 102 (2011) (“Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” (internal quotation marks omitted)); Brecht v. Abrahamson, 507 U.S. 619, 633-34 (1993) (“The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. . . . In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, ‘a bulwark against convictions that violate fundamental fairness.’” (internal quotation marks omitted) (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982))). This objection may be especially vociferous given the federalism implications of procedural default. See, e.g., Murray, 477 U.S. at 487 (“[T]he costs of federal habeas review ‘are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts.’” (quoting Engle, 456 U.S. at 128)).
250 28 U.S.C. § 2254(d); see Primus, supra note 72, at 314, 316 (explaining this feature); Marceau, supra note 72, at 2143 (same); see also, e.g., Quintero v. Bell, 256 F.3d 409, 412 (6th Cir. 2001) (reviewing a procedurally defaulted claim de novo because the state court did not address it on the merits); Mitcham v. Davis, 103 F. Supp. 1091, 1100 (N.D. Cal. 2015) (same).
251 Primus, supra note 168, at 2612 (“Justice Kennedy . . . was clearly concerned about precluding federal review of ineffective assistance of trial counsel claims when the state itself had created a procedural system that effectively prevented defendants from having an opportunity to raise the claims in state court.”).
which "the more ineffective lawyers a state prisoner [has], the less likely he [is] to obtain federal habeas review." 252

A third, related objection worries that equalizing the state-federal playing field encourages sandbagging. 253 Petitioners in state postconviction proceedings, the theory goes, will opt to reserve Batson-IAC claims rather than present them to the state postconviction court to avoid AEDPA deference in federal court. 254 Indeed, this concern played a major role in the Francis decision. 255

Even setting aside general skepticism about the prevalence of sandbagging, 256 the objection carries little weight. Since the state and federal courts would perform the same analysis, the petitioner gains no advantage from reserving the claim unless we posit—as federal courts are surely unwilling to do 257—that state courts do not engage in a good faith effort to vindicate constitutional rights. If they do not, federal habeas review only becomes more essential. 258 Besides, because an attorney’s strategic decisions can almost never provide a basis for a finding of deficient performance, 259 the strategic refusal—rather than incompetent failure—to raise a Batson claim at trial or a Batson-IAC claim on state postconviction review would likely

252 Primus, supra note 168, at 2610-11; cf. Mitchell v. Genovese, 974 F.3d 638, 647 (6th Cir. 2020) ("Martinez is an equitable decision meant to relieve habeas petitioners who . . . are unable to present their merits contentions to any court because they received two constitutionally inadequate lawyers in a row.").
254 See supra note 250.
256 See, e.g., O’Bryant, supra note 167, at 306 ("In all of the time that I have been incarcerated and been a jailhouse lawyer, I have never witnessed a situation in which a pro se prisoner wished to delay his post-conviction remedies. Those of us who are incarcerated and pursuing such proceedings are doing so because we wish to be free. Intentionally or needlessly delaying the pursuit of these remedies would be illogical and contrary to the reason we file the petitions in the first place.").
258 See Brecht v. Abrahamson, 507 U.S. 619, 636 (1993) ("Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner’s argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.").
preclude a claim on federal habeas review anyway. That is, the IAC standard already accounts for sandbagging; there is no need to fend it off twice over. Accordingly, the Ninth Circuit has explained that “[t]here is no concern about competent defense counsel who might ‘sandbag’ at trial” in the Martinez situation because “the premise of Martinez . . . is two incompetent counsel—trial counsel and state [postconviction] counsel.”

CONCLUSION

Weaver arguably redefined the IAC landscape and allowed victims of Batson violations to avoid an impossible showing. But another impossible showing meets federal habeas petitioners whose claims defaulted in state court. To achieve Martinez’s promise, courts should extend Weaver’s presumption of prejudice to the procedural default context.

Is Batson different? Would my argument sweep aside procedural default’s prejudice requirement on habeas review of any claim implicating structural error? We only reach the untenable situation where Sykes prejudice, and Sykes prejudice alone, bars federal habeas review of an otherwise reviewable claim if we apply Weaver to Batson in the way I propose. I have mounted an argument that Batson error results in fundamental unfairness in every case. The same may or may not be true for any number of other structural errors, and other similar arguments are no doubt worthwhile projects. Indeed, Susan Yorke recently argued the same with regard to coercive anti-jury nullification instructions. So did a magistrate judge in the Eastern District of Pennsylvania with regard to a faulty reasonable-doubt instruction.

The thrust of Part III is that where those arguments succeed, they should extend into habeas. That is, where a structural error merits a presumption of Strickland prejudice, it merits the same for Sykes prejudice. However, the case for extending the presumption into habeas is especially strong with regard to Batson. The jury instruction cases posed by Yorke and Magistrate Judge Hey involve instructions that the trial court necessarily considered—since it gave them to the jury—even if trial counsel failed to object. By contrast, no court has considered an unraised Batson claim. Further, Batson’s harmlessness paradox is unique. Batson-IAC claims thus lie at Martinez’s core: they involve an impossible-to-surmount procedural obstacle to federal court review of a meritorious claim that no court has considered.

260 Detrich v. Ryan, 740 F.3d 1237, 1244 (9th Cir. 2013) (en banc) (plurality opinion).
263 For a discussion of the Batson paradox, see supra notes 120–123 and accompanying text.
“[T]he central mission of the Great Writ should be the substance of ‘justice,’ not the form of procedures.”264 The writ has lost its way more than a few times. It could take one small but not insignificant step towards justice by declining to demand the impossible.