

University of Colorado Law School

Colorado Law Scholarly Commons

Publications

Colorado Law Faculty Scholarship

2001

Jury Selection Errors on Appeal

William T. Pizzi

University of Colorado Law School

Morris B. Hoffman

State of Colorado, Second Judicial District (Denver)

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Courts Commons](#), and the [Criminal Procedure Commons](#)

Citation Information

William T. Pizzi and Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391 (2001), available at <https://scholar.law.colorado.edu/faculty-articles/582>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

HEINONLINE

Citation: 38 Am. Crim. L. Rev. 1391 2001

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Mon May 22 17:34:39 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

JURY SELECTION ERRORS ON APPEAL

William T. Pizzi* and Morris B. Hoffman**

I. INTRODUCTION

Claims that errors were made during jury selection are among the most common of all grounds for criminal appeals.¹ Yet appellate courts, both state and federal, seem profoundly confused about how to analyze these kinds of errors. The confusion has its roots in a defendant's ability to cure most jury selection errors with the use of a peremptory challenge, and the resulting question of whether the price of such a cure—the loss of a peremptory challenge—is itself an injury requiring reversal.

Consider, for example, two state court cases that reached opposite conclusions about errors that led to the loss of a defendant's peremptory challenge. The first case is from Vermont, where John Doleszny was charged with sexual assault on a victim under sixteen.² During jury selection, a prospective juror disclosed that he was acquainted with one of the prosecution witnesses, a doctor who had examined the alleged victim after the assault. When asked if he could be impartial in evaluating the testimony of the doctor, the prospective juror replied, "I certainly could try to be impartial but I'm not saying that I could."³ The prosecution was unable to rehabilitate this response.⁴

Despite the prospective juror's inability to assure the trial judge that he could be impartial, the judge erroneously denied Mr. Doleszny's challenge for cause. Mr.

* B.A. Holy Cross; M.A. University of Massachusetts; J.D. Harvard. Professor of Law and Byron White Center Fellow, University of Colorado School of Law. I would like to thank my research assistant, Matthew D. Grove, who was tremendously helpful on the research in this article.

** B.A. University of Colorado; J.D. University of Colorado School of Law. District Judge, State of Colorado, Second Judicial District (Denver). I would like to thank my law clerks, Catherine A. Woods and Christian H. Hendrickson, for their invaluable contributions to some of the research in this article. The views I express here are of course my own, and do not necessarily reflect the views of the District Court for the Second Judicial District or any of my colleagues on that Court.

1. Because virtually all criminal cases are tried to juries, virtually all criminal cases that result in convictions have the potential to generate a jury selection issue on appeal. Moreover, the rate at which criminal convictions are appealed is roughly 100%. See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGIS. STUD. 379, 421 n.80 (1995). The ubiquity of jury selection issues in appeals is thus not surprising. See JOY CHAPPER & ROGER HANSON, *UNDERSTANDING CRIMINAL APPEALS* 32 (1989) (finding jury selection errors the eighth most common error in criminal appeals).

2. *State v. Doleszny*, 508 A.2d 693 (Vt. 1986).

3. *Id.* at 694.

4. At least there is nothing in the opinion of the Vermont Supreme Court indicating the juror was rehabilitated. Cf. *State v. Grega*, 721 A.2d 445, 481 (Vt. 1992) (noting rehabilitation took place after juror disclosed she knew and respected physician-witness and would be upset if someone said he did anything wrong, yet later said she would not hold such criticism against defendant or prosecution and could listen to both sides).

Doleszny was then forced to use a peremptory challenge to remove the prospective juror. Since Mr. Doleszny eventually exhausted his peremptory challenges, he was in effect deprived of one peremptory challenge as a result of the trial judge's erroneous denial of his challenge for cause.

On appeal, the Vermont Supreme Court reversed the conviction and remanded for a new trial. Such an error, said the court, is automatic reversible error.⁵ There are many jurisdictions that analyze these kinds of errors the same way: if the defense lost a peremptory challenge as a result of the judge's error, the conviction is automatically reversed without further inquiry.⁶

But other jurisdictions would apply a harmless error analysis to the same error.⁷ One example is a case from Idaho, where Eric Ramos was charged with two counts of lewd conduct with minors.⁸ During jury selection, a prospective juror expressed

5. In the introductory portions of this article, we use the phrase "automatic reversible error" to describe an error that demands reversal of a criminal conviction without any inquiry into the actual impact of the error on the reliability of the truth-finding process. As described in greater detail in *infra* text accompanying notes 139-80, courts and commentators have used several synonyms to describe this sort of error, including "per se reversible error" and, most recently, "structural error."

6. See *e.g.*, *State v. Sexton*, 787 P.2d 1097, 1099 (Ariz. 1989) (finding defendant's right to peremptory challenges "so substantial that forcing a party to use a peremptory challenge to strike potential jurors who should have been stricken for cause denies the litigant a substantial right"); *People v. Macrander*, 828 P.2d 234, 236 (Colo. 1992) (finding prejudicial error occurred where trial court failed to strike a potential juror who was related to an attorney of record and defendant was forced to use a peremptory challenge to remove the juror); *People v. Scott*, 566 N.Y.S.2d 399, 400 (N.Y. App. Div. 1991) (finding new trial necessary where the trial court erred in failing to remove a juror for cause and defendant exhausted his peremptory challenges). For the federal courts, the Supreme Court may have resolved the issue in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), which we discuss extensively later in this article. See *infra* notes 49-65 and accompanying text. Before *Martinez-Salazar*, several federal circuits held that jury selection error resulting in a defendant's loss of a peremptory challenge was automatically reversible. See, *e.g.*, *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998) ("The denial or impairment of the right to exercise peremptory challenges is reversible error without a showing of prejudice.") (citation omitted); *United States v. Cambara*, 902 F.2d 144, 148 (1st Cir. 1990) ("[I]t is true that restricting a defendant's use of the lawful number of peremptory challenges is reversible error if a challenge for cause is erroneously denied.")

7. See, *e.g.*, *Pickens v. State*, 783 S.W.2d 341, 345 (Ark. 1990) (finding loss of peremptory challenges not to be reversible error); *People v. Pride*, 833 P.2d 643, 663 (Cal. 1992) (finding no basis for reversal where defendant fails to prove the trial court erroneously denied any challenges for cause); *State v. Pelletier*, 552 A.2d 805, 810 (Conn. 1989) (finding defendant unharmed because he was not forced to accept any juror or alternate whom he requested to be removed for cause); *State v. Barlow*, 541 N.W.2d 309, 311-13 (Minn. 1995) ("[T]he necessity to exercise a peremptory challenge to strike a juror whom the trial court has erroneously refused to remove for cause does not deprive the defendant of a fair trial."); *State v. Lindell*, 629 N.W.2d 223, 251 (Wis. 2001) *overruling* *State v. Ramos*, 564 N.W.2d 328 (Wis. 1997) ("The substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a circuit court error."). In the federal courts, there were several circuits, even before *Martinez-Salazar*, that applied a harmless error analysis to these kinds of errors. See, *e.g.*, *United States v. Brooks*, 161 F.3d 1240, 1245-46 (10th Cir. 1998) (finding trial court's erroneous failure to remove a juror for cause harmless error where defendant has not alleged that any of the jurors actually seated were biased); *United States v. Farmer*, 923 F.2d 1557, 1566 (11th Cir. 1995) (rejecting "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury") (citation omitted).

8. *State v. Ramos*, 808 P.2d 1313 (Idaho 1991).

his belief that the defendant “must have done something” to be on trial.⁹ As in *Doleszny*, the prosecution was unable to rehabilitate this prospective juror.¹⁰ When the trial judge refused to remove him for cause, Mr. Ramos used a peremptory challenge to remove the putative juror and eventually exhausted his peremptory challenges.¹¹

Instead of stopping at the cause error itself and simply reversing, the Idaho Supreme Court examined the impact of the error on Mr. Ramos’ trial, specifically, whether there was anything wrong with the jury that had convicted him. Because Mr. Ramos removed the biased juror with one of his peremptory challenges and there was no evidence that the jury that convicted him had not been fair and impartial, the Idaho Supreme Court concluded that Mr. Ramos had not been prejudiced by the trial judge’s erroneous cause ruling and affirmed the conviction.¹²

These two cases represent two very different approaches to a very common problem. While the cases often involve erroneous denials of a defense challenge for cause, as in *Doleszny* and *Ramos*, there are many other situations in which a variant of the same problem commonly arises. For example, when a trial judge erroneously grants a prosecution challenge for cause and the prosecution exhausts all of its peremptory challenges, that error has the effect of giving the prosecution an additional peremptory challenge. Like *Doleszny* and *Ramos*, defendants in such cases suffer an imbalance in peremptory challenges, although the source of the imbalance is that the prosecution received more peremptory challenges rather than that the defendant received fewer. Is such an error automatically reversible, or could it be harmless?

In this article, we begin by reviewing the Supreme Court’s three opinions in the area of “curative peremptory challenges,” including its most recent pronouncement in *United States v. Martinez-Salazar*.¹³ We then discuss the historical relationship between challenges for cause and peremptory challenges, arguing that peremptory challenges have always had a curative purpose. Drawing on that history and on the evolution of the doctrine of harmless error, we break down the types and permutations of these kinds of jury selection errors into six different

9. Actually, three prospective jurors initially expressed the belief that Mr. Ramos must have done something by virtue of the fact he was on trial. *Id.* at 1314. Two were excused on defense challenges for cause, but the trial judge denied the challenge for cause as to the third. *Id.*

10. Or more precisely, there was no indication in the opinion of any rehabilitation.

11. 808 P.2d. at 1314.

12. As the Idaho Supreme Court put it:

Ramos made no showing in his motion for new trial that he was prejudiced by being required to use a peremptory challenge to remove [the juror]. Ramos has not demonstrated, nor has he even suggested, that any of the other jurors remaining on the panel were not impartial or were biased. Thus, if there was any error, it was harmless.

Id. at 1315.

13. 528 U.S. 304 (2000).

scenarios.¹⁴ We argue that in each of the six scenarios the resulting imbalance in peremptory challenges should not result in reversals, both because the error is harmless and, at least in some of the scenarios, because the defendant should be deemed to have waived the error.¹⁵

14. See *infra* notes 205-06 and accompanying text. In addition to errors in rulings on challenges for cause, there is of course a second basic kind of jury selection error—error in a trial court’s application of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court has never squarely addressed the issue, but it has suggested in various cases, including *Batson* itself, that *Batson* error is per se reversible. See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Batson*, 476 U.S. at 100 (“If the trial court decides that the facts establish prima facie discrimination and the prosecutor does not come forward with a neutral explanation of his actions, our precedents require that Petitioner’s conviction be reversed.”). Perhaps because of these strong signals from the Supreme Court, lower federal courts have uniformly held that *Batson* error is per se reversible. See, e.g., *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998); *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998); *Tankleff v. Senkowski*, 135 F.3d 235, 238 (2d Cir. 1998); *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997); *United States v. Annigoni*, 96 F.3d 1132, 1143 (9th Cir. 1996); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *Ramseur v. Beyer*, 983 F.2d 1215, 1225-26 (3d Cir. 1992).

The state courts, however, are split on this issue. Compare *K.S. v. Carr*, 618 So.2d 707, 712 (Ala. 1993) and *State v. Pharris*, 846 P.2d 454, 459 (Utah Ct. App. 1993) (*Batson* error reversible per se) with *Seubert v. State*, 749 S.W.2d 585, 588 (Tex. Crim. App. 1988) (*Batson* subject to harmless error analysis), *rev’d on other grounds*, 787 S.W.2d 688 (Tex. 1990).

Professor Muller has suggested on the one hand that the Supreme Court’s hints about this issue are far from obvious—for example, in *Allen v. Hardy*, 478 U.S. 255 (1986), the Court held that *Batson* is not retroactive, in part because it only has marginal bearing on the truth-finding function in individual cases, compared to its primary purpose of strengthening public confidence in the system. Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 121-24 (1996). On the other hand, Professor Muller concludes that the Sixth Amendment implications of a *Batson* error justify classifying it as per se reversible. *Id.* at 97-107, 149-50; see also Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807 (1993) (arguing that *Batson* error is not properly amenable to harmless error analysis because *Batson* implicates a bundle of rights that go far beyond the reliability of the outcome in a particular case).

Whether *Batson* error should be per se reversible or should be subject to harmless error analysis, or indeed whether *Batson* itself should be reconsidered, is beyond the scope of this article. But it is important to recognize that the adoption of a *Batson* per se rule does not compel a per se rule for the jury selection errors we discuss in this article. Even if we concede both Professor Muller’s point—that *Batson* in fact protects a defendant’s case-specific right to an impartial jury and therefore has everything to do with the reliability of the case outcome—and Professor Herman’s point—that *Batson* implicates a wide range of institutional issues going well beyond the reliability of a particular case—neither observation applies to errors that simply result in a small imbalance of peremptory challenges. This is so, as discussed below in *infra* text accompanying notes 217-28, because the loss of a peremptory challenge, as opposed, arguably, to the discriminatory use of peremptory challenges, has little to do with the impartiality of juries and therefore little to do with the reliability of trial outcomes.

15. See *infra* notes 210-33 and accompanying text. Although the problem of the curative use of peremptory challenges has been the subject of many judicial opinions in state and federal courts, we have found only one law review article written on the topic: William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49 (1999). Mr. Childs’ article was written while the Court’s decision in *Martinez-Salazar* was pending, and he urged the Court to hold that the impairment of peremptory challenges is a per se violation of a criminal defendant’s rights to due process, at least in federal courts. *Id.* at 52, 75-79. Of course, we disagree with Mr. Childs’ analysis, and believe that he seriously overvalues the historical and practical importance of peremptory challenges, undervalues their mischievousness, and ignores the Court’s unmistakable movement toward reliability as the measure of harmlessness.

This article is limited to a discussion of the problem of curative peremptory challenges in criminal cases. But a similar problem exists in civil cases. Civil litigants, like criminal defendants, are entitled to impartial jurors, to

II. AN UNCERTAIN SUPREME COURT: THE ABOUT FACE FROM *GRAY V. MISSISSIPPI* TO *ROSS V. OKLAHOMA*

A. *Gray v. Mississippi*

The Supreme Court has not tackled the problem of curative peremptory challenges very often, and on those few occasions when it has addressed the issue it has not given very clear guidance. Its initial foray was in a 1987 state death penalty case, *Gray v. Mississippi*.¹⁶ In that case, the trial judge erroneously removed a prospective juror for cause on the prosecution's motion.¹⁷ The Mississippi Supreme Court affirmed the conviction and death sentence, despite numerous irregularities in the jury selection,¹⁸ concluding that any cause error that

peremptory challenges, to the protections of *Batson* and in general to have their civil jury trials conducted in accordance with the minimum standards of fairness imbedded in the due process clause. They are also subject to the doctrines of harmless error and waiver. Indeed, there are a handful of reported cases discussing the problem of curative peremptory challenges in a civil context, and reaching conflicting conclusions about whether there is reversible error. Compare *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162 (3rd Cir. 1995) (reversing civil judgment when litigant forced to expend peremptory challenge to cure trial judge's error in denying challenge for cause) with *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1123 (10th Cir. 1995) (affirming civil judgment despite fact that litigant forced to expend peremptory challenge to cure trial judge's error in denying challenge for cause). We limit our inquiry in this article to the criminal side because the problem of the curative use of peremptory challenges in a criminal case is in many ways more difficult than in a civil case. The notion of harmless error in civil cases is much broader—that is, more forgiving—than in criminal cases, and more “process” is generally “due” to a criminal defendant than a civil litigant. As a result, the problem of curative peremptory challenges in a criminal case presents significantly starker issues about the role of peremptory challenges and the extent to which their impairment justifies reversing trial outcomes. If, as we argue in this article, criminal convictions should not be reversed when a defendant's peremptory challenges are impaired by a cause error, then it necessarily follows that civil judgments should not be reversed in similar circumstances.

16. 481 U.S. 648 (1987).

17. Although the record in *Gray* was not terribly clear, what was clear is that the beleaguered trial judge committed a cacophony of jury selection errors at almost every opportunity. During the death qualification of the jury, four or five of the panel members expressed doubts about whether they could ever impose the death penalty, and the prosecution challenged these prospective jurors for cause. *Id.* at 652–54. Under *Wainwright v. Witt*, 391 U.S. 510 (1968), and *Witherspoon v. Illinois*, 469 U.S. 412 (1985), the trial judge should have inquired further of those jurors to determine whether they should in fact have been removed for cause, although there are also hints in the record that some of them may have been feigning concerns about the death penalty to avoid jury service. *Gray*, 481 U.S. at 652–53. In any event, neither counsel nor the trial judge pressed these jurors on their views about the death penalty. Instead, the prosecutor simply used peremptory challenges to remove them. A new prospective juror was then called into the jury box, whom the prosecutor ultimately decided to strike peremptorily, but by then, the prosecutor had exhausted his peremptory challenges. The trial judge seemed to accept some responsibility for the situation, suggesting that he had not excused the earlier prospective jurors for cause because he had wrongly assumed that the prosecutor had plenty of peremptory challenges left. *Id.* In an apparent effort to undo the damage of his earlier failures, the judge struck the juror in question for cause, even though her answers were not a sufficient basis for a challenge for cause under *Witherspoon-Witt*. *Id.* at 654–55.

18. The trial judge's performance in *Gray* is a good advertisement for the superiority of the so-called “strike” method of exercising peremptory challenges over the so-called “sequential” or “jury box” method. Under the “strike” method, prospective jurors are called to an expanded box equal in number to the number of all regular jurors, alternates and total peremptory challenges. These prospective jurors are then examined, and challenges for cause are made and ruled upon. If a challenged juror is removed for cause, a replacement is called up to the expanded box, questioned and challenged for cause if appropriate. Only after all the jurors in the expanded box

may have resulted in an unwarranted increase in the number of prosecution peremptory challenges was harmless.¹⁹

The United States Supreme Court reversed, rejecting the prosecution's harmless error argument. Although the prosecution insisted that it would have peremptorily struck the last prospective juror if it had had any peremptory challenges left, the Court noted that the timing of a trial judge's error in a particular case could very well affect the prosecution's complex strategic decisions about when and on whom to expend its remaining peremptory challenges.²⁰ The Court concluded that the "unexercised peremptory argument" that underlay the prosecution's harmless error contention mischaracterized the nature of the error. It framed the question as being not whether a cause error resulted in the erroneous exclusion of a particular prospective juror, but rather whether "the composition of the jury panel as a whole could *possibly* have been affected by the trial court's error."²¹ It concluded that it could not say that the cause errors suffered by Mr. Gray could not have "possibly" affected the composition of the jury as a whole, and it therefore held that the error was automatically reversible.²² Interestingly, the Court reversed only Mr. Gray's death sentence, not his conviction.

Gray seemed like powerful support for the notion that virtually all jury selection errors should be automatically reversed. If the Court will reverse any conviction where the composition of the jury panel "could *possibly* have been affected by the trial court's error,"²³ then there is a far stronger argument for automatic reversal in cases like *Doleszny* and *Ramos*, where there is no doubt that the composition of the actual juries would have been different had the defense not lost a peremptory challenge due to the trial judge's cause error.

Gray was a strong opinion, but the Court was badly split. Four dissenters argued that the problem jurors should have been excluded in any event, and thus that the

have survived challenges for cause do the parties then exercise their peremptory challenges. By contrast, under the "sequential" or "jury box" method, only enough jurors are called to the box to accommodate the number of regular jurors and alternates. These jurors are then questioned, challenged for cause and then peremptorily challenged, juror-by-juror. That is, if a prospective juror survives challenges for cause, the parties must then decide whether to accept that prospective juror or exercise a peremptory challenge. For a good description of these two methods see Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. CRIM. & CONST. L. REV. 227, 244-56 (1986) and Leonard B. Sand, *Batson and Jury Selection Revisited*, 22 LITIG. 3, 3-4 (1996). The errors in *Gray*, of course, were profoundly compounded because the trial judge used the traditional "sequential" method for peremptory challenges, hopelessly and seamlessly interlacing his decisions on challenges for cause with the parties' exercise of peremptory challenges.

19. *Gray v. State*, 472 So.2d 409, 423 (Miss. 1985). The Mississippi Supreme Court's decision was even less clear than the trial court record. The United States Supreme Court was forced to engage in the rather remarkable exercise of guessing the basis for the Mississippi Supreme Court's decision. The Court divined that the Mississippi Supreme Court's opinion was susceptible to three very different interpretations, and proceeded to address each of them. 481 U.S. at 661-62.

20. 481 U.S. at 661-62.

21. *Id.*

22. *Id.* at 668.

23. *Id.* at 665.

error would not have affected the composition of the jury even under the majority's expansive recognition of systemic jury selection errors and its low "possibility" threshold.²⁴ Perhaps because the Court was so deeply divided, it undertook the rather remarkable step of reexamining the issue less than a year later, in *Ross v. Oklahoma*.²⁵

B. *Ross v. Oklahoma*

Ross was another death penalty case. Unlike in *Gray*, however, where the imbalance in peremptory challenges was the result of the trial judge erroneously excluding qualified jurors, the peremptory imbalance in *Ross* arose from the trial judge erroneously failing to exclude a disqualified juror. Specifically, the trial judge in *Ross* failed to apply *Witherspoon-Witt* to excuse a prospective juror who expressed disqualifying *pro*-death penalty views. The prospective juror in question indicated during voir dire that if the jury found the defendant guilty he would automatically vote to impose the death penalty regardless of any mitigating factors.²⁶ This sort of reverse *Witherspoon-Witt* attitude entitled the defense to remove the prospective juror for cause.²⁷ When the trial court erroneously denied Mr. Ross's challenge for cause, he was forced to use one of his peremptory challenges to remove the *pro*-death penalty juror. He eventually exhausted his peremptory challenges. Thus, as in *Doleszny* and *Ramos*, the effect of this error was that the defense ended up with one fewer peremptory challenge than guaranteed by state law.²⁸

The dissenters in *Gray*, now a majority with the loss of Justice Powell and the addition of Justice Kennedy, declined to apply *Gray*'s automatic reversal rule. Instead, the Court announced that "the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved."²⁹ *Gray*, said the new *Ross* majority, must be limited to its context and applied only to the erroneous *exclusion* of a qualified juror in a capital case, not to the erroneous *inclusion* of a disqualified juror in a capital case who is later peremptorily excused.³⁰

Freed from the automatic reversal rule of *Gray*, the *Ross* Court proceeded to fashion a rather startling syllogism to conclude that Mr. Ross suffered no error at

24. *Id.* at 672–80 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and O'Connor, JJ.).

25. 487 U.S. 81 (1988).

26. *Id.* at 83–84

27. Most courts applied *Witherspoon-Witt* symmetrically, to disqualify not only inappropriately adamant anti-death penalty jurors but also inappropriately adamant *pro*-death penalty jurors. The Court formally adopted this view in *Morgan v. Illinois*, 504 U.S. 719 (1992).

28. Under Oklahoma law, a capital defendant like Mr. Ross was entitled to nine peremptory challenges. OKLA. STAT. tit. 22, § 655 (1981).

29. 487 U.S. at 87–88.

30. *Id.*

all, let alone reversible error. It began by noting that under Oklahoma law, as in virtually all other states,³¹ a defendant waives the right to argue that a trial judge erroneously denied a defense challenge for cause if the defendant fails to use an available peremptory challenge to remove the erroneously retained juror.³² From this waiver rule, the Court reasoned that Oklahoma intended that the nine peremptory challenges it chose to give capital criminal defendants necessarily include any peremptory challenges that a defendant might have to use curatively.³³ Thus, it concluded that Mr. Ross “received all [the peremptory challenges] that Oklahoma law allowed him,”³⁴ and therefore that there was no error at all in the manner Mr. Ross’s jury was selected, let alone reversible error.

The four-justice remnant of the *Gray* majority filed a vociferous dissent in *Ross*, accusing the majority of “unaccountably” departing from the one-year precedent of *Gray*.³⁵ It argued that Mr. Ross suffered an even more direct injury to his “right” to peremptory challenges than did Mr. Gray. The imbalance in peremptory challenges in *Ross* was caused by Mr. Ross being forced to expend one of his peremptory challenges to cure the trial judge’s erroneous denial of his challenge for cause; the imbalance in *Gray* was caused by the arguably much less significant decision by the trial court to grant, erroneously, several prosecution challenges for cause. If Mr. Gray was deprived of due process because the prosecution in his case in effect received a few more peremptory challenges than allowed by law, surely Mr. Gray was deprived of exactly the same due process when he was forced to use a peremptory challenge on a prospective juror who should have been excused for cause.

Gray and *Ross* were decided according to state jury selection procedures. In a footnote, the *Ross* majority specifically left open the question of whether Federal Rule of Criminal Procedure 24(b), like its Oklahoma counterpart, requires peremptory challenges to be used curatively and therefore whether the *Ross* “no error” analysis will apply to federal cases.³⁶ Of course, *Gray* and *Ross* were also both death penalty cases, raising the issue of whether they should be limited to the unique jury selection challenges presented in capital cases.³⁷ The Court addressed these unresolved issues twelve years later, in *United States v. Martinez-Salazar*.³⁸

31. See *infra* note 222.

32. See 487 U.S. at 89–90 (citing *McDonald v. State*, 15 P.2d 1092, 1094 (Okla. 1937); *Stott v. State*, 538 P.2d 1061, 1064–65 (Okla. Crim. App. 1975); and *Ferrell v. State*, 475 P.2d 825, 828 (Okla. Crim. App. 1970)).

33. 487 U.S. at 90–91.

34. *Id.* at 91.

35. *Id.* at 92–98 (Marshall, J., dissenting, joined by Brennan, Blackmun and Stevens, JJ.).

36. *Id.* at 91 n.4.

37. See, e.g., Karen T. Grisez, *Ross v. Oklahoma: A Reversal of the Reversible Error Standard in Death-Qualification Cases*, 38 CATH. U. L. REV. 881 (1989) (analyzing both cases as death penalty cases and not as applying to jury selection errors generally).

38. 528 U.S. 304 (2000).

III. *UNITED STATES V. MARTINEZ-SALAZAR*

A. *The Jury Selection Error*

Abel Martinez-Salazar and a co-defendant were indicted in the United States District Court for the District of Arizona on charges of conspiracy to sell heroin, drug trafficking in heroin, and carrying a firearm in the course of the drug trafficking.³⁹ As in *Ross* and as in our examples, *Doleszny* and *Ramos*, the jury selection error that took *Martinez-Salazar* to the Supreme Court began with the failure of the trial judge to remove a prospective juror for cause. In response to a question on a jury questionnaire asking if he knew of anything that might affect his ability to be impartial, the prospective juror wrote, "I would favor the prosecution."⁴⁰ When the venire was brought into court, the trial judge asked the prospective juror several questions about his response on the questionnaire. Most of the replies were somewhat ambiguous.⁴¹ But at one point in the course of his

39. From what we can glean from the Ninth Circuit opinion, 146 F.3d 653 (9th Cir. 1999), the case appears to have been a rather routine drug case with very strong evidence against both defendants. Other than the jury selection issue that went to the Supreme Court, the only other issue discussed in the Ninth Circuit opinion was Mr. Martinez-Salazar's contention that there was not enough evidence to convict him of the gun charge. The Ninth Circuit summarily rejected this contention because the gun in question was found under the front passenger seat next to the heroin, Mr. Martinez-Salazar had been seated in that seat, and Mr. Martinez-Salazar admitted to a drug agent that the gun was always in the car. *Id.* at 654.

40. *Id.* at 655.

41. The transcript of the inquiry into the juror's bias reads as follows:

THE COURT: On your questionnaire, you said in question number eight, the answer: "I would favor the prosecution." Is that—are you saying that you would not be able to listen to the evidence, and decide what happened, and follow the instructions of the Court, but would simply vote for a conviction because people are charged with drug crimes?

JUROR: No. I think what I'm saying is all things being equal, I would probably tend to favor the prosecution.

THE COURT: You understand that one of the things the jury will be told, of course, is that the prosecution, the Government has the burden of proving someone guilty beyond a reasonable doubt. And I suppose realistically, all things being equal wouldn't be beyond a reasonable doubt. Would you disagree with that?

JUROR: No, I guess I wouldn't disagree with that.

THE COURT: I guess the important question is—and perhaps let me ask it this way. It's kind of my question. But if you were the defendants here charged with this crime, and all of the jurors on your case had your background and your opinions, do you think you'd get a fair trial?

JUROR: I think that's a difficult question. I don't think I know the answer to that.

Martinez-Salazar's trial counsel, Mr. Garcia, then followed up by questioning the juror:

MR. GARCIA: If you were to error [sic], where would you feel more comfortable erring, in favor of the prosecutor or the defendant?

JUROR: Well, again, not having heard any evidence in the case, I think that's kind of hard to say. I think, as I indicated on here, I would probably be more favorable to the prosecution. I suppose most people are. I mean they're predisposed. You assume that people are on trial because they did something wrong.

THE COURT: Well, you see, you heard me out there when I started the trial. That's not the general proposition. If it is, it's wrong. It's contrary to our whole system of justice. When people are accused of a crime, there's no presumption—

colloquy with the judge the prospective juror said, “I think what I am saying is all things being equal, I would probably tend to favor the prosecution.”⁴²

Mr. Martinez-Salazar and his co-defendant challenged the prospective juror for cause, but the trial judge erroneously denied the challenge.⁴³ The defendants then used one of their eleven shared peremptory challenges to strike the juror, and later exhausted all of their peremptory challenges.⁴⁴ Thus, as in *Ross*, the impact of the trial judge’s error was that the defense had one fewer peremptory challenge than it

JUROR: There’s a—

THE COURT:—of guilty. The presumption is the other way. That’s the way our system—

JUROR: I understand that in theory.

THE COURT: Okay, all right, all right. Why don’t you wait, and we’ll be done here in a few minutes, okay? Thank you very much.

Id.

42. *Id.*

43. The Ninth Circuit concluded that trial judge erred when he denied the defendants’ challenge of the subject juror for cause:

The district court here should have excused [the juror] for cause because he did not and would not affirmatively state that he could lay aside his admitted bias in favor of the prosecution. [The juror] clearly acknowledged this bias, even after being instructed by the district court that it was “contrary to our whole system of justice.” He never retreated from his statement of bias.

Id. at 656. In its arguments in the Supreme Court, the government did not contest the Ninth Circuit’s conclusion that the trial court erred in denying the defendants’ challenge for cause to this juror. 528 U.S. at 309.

44. Under Federal Rule of Criminal Procedure 24(b), a defendant charged with a non-capital felony is entitled to ten peremptory challenges and the prosecution six. FED. R. CRIM. P. 24(b); *see infra* notes 122-23 and accompanying text. The rule explicitly states that co-defendants must share these ten peremptory challenges, but also provides that in the case of multiple defendants the trial court “may” allow additional peremptory challenges and/or direct that they be exercised separately. Trial judges have great discretion in deciding whether to award co-defendants additional peremptory challenges. *See, e.g.,* United States v. Magana, 118 F.3d 1173, 1206 (7th Cir. 1997); State v. Cambara, 902 F.2d 144, 147-48 (1st Cir. 1990). Moreover, Rule 24(c) provides that a defendant shall have an additional peremptory challenge if up to two alternate jurors are to be seated. FED. R. CRIM. P. 24(c).

In *Martinez-Salazar*, one alternate juror was seated, so the two co-defendants had a presumptive eleven peremptory challenges between them. Moreover, the trial judge awarded no additional peremptory challenges, nor did he allocate the eleven peremptory challenges between the defendants. Thus, the two co-defendants were required jointly to exercise their total allotment of eleven peremptory challenges.

There are serious complications to the already daunting problem of curative peremptory challenges when multiple defendants are tried together and forced to exercise their peremptory challenges jointly, particularly when the trial court does not award them any additional peremptory challenges. The fundamental difficulty is that such defendants have an independent, constitutionally-based, right to challenge jurors for cause, but must share their now paltry per capita peremptory challenges. For example, how do we apply the *Ross/Martinez-Salazar* “no error” rule when one defendant, but not the other, challenges a prospective juror for cause, but both suffer when the trial court erroneously denies the challenge and must then exercise one of their precious joint-peremptory challenges to cure the error? Of course, this problem, and a host of other problems caused by forcing defendants to share peremptory challenges, can be greatly reduced and even eliminated by giving multiple defendants additional peremptory challenges and allowing the defendants to exercise the challenges separately. But of course the award of too many additional defense-peremptory challenges may at some point become fundamentally unfair to the prosecution. Giving Mr. Martinez-Salazar and his co-defendant eleven additional peremptory challenges, and allowing them each to exercise eleven separately, restores them to the position they would have been in had they been tried separately. But of course it also means that in the aggregate the defendants will now have twenty-two peremptory challenges to the prosecution’s six. We are unaware of any cases or commentaries discussing the problem of joint-peremptory challenges, but a good argument can be made that the number of

would otherwise have had.⁴⁵ Both defendants were convicted, and Mr. Martinez-Salazar appealed, arguing both a general insufficiency of evidence and the trial court's erroneous refusal to grant the challenge for cause.⁴⁶

The Ninth Circuit reversed the conviction. It agreed with the prosecution that under *Ross* there was no Sixth Amendment violation, since the jury that convicted Mr. Martinez-Salazar was fair and impartial.⁴⁷ Nevertheless it reversed the conviction, concluding that the impairment of Mr. Martinez-Salazar's right to a full complement of peremptory challenges denied him due process.⁴⁸

B. *The Supreme Court's Strained Analysis*

The federal circuits were split on the issue of whether a curative loss of a peremptory challenge was reversible.⁴⁹ By granting certiorari in *Martinez-Salazar*, the Court had an opportunity not only to resolve this split among the circuits, but also to address the two more general questions left open by *Ross*—whether Federal Rule 24(b) requires peremptory challenges to be used curatively and whether the principles in *Gray/Ross* have any application at all in non-capital cases. It was also an opportunity to provide much-needed guidance for state courts, which were likewise deeply divided on the question of how to analyze these kinds of jury selection errors.⁵⁰

The government argued that the Court should read Federal Rule 24(b) as requiring the curative use of peremptory challenges, and that under such a reading the *Ross* syllogism would be dispositive. But the Court refused to take that approach. In an opinion written by Justice Ginsburg, in which five other Justices joined and the three others specially concurred, the Court held that Federal Rule

additional and/or separately exercised peremptory challenges should reflect in some rough fashion the extent to which the defendants' substantive and tactical interests may diverge.

45. See *supra* text accompanying note 28.

46. Interestingly, Mr. Martinez-Salazar's initial court-appointed appellate counsel filed a so-called *Anders* brief on the jury selection error, indicating that he could not make the argument in good faith, presumably because of *Ross*. 146 F.3d at 655-56. See *Anders v. California*, 386 U.S. 738, 744 (1967) (allowing court-appointed counsel to inform an appeals court that a defendant's appeal is frivolous and move to withdraw). The Ninth Circuit rejected the inference that *Ross* governed, ordered supplemental briefs and appointed new appellate counsel. 146 F.3d at 656.

47. 146 F.3d at 657.

48. As the Ninth Circuit noted:

Martinez-Salazar's case presents the question *Ross* left open. Martinez-Salazar was entitled to and received eleven peremptory challenges, and federal law does not require a defendant to expend a peremptory challenge in order to cure an erroneous refusal to strike a juror for cause. Furthermore, Martinez-Salazar and his co-defendant exhausted his [sic] eleven peremptory challenges and had to use one of them to strike [the erroneously retained juror]. Under these circumstances, we hold that Martinez-Salazar's Fifth Amendment due process rights were violated.

Id. at 658 (footnote omitted).

49. See *supra* notes 6-7.

50. *Id.*

24(b), unlike its Oklahoma counterpart, does not mandate that peremptory challenges be used curatively.⁵¹ Thus, it concluded that Mr. Martinez-Salazar, unlike Mr. Ross, was in fact entitled to the full federal compliment of eleven peremptory challenges.

But the Court then turned that entitlement on its head, by reasoning that precisely because Mr. Martinez-Salazar was not forced to use any peremptory challenges curatively, he could not complain about his voluntary election to do so. He was entitled to, and received, all of his peremptory challenges, so there was no error.⁵² Although the Court acknowledged that the trial judge had put the defendants in a difficult position by erroneously denying their challenge for cause, the Court reasoned that the defendants had a choice at that point of whether or not to remove the biased juror peremptorily. The defendants, according to the Court, “had the option of letting [the juror] sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal.”⁵³ Unattractive as this would have been, the Court opined, “[a] hard choice is not the same as no choice.”⁵⁴

Justice Scalia, in a concurring opinion joined by Justice Kennedy, objected to the majority’s assertion that Mr. Martinez-Salazar’s lawyer could have allowed the biased juror to remain and then appealed the conviction. Besides pointing out that this issue was not before the Court, Justice Scalia argued that “normal principles of waiver . . . disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent.”⁵⁵ Justice Scalia also suggested that “it may well be regarded as one of the very purposes of peremptory challenges to enable the

51. 528 U.S. at 315 (citations omitted):

The Government urges us to reverse the Court of Appeals judgment on the ground that federal law, like the Oklahoma statute in *Ross*, should be read to require a defendant to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for-cause ruling impaired the defendant’s right to a fair trial To date, this Court has recognized only one substantive control over a federal criminal defendant’s choice of whom to challenge peremptorily. We decline to read into Rule 24, or otherwise impose, the further control advanced by the Government.

It is rather perplexing that the Court would fix onto the peremptoriness of peremptory challenges to explain why Federal Rule 24(b) should not be read to require the curative use of peremptory challenges. A curative requirement, like the state law requirement the Court was more than willing to accept in *Ross*, is not a “substantive control” over a defendant’s choice of peremptory challenges. It is instead a straightforward application of waiver. See *infra* text accompanying notes 182-201. A defendant is still free to use or not use a peremptory challenge curatively; he or she is simply not free to make that choice without consequences. A hard choice is indeed still a choice.

52. 528 U.S. 315-16.

53. *Id.* at 315.

54. *Id.* Justice Souter wrote a one paragraph concurring opinion, observing that Mr. Martinez-Salazar never asked for additional peremptory challenges. Justice Souter wrote separately to emphasize that the case did not present the question of whether it would have been reversible error for the trial court to refuse such a request for additional peremptories. *Id.* at 317 (Souter, J., concurring).

55. *Id.* at 318 (Scalia, J., concurring).

defendant to correct judicial error on [juror-bias questions].”⁵⁶ In the next section on the history of peremptory challenges and their relationship to challenges for cause, we will show that Justice Scalia’s suggestion is indeed correct.⁵⁷

C. *The Court’s Fear of Harmless Error*

What is striking about the Ginsburg and Scalia opinions in *Martinez-Salazar* is the extent to which they strain, in their own ways, to avoid reaching the harmless error issue that we contend is at the heart of the problem of curative peremptory challenges. In doing so, both stretch themselves into some very difficult contortions.⁵⁸

Justice Scalia concurs in the majority’s flawed “no error” syllogism, yet chides the majority for reaching the waiver issue. But the majority’s “no error” conclusion is entirely dependent on its “no waiver” conclusion. It is only after the majority interprets Federal Rule 24(b) as not requiring the curative use of peremptory challenges that it can engage in the fiction that Mr. Martinez-Salazar was not “forced” to expend a peremptory challenge to cure the cause error, and that “a hard choice is not the same as no choice.”

The majority opinion is more problematical. By holding that a criminal defendant is not required to cure cause errors with peremptory challenges, the majority turns well-settled principles of waiver upside down. A fundamental tenet of judicial review is the “contemporaneous objection rule,” under which a lawyer must object to all trial errors during trial, other than those few denominated as “plain” errors, in order to preserve the errors on appeal.⁵⁹ What is different about peremptory challenges, of course, is that the defense has at its disposal an

56. *Id.* at 319 (Scalia, J., concurring).

57. *See infra* text accompanying notes 67-136.

58. Justice Souter’s opinion also does some stretching. His suggestion that the outcome of the case might have been different had Mr. Martinez-Salazar requested additional peremptory challenges seems sensible at first blush, but it ignores the practical realities of jury selection. If a trial judge erroneously denies a defendant’s challenge for cause, how likely is it, in the fast-paced and pressurized world of jury selection, that that same judge will later realize the mistake, before jury selection is over, and give the defendant an extra peremptory? If we can agree that such a scenario is unlikely, what sense does it make to require a defendant to request additional peremptory challenges? More importantly, how is it *more* of a violation of due process for defendants to be denied an additional peremptory challenge—when the rule is clear that the award of extra peremptory challenges is entirely within the trial judge’s discretion, *see supra* note 45, and *less* of a violation of due process for defendants to be deprived of a peremptory challenge to which they are entitled by rule or statute? And perhaps most fundamentally of all, why would the proper remedy be to award an additional peremptory challenge rather than simply to reverse the ruling on the challenge for cause and excuse the juror for cause? Remember, in the *Ross/Martinez-Salazar* situation, the error is the erroneous *denial* of the defendant’s challenge for cause. The trial judge can correct that error at any time during jury selection simply by reconsidering the challenge, granting it, and then removing the juror in question. There is therefore no need to award an extra peremptory challenge.

Justice Souter’s observation that Mr. Martinez-Salazar “did not object to any juror who sat,” *Martinez-Salazar*, 528 U.S. at 318, is a non-sequitur. By definition, defendants in the *Ross/Martinez-Salazar* predicament *never* have an objection to the *sitting* jurors, all of whom were passed for cause.

59. *See infra* text accompanying notes 182-202.

independent mechanism to correct an erroneous failure to remove a juror for cause. Yet the *Martinez-Salazar* Court suggests that a defendant can elect not to cure the cause error and nevertheless raise it on appeal. As Justice Scalia points out, such a suggestion is inimical to the contemporaneous objection rule and the axiom of waiver upon which it is built:

The difficult question . . . is not whether Federal Rule of Criminal Procedure 24(b) requires exercise of the peremptory, but rather whether normal principles of waiver (not to say the even more fundamental principle of *volenti non fit injuria*) disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent.⁶⁰

The *Martinez-Salazar* Court's refusal to read basic and well-settled notions of waiver into Rule 24(b) was particularly mysterious because it led the Court to engage in a troubling line of reasoning about the role of defense counsel. We cannot imagine a circumstance in which a competent defense lawyer could ethically, or would practically, decide to infect his client's jury with a demonstrably biased juror who could have been removed with an available peremptory challenge. Imagine the logic of such a decision: "I think I'll keep that Klansman on the jury, who said in open court that he could not be fair to my black defendant, because I want to keep my peremptory challenges available so I can strike all Tauruses, who are well known to be pro-prosecution." No competent defense lawyer would ever trade away the opportunity to excuse a demonstrably biased juror for the chance to peremptorily excuse jurors he or she has an inarticulable hunch might be biased.

Moreover, as a practical matter, how often will a defense lawyer be so sure of the righteousness of his challenge for cause that he will gamble everything on a reversal based on that challenge? As the majority itself points out in *Martinez-Salazar*: "Challenges for cause and rulings upon them . . . are fast paced, made on the spot and under pressure. Counsel as well as court, in that setting, must be prepared to decide, often between shades of gray, 'by the minute.'"⁶¹

Precisely because black shades into gray, and because "obvious" challenges for cause are seldom obvious, it would be a rare defense lawyer indeed who would gamble his client's fate, and his own license to practice, on a subsequent appeal attacking the bias of a juror, when the lawyer had a chance to remove that very juror with a peremptory challenge. In one of the first federal circuit cases to discuss this aspect of *Martinez-Salazar*, the Seventh Circuit predicted that "prudent

60. 528 U.S. at 318 (Scalia, J., concurring). "*Volenti non fit injuria*" means "no wrong is done to one who consents," and is a well-recognized maxim of English common law that developed into the modern tort notion of assumption of the risk. RESTATEMENT (SECOND) OF TORTS § 496A cmt. b, § 892A cmt. a (1979); BLACK'S LAW DICTIONARY 1575 (6th ed. 1990); see also Charles Warren, *Volenti Non Fit Injuria in Actions in Negligence*, 8 HARV. L. REV. 457, 459 (1895).

61. 528 U.S. at 316.

defense counsel will continue to use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal of a conviction on this basis.”⁶² The lawyer’s choice in this situation is not “a hard choice” at all; it is a very easy choice. Competent representation demands that the defense lawyer correct the trial judge’s error by removing the biased juror peremptorily, unless of course it is the defense lawyer’s intention to inject error into the case.⁶³

This brings us to the second, and perhaps even more troubling, ethical aspect of the Court’s no-waiver conclusion. It invites defense lawyers, facing overwhelming evidence of their clients’ guilt and therefore little reason to believe that even an impartial jury will do anything but convict, to intentionally infect the jury with a biased juror whenever a trial court erroneously fails to remove that biased juror for cause, thus ensuring a reversal on appeal. Accepting such a strange invitation violates ethical duties that even criminal defense lawyers owe to the integrity of the judicial system.⁶⁴

Quite apart from these ethical issues, the majority opinion in *Martinez-Salazar* leaves the interplay between waiver and error in an eerie state of meaninglessness. If a defendant *is* required to use a peremptory challenge curatively, then under *Ross*

62. *United States v. Polichemi*, 219 F.2d 698, 704 (7th Cir. 2000). The Seventh Circuit was also the source of a strange recent case in which the court reversed convictions where the prosecution was allowed to “save” a peremptory challenge and use it mid-trial. *See United States v. Harbin*, 250 F.3d 523 (7th Cir. 2001).

63. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.1 (2001): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *But cf.* *Arnold v. Wainwright*, 516 F.2d 964, 971 (5th Cir. 1975) (holding that failure to use reasonable diligence with regard to jury challenges is not a priori ineffective).

64. For a defense lawyer to permit a trial to take place which the lawyer knows to be fatally flawed due to the presence of a juror biased against the defendant, whom the lawyer could have removed, raises the issue of what a trial lawyer’s obligation is to the administration of justice.

The ABA Model Rules do not contain a specific acknowledgment that a criminal defense lawyer has an obligation to the administration of justice. But one can infer such an obligation from rules such as those that require all lawyers to be candid with the trial judge about adverse controlling legal authority, *see* MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2001) (“A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.”), as well as rules which condemn specific actions by a lawyer that are prejudicial to the administration of justice, *see, e.g.* R. 3.3(a)(1) (“A lawyer shall not knowingly make a materially false statement of fact or law to a tribunal.”); *id.* R. 3.5(1)(c) (“A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.”).

One can always draw support for such an obligation from English ethics rules which state that a barrister should not engage in conduct that is “prejudicial to the administration of justice,” *see* CODE OF CONDUCT OF ENG. AND WALES, para. 301(a)(ii) (7th ed. 2000) *reprinted in* ARCHBOLD’S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, at 289 (P.J. Richardson ed., 49th ed., & 3d Supp. 2001), or conduct that “is likely to diminish public confidence in the legal profession or the administration of justice.” *Id.* The same ethical standards state that a barrister must “take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court’s time.” *Id.* para. 701(a).

Against this background, it seems hard to allow that it would be ethical and competent representation for an American lawyer to allow a trial to take place that the lawyer knows violates a fundamental right of the defendant when the lawyer has the power through a defense peremptory to cure the error and assure that the trial is fair.

there is no error. If a defendant is *not* required to use peremptory challenges curatively, then under *Martinez-Salazar* there is likewise no error. As discussed below, we think these two tortured syllogisms, when put together, actually mean that errors of this kind are harmless, but that the Court is unwilling to analyze them under that standard for fear of what such an analysis will say about the whole role of peremptory challenges in the truth-finding process.⁶⁵

It appears that the Court's logic has not impressed some state appellate courts that have already rejected the *Martinez-Salazar* approach and have indicated that they will continue to view the loss of a peremptory challenge as *per se* reversible error under their state constitutions.⁶⁶ Perhaps the split among state courts would have remained in any case, but the Court has provided weak guidance even for federal courts on the proper analysis to be applied when these sorts of jury selection errors occur.

Why did the *Ross* and *Martinez-Salazar* Courts struggle so mightily to avoid the harmless error issue? In some ways, the Court's failure to face the issue directly is puzzling. In other ways, it is typical of the ambivalence many English and American courts have expressed about the peremptory challenge for centuries.

IV. THE HISTORICAL RELATIONSHIP BETWEEN CHALLENGES FOR CAUSE AND PEREMPTORY CHALLENGES

The problem of curative peremptory challenges addressed in *Martinez-Salazar* raises issues that lie at the heart of the relationship between the challenge for cause and the peremptory challenge. These two kinds of challenges compliment one another in a rather complex fashion, and their complimentary nature is the product of a long and often misunderstood history.

A. Challenges for Cause

From the very beginnings of the English jury in the late 1100s and early 1200s, prospective jurors could be challenged for cause, though there were only three recognized challenges: being related to the defendant by blood, marriage or economic interest.⁶⁷ There was no generic challenge for lack of impartiality.⁶⁸ Indeed, English jurors before the fifteenth century, like ancient jurors in Greece

65. See *infra* text accompanying notes 234-47.

66. See *State v. Martinez*, 999 P.2d 795, 803 (Ariz. 2000) (refusing to follow *Martinez-Salazar*); *People v. Lefebvre*, 5 P.3d 295, 307-04 (Colo. 2000) (same); *Johnson v. State*, 43 S.W.3d 1, 11 n.3 (Tex. Crim. App. 2001) (same); *Brown v. Commonwealth*, 533 S.E.2d 4, 8-9 n.2 (Va. Ct. App. 2000) (same); *State v. Fire*, 998 P.2d 362, 364-65 (Wash. Ct. App. 2000) (same).

67. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 141 (1977).

68. *Id.*

and Rome, did not have to be impartial. These ancient and medieval juries typically were “presentment” juries, whose functions were investigatory and accusatory, not decisional.⁶⁹ Once the presentment juries accused a defendant of a crime, they turned him or her over to the ruler for trial and punishment.⁷⁰ Presentment jurors were often selected precisely because they may have had personal knowledge of the alleged crime, or, more commonly, personal knowledge of the accused or of the alleged victim. Thus, the early English challenge for cause was quite narrow, and bore little resemblance to our modern challenge for cause grounded on a lack of juror impartiality.⁷¹

As the presentment jury began to evolve into the trial jury, and as jurors were called upon not merely to make accusations but also to determine ultimate guilt, the concept of jurors-as-witnesses began to be replaced with the concept of jurors-as-independent-fact-finders. By the end of the fifteenth century, the notion

69. LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 14 (2d ed. 1988). Ancient presentment juries were usually quite large, so large that one suspects the procedure was more like a referendum than a modern trial. Greek presentment juries commonly contained from 100 to 1,500 members, no small administrative feat in any era. JOHN PROFFATT, *A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT* § 6 (1986). Early English presentment juries could also be quite large; there is evidence of some thirteenth century juries containing as many as sixty-six jurors. MOORE, *supra*, at 41.

In Europe at the time of the Conquest, trial by ordeal remained the preferred method of ultimate truth-finding in serious criminal (that is, capital) cases. PROFFATT, *supra*, § 28. Less serious criminal charges were resolved by compurgation. See *infra* note 71. Presentment juries, even in felony cases, were exceedingly rare. THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE* 11 (1985).

Two events catapulted the jury trial into the forefront of medieval English use. In 1166, Henry II proclaimed the Assize of Clarendon, which established a uniform national system of juries, called “assizes,” to resolve real property disputes, and which also banned trial by compurgation for most felonies and required that they be tried by ordeal. See MOORE, *supra*, at 37-40. In 1215, Pope Innocent III banned the ordeal. Because neither compurgation nor ordeal was any longer available for serious offenses, trial by jury became the accepted felony trial method by default. The transformation was rapid. By 1220, just five years after the ordeal was banned, trial by jury had become the primary method for determining a defendant’s guilt in serious criminal cases. GREEN, *supra*, at 3. Presentment juries continued their investigative and accusatory roles, but the accused defendants were now turned over to petit juries for trial rather than to the Church for the ordeal. Typically, but not always, the petit jury was a composed of some smaller subset of the same presentment jury that had done the investigation and made the accusation. *Id.* at 13-15; MOORE, *supra*, at 39. In fact, the need to reduce the size of the presentment jury may represent the true historical headwaters of the idea of the peremptory challenge. See *infra* text accompanying note 100. Over time, the two kinds of juries—presentment and trial—became more and more distinct. By the beginning of the fourteenth century, the break between them was complete. GREEN, *supra*, at 15-16.

70. MOORE, *supra* note 69, at 14.

71. The early English jury trial was an evolving hodge-podge of older forms of trial, including trial by compurgation (also called “the wager of law”), in which the accused was acquitted simply by producing a sufficient number and quality of men to swear to the truth of his oath of innocence. See generally 3 WILLIAM BLACKSTONE, *COMMENTARIES* *341-44; ROBERT VON MOSCHZISER, *TRIAL BY JURY* §§ 43-44, at 34-36 (2d ed. 1930). The role of medieval jurors as witnesses, rather than as impartial finders of fact, was a remnant of the compurgative notion that an oath-taker’s (both the accused’s and his compurgators’) fear of eternal damnation was the best method of discovering truth. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638-68 (1996) (discussing the ecclesiastical significance of the oath in the development of the privilege against self-incrimination).

that jurors had to be impartial was firmly entrenched in English common law.⁷² Thus, the challenge for cause necessarily broadened to capture prospective jurors who, for a variety of reasons other than the three ancient challenges for cause, simply could not be impartial.

English challenges for cause also expanded because the English venire grew more and more diverse. Originally, presentment jurors were selected by the King's sheriffs exclusively from the nobility.⁷³ All jurors had to be freehold males under seventy years old, and their membership in the nobility also meant they typically owned substantial real property.⁷⁴ As the Crown's political prosecutions increasingly targeted anti-royalist members of Parliament, Parliament began to react, out of sheer self-preservation, by making some pro-defendant changes to criminal procedures, including the methods of jury summoning and selection. Over time, the King's influence in jury selection waned, and specific levels of property ownership began to replace rigid feudal qualifications. Many more kinds of prospective jurors presented themselves for jury duty, and they brought with them hosts of biases not commonly present when all prospective jurors had been selected by the King exclusively from the relatively homogeneous class of loyal nobles.⁷⁵

The final, and perhaps most significant, pressure toward the expansion of the English challenge for cause was the demise of the English peremptory challenge. Prior to 1305, the King's prosecutors had an unlimited number of peremptory challenges, so their resort to challenges for cause was simply unnecessary. As discussed below, the number of allowable peremptory challenges in England steadily declined over the next 700 years, and by 1989 they were eliminated entirely.⁷⁶ The broadening of the English challenge for cause probably had as much to do with the narrowing and eventual elimination of the English peremptory challenge as anything else. There is a deep and unbreakable historical counterpoint between challenges for cause and peremptory challenges.

Although the right to jury was less than comprehensively embraced at the constitutional debates, and even in the text of the Constitution itself,⁷⁷ the Sixth

72. WILLIAM FORSYTHE, *HISTORY OF TRIAL BY JURY* 125–38 (2d ed. 1971); MOORE, *supra* note 69, at 56; VON MOSCHZISKER, *supra* note 71, at 57–58.

73. Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 1200–1800*, 305, 349–57 (J.S. Cockburn & Thomas A. Green eds., 1988).

74. *Id.*

75. *Id.* It is important, however, not to overstate this democratization of the English jury. Even as late as the eighteenth century, property requirements were still so demanding that seventy-five percent of all male freeholders had insufficient wealth to qualify for English jury duty. *Id.*

76. See *infra* text accompanying notes 106–11.

77. Despite modern popular conventional wisdom to the contrary, the framers expressed a surprising lack of interest in the jury trial, at least at the federal level. Randolph's original draft of Article III contained no provision guaranteeing either criminal or civil juries. SAUL K. PADOVER, *TO SECURE THESE BLESSINGS* 419 (1962). Article III, Section Two's guaranty of a jury in all federal criminal trials was subsequently added by committee, and was

Amendment did constitutionalize the long-standing English and colonial common law guaranties of an impartial jury.⁷⁸ In fact, at least one draft of the Sixth Amendment expressly provided that a criminal defendant had a right to challenges for cause,⁷⁹ although this express reference was later deleted at Madison's urgings, on the ground that challenges for cause are so inherent in the concept of an impartial jury that their express mention was unnecessary.⁸⁰

In 1911, Congress codified the Sixth Amendment notion of the right to an impartial jury by creating a right in defendants (and prosecutors) to challenge jurors for cause.⁸¹

Because the Sixth Amendment's guarantee of an impartial criminal jury is applicable to the states via the Fourteenth Amendment,⁸² its implicit requirement that there be some recognized mechanism—challenges for cause—to effect the guaranty of impartiality is also binding on the states.⁸³ Thus, every state recognizes a criminal defendant's right, and the prosecutor's right, to challenge jurors for cause. By statute or rule or both, most states recognize two fundamentally different types of challenges for cause: ones in which a described relationship between the juror and some trial participant is irrebuttably presumed to render the juror partial ("principal challenges"); and ones in which the challenger must demonstrate to the

accepted at the convention with no recorded debate or dissent. *Id.* Although there was some debate on the question of judicial review of jury verdicts, *see infra* text accompanying notes 129-30, and even on what may seem to us today as a rather obscure question of whether the venire should be drawn from a unit as large as a whole state (as the Sixth Amendment now provides), *see, e.g., VAN DYKE, supra* note 67, at 7, there is no recorded debate about the right to jury trial. PADOVER, *supra*, at 419.

The states, by contrast, recognized that the criminal jury trial was an important right. It was the only right common to the twelve state constitutions that predated the constitutional convention, and it has thereafter appeared in the state constitutions of every state entering the union. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870, 875 n.44 (1994).

78. U.S. CONST. amend. VI provides (emphasis added): "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an *impartial* jury of the State and district wherein the crime shall have been committed."

79. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 37 (1986), quoting the first draft of the Sixth Amendment as including "the right of challenge and other accustomed requisites."

80. *Id.* (noting that Patrick Henry denounced Madison's proposal to delete the reference to challenges for cause, saying with his customary hyperbole that he "would rather the trial by jury were struck out altogether").

81. Law of March 3, 1911, ch. 231, § 287, 36 Stat. 1166 (1911) (current version at FED. R. CRIM. P. 24(b) and 28 U.S.C. § 1870 (1994)).

82. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

83. The Supreme Court has never squarely addressed the question of whether challenges for cause are required by the Sixth Amendment, though almost every state and lower federal court that has addressed the question has held that the Sixth Amendment's guaranty of impartial juries implicitly requires a mechanism to remove biased jurors. *See, e.g., United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (noting that challenges for cause are an inherent part of Sixth Amendment's guarantee of impartial juries); *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) (same); *Sorter v. Austen*, 129 So. 51, 52 (Ala. 1930) (same); *People v. Doran*, 159 N.E. 379, 385 (N.Y. 1927) (same); *see also supra* notes 78-81 (discussing Madison's views). *See generally* FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 71 (1951) (arguing that the Sixth Amendment includes the right to challenge for cause). *But see United States v. Capua*, 656 F.2d 1033, 1038 (5th Cir. 1981) (noting challenges for cause are not an inherent component of the right to an impartial jury).

trial judge that the prospective juror is in fact partial (“challenges to the favour”).⁸⁴

State principal challenges typically provide that litigants may challenge jurors who are related not just to the defendant but also to the lawyers,⁸⁵ are in an employee/employer relationship with the defendant,⁸⁶ are in a landlord/tenant relationship with the defendant,⁸⁷ are in a debtor/creditor relationship with the defendant,⁸⁸ are in any fiduciary relationship with the defendant,⁸⁹ were witnesses to any of the alleged events,⁹⁰ or were jurors in any previous trial regarding the same allegations.⁹¹

States that have lists of principal challenges also have a catch-all challenge to the favor. These catch-alls typically mimic the broad impartiality language of the Sixth Amendment by providing that all litigants may challenge for cause any jurors who cannot be “impartial” or “fair” or “unbiased.”⁹²

Interestingly, the federal statutes and rules, and the statutes and rules of a handful of states, do not contain any laundry list of principal challenges for

84. *See, e.g.*, ALA. CODE § 12-16-150 (2000); ARK. CODE ANN. § 16-33-304 (1999); CAL. CODE CIV. PROC. § 229 (1999); COLO. REV. STAT. 16-10-103 (2000); FLA. STAT. ch. § 913.03 (2000); GA. CODE ANN. § 15-12-135 (2000); IDAHO CODE § 19-2020 (2000); IND. CODE ANN. § 35-37-1-5 (2000); KAN. STAT. ANN. § 22-3410 (1999); LA. CODE OF CRIM. PROC. art. 797 (2000); MONT. CODE ANN. § 25-7-223 (2000); NEB. REV. STAT. ANN. § 29-2006 (2000); NEV. REV. STAT. ANN. § 16.050 (2000); N.H. REV. STAT. ANN. §500-A:12 (2000); N.Y. CRIM. PROC. LAW § 270.20 (1999); N.C. GEN. STAT. § 15A-1212 (2000); N.D. CENT. CODE § 28-14-106 (2000); OHIO REV. CODE ANN. § 2313.42 (2000); OKLA. STAT. tit. 12, § 572 (1999); S.D. CODIFIED LAWS § 23A-20-13.1 (2000); TEX. CODE CRIM. ANN. art. 35.16 (2000); WASH. REV. CODE ANN. § 4.44.180 (2000); WYO. STAT. § 7-11-105 (2000). The terms “principal challenges” and “challenges to the favour” derive from British common law. *See* 3 BLACKSTONE, *supra* note 71, at *363.

85. *See, e.g.*, ALA. CODE § 12-16-150(4) (2000); COLO. REV. STAT. § 16-10-103(1)(b) (2000); GA. CODE ANN. § 15-12-163(B)(4) (2000); LA. CODE OF CRIM. PROC. art. 797(3) (2000); MINN. CRIM. PROC. RULE 26.02 Subd. 5(1)(5) (2000); N.Y. CRIM. PROC. LAW § 270.20(1)(c) (2000); OHIO REV. CODE ANN. § 2313.42(G) (2000); WASH. REV. CODE ANN. § 4.44.180(2) (2000).

86. *See, e.g.*, ARIZ. CRIM. PROC. RULE 18.4(b)(5) (2000); ARK. CODE ANN. § 16-33-304(b)(2)(i) (1999); COLO. REV. STAT. § 16-10-103(1)(c) (2000); IA. STAT. § 813.2, Rule 17(5)(e) (2000); KAN. STAT. ANN. § 22-3410(2)(b) (1999); LA. CODE OF CRIM. PROC. art. 797(3) (2000); MINN. CRIM. PROC. RULE 26.02 Subd. 5(1)(6) (2000); MONT. CODE ANN. § 25-7-223(3) (2000); OHIO REV. CODE ANN. § 2313.42(E) (2000).

87. *See, e.g.*, ARK. CODE ANN. § 16-33-304(2)(B)(1) (1999); COLO. REV. STAT. § 16-10-103(1)(c) (2000); KAN. STAT. ANN. § 22-3410(b)(2) (1999); MONT. CODE ANN. § 25-7-223(3) (2000).

88. *See e.g.*, COLO. REV. STAT. § 16-10-103(1)(c) (2000); KAN. STAT. ANN. § 22-3410(2)(b) (1999); MONT. CODE ANN. § 25-7-223(3) (2000).

89. *See e.g.*, COLO. REV. STAT. § 16-10-103(1)(i) (2000); KAN. STAT. ANN. § 22-3410(2)(h) (1999).

90. *See, e.g.*, ALA. CODE § 12-16-150(10) (2000); COLO. REV. STAT. § 16-10-103(1)(h) (1999); KAN. STAT. ANN. § 22-3410(2)(g) (1999); MONT. CODE ANN. § 25-7-223(3) (2000); N.Y. CRIM. PROC. LAW § 270.20(1)(e) (1999).

91. *See, e.g.*, ARIZ. CRIM. PROC. RULE 18.4(b)(9) (2000); ARK. STAT. ANN. § 16-33-304(b)(2)(B)(v) and (vi) (1999); COLO. REV. STAT. § 16-10-103(1)(f) (1999); FLA. STAT. § 913.03(5) (2000); IA. STAT. § 813.2, Rule 17(5)(i) (2000); MINN. CRIM. PROC. RULE 26.02 Subd. 5(1)(10) (2000); N.C. GEN. STAT. § 15A-1212 (2000); OHIO REV. CODE ANN. § 2313.42(D) (2000); WASH. REV. CODE ANN. § 4.44.180(3) (2000); WYO. STAT. § 7-11-105(a)(v) (2000).

92. *See, e.g.* ARIZ. R. CRIM. PROC. Rule 18.4(b) (2000); FLA. STAT. ANN. § 913.03(10) (2000); N.C. GEN. STAT. ANN. § 15A-1212(9) (2000).

cause.⁹³ In theory, all challenges for cause in federal courts and in these few state courts are challenges to the favor, and the challenger must actually prove to the judge that the prospective juror, for whatever reason, cannot be fair and impartial. In practice, however, a common law has evolved that mimics the principal challenges. Beginning as early as 1807, state and federal courts have recognized that certain relationships between prospective jurors and litigants give rise to “implied bias,” and should be disqualifying even in the absence of satisfactory evidence of actual bias.⁹⁴ The laundry list of implied biases includes the same kinds of juror-litigant relationships recognized in most states as principal challenges, including kinship, financial interest and former jury service in the same cause.⁹⁵

93. Indeed, Rule 24, which governs the examination of prospective jurors, does not contain the words “challenge for cause” or “impartiality.” FED. R. CRIM. P. 24. The federal right to challenges for cause is set forth in 28 U.S.C. § 1870 (2000) (“All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.”) Interestingly, the statute contains no list of principal challenges; it merely provides that challenges for cause are to be ruled upon by the trial court.

There are a small number of states that follow the federal scheme of providing no list of principal challenges, relying instead on the generic challenge to the favor. *See, e.g.*, D.C. CODE ANN. § 23-105(c) (2000); HAW. REV. STAT. § 635-27 (2000); ILL. COD. STAT. ANN. § 705:305/15 (2000); MISS. CODE ANN. § 13-5-79 (2000); MO. REV. STAT. § 494.470 (1999); N.J. STAT. § 2B:23-10 (2000); N.M. STAT. ANN. § 38-5-14 (2000); R.I. GEN. LAWS § 9-10-14 (2000); S.C. CODE ANN. § 14-7-1020 (1999).

94. In *United States v. Burr*, 25 Fed. Cas. 49 (C.C. Va. 1807) (No. 14,692), which was one of several reported cases arising out of the prosecution of Aaron Burr, Chief Justice Marshall held that a prospective juror must be removed if he expresses an unqualified opinion that the defendant is guilty. In explaining what today seems like a rather straightforward challenge to the favor, Chief Justice Marshall made reference to the implied bias that underlies well-recognized principal challenges:

Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason for the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such to induce a suspicion of partiality.

25 Fed. Cas. at 50. *But see* *Smith v. Phillips*, 455 U.S. 209, 220-21 (1990) (declining to apply the implied bias doctrine where juror had applied for a job as an investigator with prosecutor’s office). In the state courts, *see, e.g.*, *State v. Kauhi*, 948 P.2d 1036, 1040-41 (Haw. 1997) (implying bias as a matter of law where prospective juror was a prosecutor in same office as prosecutor trying defendant); *State v. Sanchez*, 901 P.2d 178, 183-84 (N.M. 1995) (holding that some relationships with the prosecutor require removal for bias as a matter of law, but tenuous relationship present in this case did not so require); *Taylor v. State*, 656 So.2d 104, 111 (Miss. 1995) (holding that implied bias exists when a juror is related to an attorney employed by the prosecuting attorney’s office).

95. *See* *United States v. Haynes*, 398 F.2d 980, 983-85 (2d Cir. 1967). Of course, since the implied bias doctrine is a matter of common law, there is much more room for disagreement among courts about precisely what kinds of relationships should be presumed disqualifying than there is in those state courts where the disqualifying relationships are expressly itemized by rule or statute. There is also considerable controversy about where the line between implied bias and actual bias should be drawn; that is, what kind of relationships will be irrebuttably presumed disqualifying, and what relationships will require proof of actual bias. *Id.*

B. Peremptory Challenges

Peremptory challenges first appeared in England sometime between 1250 and 1300.⁹⁶ They were initially recognized only in criminal cases, and indeed only in capital criminal cases.⁹⁷ Only the King's prosecutors, not the defendant, had a right to exercise peremptory challenges, and there was no limit to the number of peremptory challenges the King's prosecutors could exercise.⁹⁸

As large presentment juries began to evolve into smaller trial juries, the peremptory challenge probably began simply as a mechanism to reduce the unwieldy size of the presentment jury. Faced with the prospect of having to cut down large presentment juries to twelve-man trial juries, prosecutors were required by sheer arithmetic to excuse many presentment jurors.⁹⁹

There is some historical support for the proposition that these early peremptory challenges, both to the presentment juries themselves and later to the separately summoned trial juries, were not really peremptory challenges at all but rather were challenges for cause made by an infallible King. If the King's prosecutors asserted that a prospective juror had some connection to the defendant sufficient to require his removal under the then narrow English challenges for cause, that royal assertion was deemed infallible, and no further inquiry was necessary.¹⁰⁰ Some commentators have also suggested that early English peremptory challenges were actually a kind of shorthand challenge for cause in small English villages and towns, where it was commonplace for lawyers, judges, jurors and defendants to be well acquainted with one another and, thus, for cause disqualifications to be obvious to all.¹⁰¹

In an almost immediate response to the King's unlimited peremptory challenges in capital cases, English courts began to permit criminal defendants in capital cases to exercise their own peremptory challenges. By 1300, it was well-settled as a matter of common law that in all capital cases the Crown had an unlimited number of peremptory challenges and the defendant had thirty-five.¹⁰²

In 1305, in a further effort to limit the King's abusive prosecutorial powers, Parliament passed the Ordinance for Inquests, which abolished all prosecutorial peremptory challenges but retained the defendant's thirty-five peremptory challenges.¹⁰³ The King's courts immediately side-stepped the Ordinance for Inquests

96. See PROFFATT, *supra* note 69, § 155 (noting historical roots of peremptory challenges in England).

97. *Id.*

98. *Id.*; VAN DYKE, *supra* note 67, at 147.

99. See *supra* note 69.

100. PROFFATT, *supra* note 69, § 159; VAN DYKE, *supra* note 67, at 148.

101. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165 & n.51 (1989).

102. PROFFATT, *supra* note 69, § 155.

103. 33 Edw. 1 (1305) (Eng.). For a discussion of the Ordinance for Inquests, see 4 BLACKSTONE, *supra* note 71, at *347 and FORSYTHE, *supra* note 72, at 192.

by adopting a common law procedure they called “standing aside,” in which the King’s prosecutors could direct any number of prospective jurors to “stand aside” pending selection from the balance of the reporting panel.¹⁰⁴ Subject only to the problem of running out of regular jurors and being forced to use some of the jurors who were standing aside, which circumstance was presumably quite rare given the limited nature of challenges for cause,¹⁰⁵ this procedure was of course tantamount to giving the prosecution an unlimited number of peremptory challenges.

From 1305 forward, the number of allowable defense peremptory challenges in English criminal trials steadily decreased. Parliament reduced them from thirty-five to twenty in 1530,¹⁰⁶ to seven in 1948,¹⁰⁷ to three in 1977,¹⁰⁸ and abolished them entirely in 1989.¹⁰⁹ Despite even these reduced numbers, one of the most striking things about the 700-year history of English peremptory challenges is that defendants almost never exercised them. Indeed, they were so rarely exercised that some scholars have posited that ordinary criminal defendants simply had no “right” to any peremptory challenges, despite the pronouncements of Parliament.¹¹⁰ And although the prosecution theoretically retained its power to ask prospective jurors to stand aside, the standing aside procedure was just as rare, and perhaps even rarer, than the exercise of defense peremptories.¹¹¹

Most American colonial courts accepted the English common law practice of giving criminal defendants some peremptory challenges, but they were in sharp disagreement over the question of whether the prosecution should have any peremptory challenges at all, by standing aside or otherwise. Some colonies allowed prosecutors an unlimited number of peremptory challenges, while others allowed none.¹¹²

104. See VAN DYKE, *supra* note 67, at 148. See also PROFFATT, *supra* note 69, § 160.

105. See *supra* text accompanying notes 68-69.

106. 22 Hen. 8, ch. 14 § 6 (1530) (Eng.).

107. 11 and 12 Geo. 6, ch. 58 § 35 (1948) (Eng.).

108. The Criminal Law Act, 1977, ch. 45 § 43 (Eng.).

109. The Criminal Justice Act, 1988, ch. 33 § 118 (Eng.).

110. J.B. Post, *Jury Lists and Juries in the Late Fourteenth Century*, in COCKBURN AND GREEN, *supra* note 73, at 71 (noting an exhaustive study of jury records in the last half of the fourteenth century uncovered no evidence of the use of any peremptory challenges). A similar study of the jury records in Essex County, spanning most of the eighteenth century, concluded that even by that late date peremptory challenges were “rarely used.” P.J.R. King, “*Illiterate Plebeians, Easily Mislead*,” *Jury Composition, Experience, and Behaviour in Essex 1735-1815*, in COCKBURN AND GREEN, *supra* note 73, at 277-78. As late as 1979, peremptory challenges were still the exception in England rather than the rule, with no more than one in seven trials having even a single peremptory challenge used. JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 92-93 (1979). To put the infrequency of even the modern English peremptory challenge into some perspective, the infamous spy trial that acted as the catalyst for the abolition of the English peremptory challenge in 1989—the so-called Cyprus Spy Trial—involved seven co-defendants, all of whom pooled their peremptory challenges and exercised a grand total of seven. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 822 (1997).

111. BALDWIN & MCCONVILLE, *supra* note 110, at 93 n.15 (citing a separate survey which found that the exercise of jury challenges was used far more frequently by the defense).

112. VAN DYKE, *supra* note 67, at 148.

This was the mixed state of colonial affairs at the time of the constitutional debates. There is no record of any discussion by the framers, formal or informal, about peremptory challenges. Article III, Section 2 of the Constitution secures the right to jury in all federal criminal trials, but makes no mention of the peremptory challenge.¹¹³ Indeed, in 1919 the Court held in *Stilson v. United States*¹¹⁴ that “[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”¹¹⁵

Congress codified the English practice in 1790, by giving thirty-five peremptory challenges to defendants in federal treason cases and twenty in all other federal capital cases.¹¹⁶ It did not address the question of defense peremptories in non-capital federal cases, or the question of whether the prosecution had any peremptory challenges in any kind of federal criminal case. Federal courts in these early years were sharply divided over the question of whether federal prosecutors had a common law right to peremptory challenges, either traditionally or by standing aside.¹¹⁷ The Supreme Court settled the matter in 1856, when it held in *United States v. Shackelford* that neither prosecutorial peremptories nor standing aside were rooted in federal common law, and that federal courts must instead look to state procedures to decide whether federal prosecutors could peremptorily excuse prospective jurors or have them stand aside.¹¹⁸

In a direct though somewhat delayed response to *Shackelford*, Congress established in 1865 that in all non-capital federal felony cases defendants would have ten peremptory challenges and the prosecution two, and that in capital cases the prosecution would have five peremptory challenges but defendants’ peremptories

113. U.S. CONST., Art. III, § 2, cl. 3 states:

The trials of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

114. 250 U.S. 583 (1919).

115. *Id.* at 586. This early recognition by the Court—that peremptory challenges are not a necessary condition for the constitutional requirement of juror impartiality—seems to have been lost over the years, as the Court began to ascribe more and more quasi-constitutional importance to the peremptory challenge. *See infra* text accompanying notes 159-65.

116. Law of April 30, 1790, ch. 10, § 30, 1 Stat. 119 (1790) (current version at FED. R. CRIM. P. 24(b)).

117. *United States v. Marchant*, 25 U.S. (12 Wheat.) 480, 483-84 (1827) (Story, J.) (suggesting, in dictum, that federal prosecutors have an unlimited number of peremptory challenges via standing aside). This appears to have become the accepted view in most lower federal courts. *VAN DYKE*, *supra* note 67, at 149 (stating that although Justice Story’s comment about prosecutorial peremptories in *Marchant* was not binding, it was nevertheless followed by most federal judges). But this view was not unanimous. *See, e.g.*, *United States v. Douglass*, 25 F. Cas. 896, 898-99 (C.C.N.Y. 1851) (No. 14,988) (Betts, J., dissenting) (arguing that there is no justification to return to the discredited English practice of standing aside, and that federal prosecutors should therefore have no common law right to any peremptory challenges).

118. 59 U.S. (18 How.) 588 (1856).

would be decreased from thirty-five to twenty.¹¹⁹ In 1872, Congress increased the number of prosecutorial peremptories in non-capital cases from two to three, and for the first time extended the notion of peremptory challenges to federal civil cases (giving each side three) and to federal misdemeanors (giving each side three).¹²⁰ In 1911, Congress changed the peremptory challenge numbers again: six for the prosecution and twenty for the defendant in capital cases; six for the prosecution and ten for the defendant in non-capital felony cases; and three each in misdemeanor and civil cases.¹²¹

When the Federal Rules of Criminal Procedure were adopted in 1946, Rule 24(b) increased the prosecution's peremptories in capital cases to equal the defendant's at twenty.¹²² That 1946 version is the scheme currently in place in the federal courts: each side gets twenty peremptory challenges in capital cases; the prosecution gets six and the defendant ten in non-capital felony cases; and each side gets three in misdemeanor and civil cases.¹²³

This federal evolution in peremptory challenges was generally mimicked in the states. By 1790, most states recognized by statute a defendant's right to some peremptory challenges, and most states shared the pre-*Shackleford* federal view that prosecutors had a common law right to some peremptory challenges.¹²⁴ Only fourteen years after *Shackleford*—by 1870—almost all states had enacted statutes

119. Law of March 3, 1865, ch. 86, § 2, 13 Stat. 500 (1865) (current version at FED. R. CRIM. P. 24(b)).

120. Law of June 8, 1872, ch. 333, § 2, 17 Stat. 282 (1872) (current version at FED. R. CRIM. P. 24(b) and 28 U.S.C. § 1870 (1994)).

121. Law of March 3, 1911, ch. 231, § 287, 36 Stat. 1166 (1911) (current version at FED. R. CRIM. P. 24(b) and 28 U.S.C. § 1870 (1994)).

122. FED. R. CRIM. P. 24(b).

123. *Id.* (criminal); 28 U.S.C. § 1870 (1994) (civil).

There have been a few attempts since 1946 to reduce the number of federal peremptory challenges further, driven primarily by concerns about their racially discriminatory use.

In 1976, the Supreme Court's Advisory Committee on Criminal Rules proposed that Rule 24(b) be amended to reduce the number of peremptory challenges to five for each side in non-capital felonies, and two for each side in misdemeanors. FED. R. CRIM. P. 24 advisory committee's notes. The change was approved by the Court but rejected by Congress. *Id.*; S. REP. NO. 95-354 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 532.

The Committee tried again in March 1990, proposing that peremptory challenges be reduced to six for each side in non-capital cases, again to no avail. FED. R. CRIM. P. 24 advisory committee's notes.

In late 1997, a subcommittee of the District of Columbia Jury Project recommended that peremptory challenges be abolished entirely in the federal and superior courts in the District Council for Court Excellence District of Columbia Jury Project, DRAFT SUMMARY REPORT (Dec. 1997) (on file with the American Criminal Law Review) (*Proposed Recommendation 30.4*). In its final report, the full committee recommended in the alternative that peremptory challenges be abolished entirely, or that they be "drastically reduced"—to three for each side in non-capital felonies and one for each side in misdemeanors and civil cases. *Recommendation 19(d)*, Council for Court Excellence District of Columbia Jury Project, JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEM IN WASHINGTON, D.C. 24 (Feb. 1998) (on file with the American Criminal Law Review); also available at http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf (last visited 10/21/01). Congress has not yet acted on these recommendations.

124. See *Swain v. Alabama*, 380 U.S. 202, 215-17 nn.16-20 (1965) (cataloging the peremptory challenge procedures of states).

granting both the prosecution and the defense some peremptory challenges.¹²⁵ Today, every state recognizes some number of peremptory challenges for both sides in criminal and civil cases, though it is interesting that many states continue to follow the asymmetry of federal Rule 24(b) by giving the prosecution considerably fewer peremptory challenges than the defense.¹²⁶

Although state courts were certainly free, even after *Stilson*, to hold that there is a state constitutional right to peremptory challenges, we have found no such cases. Similarly, even though state courts were free after *Shackleford* to ground the peremptory challenge in state common law, we have again found no such cases. Thus, peremptory challenges in all state courts, like those in federal court, are creatures of statute and court rule, and are not compelled either by the Constitution or by the common law.¹²⁷

C. Judicial Review

It is important to recognize that peremptory challenges long antedated the right of a criminal defendant to appeal a conviction, both in England and America. Indeed, there was never an English or federal common law right to a criminal appeal.¹²⁸ The founders engaged in some limited debates about the question of whether our Constitution should recognize the right to a criminal appeal,¹²⁹ but

125. *Id.* at 216 n.18 (listing those states that granted the prosecution a “substantial number” of peremptory challenges).

126. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 8–301(c) (allowing, for cases with the potential of twenty years or greater imprisonment, ten peremptory challenges for defendant and five for state); N.J. STAT. ANN. § 2B:23–13(b) (allowing, for serious felonies, twenty peremptory challenges for defendant and twelve for the state); MINN. R. CRIM. PROC. 26.02 subd. 6 (allowing, for offenses with the potential for life imprisonment, fifteen peremptories for defendant and nine for state; for all other offenses, five peremptories for defendant and three for state).

127. The history of peremptory challenges in the state courts is primarily a history of racial exclusion. Peremptory challenges were the last best tool of Jim Crow, used quite efficiently by southern prosecutors to eliminate the new black faces that began to appear for jury duty after Reconstruction. *See generally* Hoffman, *supra* note 110, at 827–30. The systematic use of prosecutorial peremptory challenges to exclude blacks was not limited to the Deep South. As late as 1880, no black person had ever served as a juror in the state of Delaware. *See* Neal v. Delaware, 103 U.S. (13 Otto) 370, 397 (1880). It is harder to say whether northern prosecutors used the peremptory challenge as comprehensively as their southern brethren to keep free and emancipated blacks off northern juries, because northern states, unlike southern and border states, kept almost no information about the racial make-up of summoned jurors during Reconstruction. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 11 n.39 (1990).

128. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 334–35 (1904).

129. *See, e.g.*, THE FEDERALIST NO. 81, at 489–91 (Alexander Hamilton) (Clinton Rossiter, ed., 1961); VAN DYKE, *supra* note 67, at 7. It appears these pre-constitutional debates were over by the time Congress debated the Bill of Rights. David Rossman, “Were There No Appeal:” *The History of Review in American Criminal Courts*, 81 J. CRIM. & CRIMINOLOGY 518, 555 (1990) (“Nothing in the Congressional debates over the Bill of Rights directly addressed . . . review of criminal convictions.”).

ultimately decided it should not.¹³⁰ In 1881, Congress gave the Supreme Court statutory authority to review federal death penalty convictions by writ of error,¹³¹ but it was not until the Court of Appeals Act of 1891 that federal criminal defendants had a generalized statutory right to a criminal appeal.¹³²

The evolution of the right to a criminal appeal in the state courts followed a similar pattern. Most colonial and early state courts followed the English tradition of not recognizing any common law right to a criminal appeal.¹³³ All fifty states eventually recognized the right to a criminal appeal by rule or statute, and none of these provisions has ever been repealed.¹³⁴

The fact that peremptory challenges were part of the criminal trial process long before there was any statutory or constitutional right to a criminal appeal is important when we consider the problem of curative peremptory challenges. As Justice Scalia observed in his concurrence in *Martinez-Salazar*, peremptory challenges must have had a fundamentally curative purpose in these early years, when they represented the only way to correct a trial judge's erroneous retention of a biased juror.¹³⁵ As he also observed, we distort that historical purpose when we allow a criminal defendant the option of either using a peremptory challenge to remove a biased juror or hoarding the peremptory challenge and appealing the conviction.¹³⁶

130. Although the Bill of Rights secures many rights for criminal defendants, the right to an appeal is not one of them. The Supreme Court has repeatedly and consistently indicated that criminal defendants have no right under the Constitution to an appeal of their convictions, though, remarkably, these indications have always been in dictum and the Court has never addressed the issue squarely. *See, e.g.,* *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974); *McCane v. Durston*, 153 U.S. 684 (1894); *see also* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 9 n.46 (1994) (arguing that a five justice majority on the current Court supports the proposition that there is no right of appeal from a criminal conviction). Most interesting to us, as we examine the harmlessness of certain jury selection errors, is Professor Meltzer's profoundly creative look at the extent to which the conventional view that there is no constitutional right to appeal conflicts with the whole post-*Chapman* construct of harmless error. Meltzer, *supra*. As Professor Meltzer puts it, if *Chapman* is itself a rule of constitutional law, binding on all the states, then why can't states craft a harmless error standard less protective of defendants, since they can do away with criminal appeals entirely? *Id.* at 3-4. We might put it more bluntly: how can there be "structural" error if there is no error at all (because there are no appeals)? In the end, Professor Meltzer solves this problem by positing that *Chapman* and the cases that followed it are not based on the Constitution itself, but rather are a kind of constitutional common law reversible by Congress. *Id.* at 5; *see also* Craig Goldblatt, *Harmless Error as Constitutional Common Law: Congress's Power to Reverse Arizona v. Fulminante*, 60 U. CHI. L. REV. 985 (1993).

131. Act of February 6, 1889, ch. 113, 25 Stat. 655 (1889) (allowing appeal as of right upon writ of error filed by respondent sentenced to death).

132. Act of March 3, 1891, ch. 517, 26 Stat. 826 (1891) (creating right to appeal directly to the Supreme Court in capital cases and infamous crimes).

133. Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 521 n.79 (1992) (noting lack of a right of appeal from criminal conviction at founding); Meltzer, *supra* note 130, at 6 (noting that there is no textual or historical support for a criminal appeal).

134. Arkin, *supra* note 133, at 513-14.

135. *See supra* text accompanying note 55-56.

136. *Id.*

V. HARMLESS ERROR, STRUCTURAL ERROR AND PLAIN ERROR

Before we examine the problem of the curative use of peremptory challenges and the effect, if any, that an imbalance in peremptory challenges should have on the integrity of criminal convictions, we pause to consider the general notions of harmless error, structural error and plain error. It is, after all, in the context of these larger doctrines that the jury selection errors addressed in this article must ultimately be analyzed, despite the Court's current and rather curious reluctance to do so.¹³⁷

A. Harmless Error

No trials are perfect, and the idea that not all trial imperfections infect the integrity of the truth-finding process is a central limitation to the judicial review of jury verdicts. Indeed, as modern constitutional law and criminal procedure have vastly complicated the trial machinery, there are more opportunities than ever for various "errors" to creep into the trial process, and a correspondingly unprecedented demand that our appellate courts separate the important errors from the unimportant ones. The devil, of course, is in the details, and in the lines we draw between the kinds of trial errors we will and will not tolerate.

It has always been so. Although many harmless error opponents claim our modern harmless error rule is in derogation of English common law,¹³⁸ in fact the earliest English pronouncements on the subject recognized a broad concept of harmless error. As early as 1807, in a criminal case involving the erroneous admission of evidence, the King's Bench declared that there must be a new trial only "if the case without such improper evidence were . . . not clearly made out . . . and the improper evidence might be supposed to have had an effect on the minds of the jury."¹³⁹ The precise test of harmless error changed from case to case,¹⁴⁰ but it was well-recognized throughout the late 1700s and early 1800s, at least in the King's Courts, that not all trial error required reversal. Legal historians often refer

137. See *supra* text accompanying notes 58-66.

138. See, e.g., Charles L. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 516-21 (1998); Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991); Note, *Ake v. Oklahoma and Harmless Error: The Case for a Per Se Rule of Reversal*, 81 VA. L. REV. 521, 531 (1995). Perhaps Justice Traynor bears some responsibility for this common historical misunderstanding because he begins his influential treatise with a discussion of *Crease v. Barrett*, 149 Eng. Rep. 1353 (Ex. 1835), the Exchequer case commonly credited with establishing the rule that no error is harmless. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 4 (1970). Yet he makes it clear, later in the introductory section, that he believes *Crease* itself did not establish the per se reversible error rule, but rather that subsequent cases misinterpreted its meaning. TRAYNOR, *supra*, at 4-7; see *infra* note 146.

139. *Rex v. Ball*, 168 Eng. Rep. 721 (K.B. 1807).

140. In fact, the harmless error inquiry seems to have become more and more forgiving in the years after *Ball*. For example, in the much-cited *Doë v. Tyler*, 130 Eng. Rep. 1397, 1398 (C.P. 1830), the court held that jury verdicts would not be reversed if "there is enough to warrant the finding of the jury independently of the evidence objected to and . . . when the jury are right upon that portion of the evidence which is unimpeached."

to the harmless error rules announced in these early criminal cases as establishing the “Orthodox English Rule.”¹⁴¹

The Orthodox English Rule was more forgiving than our modern notions of “harmless beyond a reasonable doubt.” Under the Orthodox English Rule, *all* trial errors were subject to the harmless error inquiry; that is, the Orthodox English Rule had no exception, like our pre-*Chapman*¹⁴² approach, for errors deemed to be particularly significant, or, as we would say, for errors of constitutional magnitude.¹⁴³ Moreover, if an appellate court were “satisfied” that the trial error did not affect the trial outcome, the conviction was affirmed.¹⁴⁴

Not until the mid-1800s did the Orthodox English Rule begin to give way to a rule of per se reversal. An 1835 civil case decided in the Exchequer Courts, *Crease v. Barrett*,¹⁴⁵ is generally credited as having originated the so-called Exchequer Rule, under which virtually all trial error was automatically reversible.¹⁴⁶ Its legacy was short-lived. Parliament abrogated the Exchequer Rule with its adoption of the Judicature Act of 1873, under which civil trial errors were presumed harmless unless “some substantial wrong or miscarriage occurred.”¹⁴⁷

The history of harmless error in America mirrored its history in England—both in terms of the common law and in terms of legislative responses to the common law.¹⁴⁸ Because the Orthodox English Rule was well entrenched during the early post-Revolutionary period, most colonial courts and their state court successors accepted it.¹⁴⁹ But the Exchequer Rule eventually found its way into our common law, as it did in England. By 1900, most state and federal appellate courts were of the mind that virtually all trial errors, no matter how trivial, required reversal and a

141. See TRAYNOR, *supra* note 138, at 7; Goldblatt, *supra* note 130, at 993.

142. *Chapman v. California*, 386 U.S. 18 (1967). See also discussion of *Chapman* in *infra* text accompanying notes 156-166.

143. See Goldblatt, *supra* note 138, at 995.

144. See *supra* note 140.

145. 149 Eng. Rep. 1353 (Ex. 1835).

146. In fact, scholars disagree about whether *Crease* marks the beginning of the Exchequer Rule. Professor Wigmore contends that *Crease* was indeed a per se reversal case, and that the Exchequer Rule therefore dates from that decision. 1 J. WIGMORE, EVIDENCE § 21, at 887-88 (3d ed. 1983). Justice Traynor, on the other hand, makes a compelling case that *Crease* was not really a per se reversal case at all, that later cases misconstrued its holding, and therefore that the Exchequer Rule was not in fact established in England until the time of those later cases, in the 1850s. TRAYNOR, *supra* note 138, at 4-7. In any event, everyone agrees that by the mid-1850s the per se reversal principles of the Exchequer Rule were firmly entrenched.

Interestingly, the harmless error traditions embodied in the Original English Rule were the product of criminal cases decided in the King's Courts, while the Exchequer Rule claims its origins in a civil case (*Crease*) about a landlord's right to royalties on his tenant's tin. Perhaps these two very different ways of looking at the role of juries and the reliability of their verdicts is a remnant of the ancient English preoccupation with accuracy in real property cases. Indeed, the very first English jury trials were not criminal trials, but were instead assizes convened throughout England by William the Conqueror to decide real property disputes between and among the Norman victors and the Anglo-Saxon vanquished. MOORE, *supra* note 69, at 33-34.

147. TRAYNOR, *supra* note 138, at 8-9.

148. See generally *id.* at 13-14.

149. See Ogletree, *supra* note 138, at 156.

new trial.¹⁵⁰ These cases, just as in England, triggered a quick legislative response.

Beginning as early as 1912, states began to enact legislation overruling the per se cases.¹⁵¹ All fifty states presently have harmless error statutes or rules.¹⁵² In 1919, Congress did the same for the federal courts, enacting its own harmless error statute.¹⁵³ The federal harmless error statute remains in effect today, and indeed was incorporated with slightly different language into the Federal Rules of Criminal Procedure, as Rule 52(a).¹⁵⁴

Until 1967, the federal harmless error statute and rule, and their state counterparts, were widely assumed to be inapplicable to trial errors that deprived defendants of constitutionally based rights.¹⁵⁵ All this changed in 1967, when the Court, in *Chapman v. California*,¹⁵⁶ held that even constitutional errors can be harmless if the appellate court is sufficiently confident that the constitutional error did not affect the trial outcome. In particular, the Court in *Chapman* held that a violation of a defendant's Fifth Amendment rights, in the form of the prosecutor commenting in closing arguments on the defendant's decision not to testify, could be harmless.¹⁵⁷ The *Chapman* Court also held that the prosecution must "prove

150. See TRAYNOR, *supra* note 138, at 14. One commentator described the American appellate courts at the turn of the century as "impregnable citadels of technicality." See *id.* (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)); see also Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906) (discussing the "sporting theory of justice" prevalent at the time).

It is difficult to overstate the triviality of some of the errors that resulted in the reversals of criminal convictions under the per se rule. See, e.g., *People v. Vice*, 21 Cal. 344, 345 (1863) (reversing a robbery conviction because indictment failed to state that the victim's property did not belong to the defendant); *People v. St. Clair*, 56 Cal. 406, 407 (1880) (reversing larceny conviction because indictment omitted the letter "n" from the word "larceny"); *Williams v. State*, 27 Wis. 402, 403 (1871) (reversing a conviction because the indictment described the crime as having been committed "against the peace of the State" instead of against the "peace and dignity of the State").

151. See CODE OF CRIMINAL PROCEDURE § 461, cmt. (1930).

152. See Goldblatt, *supra* note 138, at 994. See also *Chapman v. United States*, 386 U.S. 18, 22 (1967) (stating that as of 1967, all fifty-states had harmless error rules).

153. 40 Stat. 1181 (February 26, 1919) (codified at 28 U.S.C. § 2111 (1999)) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

154. FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

155. See *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) ("If the error did not influence the jury, or had but slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm."); see also Phillip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 520 (1969).

156. 386 U.S. 18 (1967).

157. *Id.* at 24-25. Mr. Chapman and a co-defendant were convicted in a California state court of robbery, kidnapping and murder. At the time of the trial, the California Constitution expressly allowed prosecutors to comment in closing arguments on a defendant's decision not to testify. CALIF. CONST., art. I, § 13 (repealed November 5, 1974). In accordance with that expressly allowed practice, the *Chapman* prosecutor commented extensively on Mr. Chapman's and his co-defendant's decision not to testify. While the case was on appeal in the California courts, the United States Supreme Court decided *Griffin v. California*, 380 U.S. 609 (1965), holding that prosecutorial comment on a defendant's decision not to testify itself violated the defendant's right against self-incrimination. The *Chapman* case presented the Court with a perfect opportunity to consider whether it

beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”¹⁵⁸

Chapman marked a sea change in the Court’s approach to harmless error. For the first time since the Original English Rule, the truth-finding reliability of the process, and not the process itself, once again became the focus of the harmless error inquiry.¹⁵⁹ Since *Chapman*, the Court has added one constitutional error after another to the growing list of constitutional errors subject to harmless error review, including: impeaching a defendant with his or her post-*Miranda* silence;¹⁶⁰ admitting a coerced confession;¹⁶¹ giving the jury over-broad instructions in the sentencing stage of a capital case;¹⁶² giving the jury an instruction containing an erroneous conclusive presumption;¹⁶³ and giving the jury a burden-shifting instruction.¹⁶⁴ Indeed, just three years after *Chapman*, the Court was already describing the notion of applying harmless error review to constitutional errors as the rule, and per se reversals for constitutional errors as the exception.¹⁶⁵

But the exceptions have not disappeared entirely. There remains a very small

would continue to apply the per se reversal rule to an error of now unmistakable, if recent, constitutional dimension.

It is nevertheless somewhat surprising that the Court chose *Chapman* as the vehicle for such a fundamental change in course, since the actual holding of the case was that the error there was not harmless, and Mr. Chapman’s conviction was affirmed. As Professor Muller has put it:

There was something contrived about using *Chapman* for this purpose, since the Court went on to hold that the *Griffin* error in the case was not harmless. One might have expected the Court to wait to craft a harmless error rule in a case where the rule actually made a difference. Still, the gratuitous *Chapman* rule has never been treated as dictum.

See Muller, *supra* note 14, at 109 n.107.

158. 386 U.S. at 24. In an earlier case, *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963), the Court described the standard of harmlessness, in an evidentiary context, as “whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” The *Chapman* Court expressly stated that “[t]here is little, if any, difference” between this *Fahy* standard and the standard it announced. 386 U.S. at 24. Despite these protestations of equivalence, commentators have suggested that the Court’s standard for harmlessness has, just like its shrinkage of structural error, become more and more forgiving over time. See, e.g., David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401 (1997).

159. Several commentators view *Chapman* as merely an example of a larger movement by the Court toward a reliability-based model of the criminal process. See, e.g., Muller, *supra* note 157; Thomas Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991); see also Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of the Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

160. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Brecht* was a particularly significant harmless error case, because it arose in a habeas corpus context. The Court applied the more demanding harmless error standard set forth for habeas review (whether the error had “substantial and injurious effect on the verdict”), rather than the less demanding *Chapman* harmless error standard for direct review (harmless beyond a reasonable doubt). *Id.* at 623 (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

161. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

162. *Clemons v. Mississippi*, 494 U.S. 738, 752–53 (1990).

163. *Carrela v. California*, 491 U.S. 263, 266 (1989).

164. *Yates v. Evatt*, 500 U.S. 391, 402 (1991).

165. *Rose v. Clark*, 478 U.S. 570, 578–79 (1986).

group of errors, which the Court has come to label “structural errors,” that continue to merit automatic reversal.

B. Structural Error

In *Chapman* itself, the Court identified three kinds of constitutional rights—the right to counsel, the right to the suppression of a coerced confession and the right to an unbiased judge—as “so basic to a fair trial” that their denial would not be subject to harmless error analysis and would instead compel automatic reversal.¹⁶⁶ The *Chapman* Court did not articulate in any more detail whether these three particular types of errors were immune from its sweeping change because they involved particularly important rights that justified protection regardless of their impact on trial outcomes, or rather whether they were simply the kinds of error that *always* affect trial outcomes.

In *Arizona v. Fulminante*,¹⁶⁷ the Court not only struck one of *Chapman*’s three untouchable categories of errors that required automatic reversal—the erroneous admission of a coerced confession—it also coined the term “structural” error to describe the dwindling group of errors immune to harmless error analysis.¹⁶⁸ Most importantly, the *Fulminante* Court made it absolutely clear that structural errors require reversal not because they implicate rights abstractly deserving of some greater degree of protection, but rather because those rights are so bound up with the reliability of the process that we irrebuttably presume their violation had an effect on outcome.¹⁶⁹

The *Fulminante* Court added three structural errors to the *Chapman* list it had just reduced by one:¹⁷⁰ the denial of the right to self-representa-

166. 386 U.S. at 23, at 23 & n.8.

167. 499 U.S. 279 (1991).

168. *Id.* at 309 (“These are structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless error’ standards.”).

169. As Chief Justice Rehnquist put it in his majority opinion on the structural error issue:

[S]tructural [errors are] defects in the constitution of the trial mechanism, which defy analysis by “harmless-error” standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. “Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.”

Id. at 309–10 (quoting *Rose*, 478 U.S. at 577–78).

170. 499 U.S. at 310. To be more precise, the *Fulminante* Court confirmed, in the new language of “structural error,” its earlier rulings that these errors require automatic reversal. See *Vasquez v. Hillery*, 474 U.S. 254, 260–66 (1986) (racially discriminatory grand jury selection); *Waller v. Georgia*, 467 U.S. 39, 49 (1984) (public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 177–78 & n.8 (1984) (self-representation).

tion;¹⁷¹ the denial of the right to a public trial;¹⁷² and the discriminatory exclusion of members of a defendant's race from a grand jury.¹⁷³ In the ten years since *Fulminante*, the Court has added only one class of errors to the list of structural errors requiring automatic reversal: the giving of a constitutionally deficient instruction on the standard of proof beyond a reasonable doubt.¹⁷⁴

Despite a firestorm of criticism, both inside the Court's own ranks¹⁷⁵ and in the

171. This seems like a decidedly odd kind of error to treat as deserving automatic reversal under *Fulminante's* enlightened inquiry into reliability. Does the Court really mean to say that self-representation is so bound up with a positive trial outcome that we must irrebuttably presume prejudice when a defendant is not allowed to represent him or herself? On the contrary, this may be one of those rights whose violation we may safely say results in a better outcome for the defendant. Perhaps we should create a new per se category of errors: those whose violation is irrebuttably presumed to have been harmless. Despite its embrace of the reliability value, it appears this new structural error simply reflects the Court's view that the right to self-representation is so important that it must be protected in this fashion. See *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984) (holding that appointment of stand-by counsel to *pro se* defendant does not infringe upon that defendant's right to self-representation, so long as the defendant may still "present his own case his own way").

172. The abridgment of a defendant's right to a public trial is a perfect example of post-*Fulminante* structural error. The institutional values we place in airing our trials in public far outweigh any intrinsic value a particular defendant might enjoy from a public trial. That is, the very reasons we insist on public trials are bound up with the fundamental reliability of the process as a whole. We have decided that public trials, on the whole, will be more reliable than private ones, and we will therefore not tolerate private trials even if a particular private trial is perfectly fair and the outcome of that particular trial perfectly reliable. See *Waller v. Georgia*, 467 U.S. 39, 43, 49-50 (1984) (closing a suppression hearing to the public violates the Sixth Amendment guarantee of a public trial and requires new suppression hearing).

173. It is difficult to understand how errors in the selection of grand jurors implicate the reliability of trial verdicts. As discussed in *supra* note 14, the Court has never addressed the question of whether ordinary *Batson* error in the selection of a trial jury is structural error or may be harmless, and the question is far from self-evident. See *Muller, supra* note 14, at 94-96. But in *Vasquez v. Hillery*, 474 U.S. 254, 260-66 (1986), the Court held that the prosecution's practices of racially discriminating against prospective grand jurors tainted the subsequent conviction and required reversal. The inclusion of *Vasquez* error in *Fulminante's* new list of structural errors may simply reflect the Court's continuing uneasiness with the notion that reliability alone should be the pole star of harmlessness. As Professor Muller has put it:

Vasquez . . . sits uncomfortably in *Fulminante's* list of structural errors requiring automatic reversal. . . . Modern grand juries are notoriously dependent on, and controlled by, the prosecutor. . . . Whatever might be said of the harm that racial exclusion causes to the verdict pronounced by an independent and autonomous petit jury, the same cannot be said for the impact of racial exclusion on the indictment produced by a subservient grand jury.

Muller, *supra* note 14, at 112-13 n.131 (citations omitted).

174. *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993). The Court has also strongly suggested, in a pre-*Fulminante* case and therefore in pre-*Fulminante* language, that a trial court commits structural error when it directs a verdict of conviction in a criminal case. See *Rose v. Clark*, 478 U.S. 570, 578 (1986). Some federal circuit courts have interpreted *Rose* as meaning that a trial court also commits structural error even when it partially directs a verdict against the defendant on one element. See, e.g., *United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (finding that the harmless error rule is inapplicable when a judge fails to instruct the jury on one element of the crime); see also *Old Chief v. United States*, 519 U.S. 172 (1997) (finding that a trial court abuses its discretion when it allows prosecution to put on evidence of an element of the offense—a prior conviction—which defendant confesses).

175. The *Fulminante* Court was badly divided. The case contains four separate opinions reflecting permutations of three questions: was Mr. Fulminante's jailhouse confession coerced, does harmless error analysis apply

academy,¹⁷⁶ there is every indication that *Fulminante's* reliability-based view of harmless error is here to stay. Indeed, in 1999, the Court reaffirmed its commitment to reliability as the pole star of the harmless error inquiry. In *Neder v. United States*,¹⁷⁷ the Court held that a trial judge's erroneous failure to submit the materiality element to the jury was not structural error, and was instead subject to harmless error analysis. The *Neder* Court rejected the defendant's argument that by failing to instruct the jury on an element of the offense, the trial court in effect deprived the defendant of the structural right to have a jury decide his guilt beyond a reasonable doubt.¹⁷⁸

Now that *Chapman* has taught us that the inquiry is no longer "constitutional v. non-constitutional errors," what factors drive the decision about whether a particular kind of error should be amenable to harmless error analysis? It seems to us that there are two distinct, though related, principles: (1) is the error the kind of error that will likely affect the reliability of the truth-finding process; and (2) is the

and was this error harmless? A slim five-Justice majority—White, Marshall, Brennan, Stevens and Scalia—held that Mr. Fulminante's conviction was coerced. A different five-Justice majority—Rehnquist, O'Connor, Kennedy, Souter and Scalia—held that the coerced confession error was not structural error and was thus subject to harmless error analysis. Yet another five-Justice majority—White, Marshall, Brennan, Stevens, and Kennedy—held that the prosecution failed to prove beyond a reasonable doubt that the error was harmless.

Justice White, joined by Justices Marshall, Blackmun and Stevens, vigorously dissented on the structural error issue:

The search for truth is indeed central to our system of justice, but "certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial [citation omitted]." The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair [citation omitted]."

499 U.S. at 295 (White, J., dissenting).

176. See, e.g., Ogletree, *supra* note 138, at 161–75; Stacy, *supra* note 159, at 1382–83; John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 16 n.9 (1992); see also Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 27–28 (1976) (criticizing *Chapman*); Mause, *supra* note 155, at 527–37 (same). Many of the critics of *Chapman* and *Fulminante* level their criticisms at the unworkability of the "harmless beyond a reasonable doubt" test. See, e.g., Field, *supra*, at 15–16, 58–59; Stacy, *supra* 159. Others address the same problem but in a deeper jurisprudential context: do we really want appellate courts guessing about what hypothetical verdicts hypothetical juries would have returned if the trial had been hypothetically error-free? See, e.g., Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167 (1995); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994). Both of these sets of objections, even if valid, overstate the mark because they apply with equal force to non-constitutional and constitutional harmless error. That is, once we accept the notion that not all error requires reversal, we are necessarily forced to address the admittedly difficult question how to separate reversible from non-reversible error.

177. 527 U.S. 1 (1999).

178. *Id.* at 26–27; Also note *Johnson v. United States*, 520 U.S. 461 (1997), a plain error case in which the Court, in dictum, indicated it would not treat as structural error a trial court's erroneous failure to instruct the jury on materiality in a perjury case. In an opinion from which only Justice Scalia dissented, the Court said, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Id.* at 470 (quoting TRAYNOR, *supra* note 138, at 50).

truth-finding impact of the error incapable of rational assessment? In accordance with the teachings of *Chapman* and *Fulminante*, both of these factors focus on the error's effect on the truth-finding process, not on the abstract rights of the defendant.

Only by asking *both* of these questions do we get to the heart of the proper harmless error inquiry, and to the correct criteria for structural error. If an error is the kind of error unlikely to affect the reliability of the trial outcome, then we need not ask the second question about the difficulty of ferreting out its actual impact. Such errors should be harmless despite the difficulty of assessing actual impact. Indeed, many abjectly harmless errors are nevertheless resistant to any kind of rational impact assessment.

On the other hand, if the error *is* the kind of error we think likely to affect the reliability of the trial outcome, we will still subject the error to harmless error analysis if we think its impact is capable of being quantified. Thus, in *Fulminante*, even though all the Justices agreed that the admission of a coerced confession is the kind of error likely to affect the reliability of the trial outcome, the majority concluded that its impact, though great, could nevertheless be measured against the other evidence in a case.

It is only when the error is likely to affect reliability *and* has effects incapable of being measured, that we should label the error "structural" and reverse without any harmless error inquiry.

The Court's now long-standing commitment to a reliability-based view of harmless error has important implications for the jury selection errors that are the subject of this article. That commitment to reliability supports our thesis that all of these jury selection errors are harmless because they have, by definition, no qualitative impact on the reliability of convictions, even though we might all agree that the effects of any particular jury selection error are almost always impossible to quantify.¹⁷⁹

D. Plain Error

Appellate courts use the term "plain error" not to describe errors that are necessarily reversible, but rather to describe errors that an appellate court may choose to review even though the defendant failed to object to the errors at trial.¹⁸⁰ We include this discussion of plain error because it bears on the Court's "no waiver" prong of *Martinez-Salazar*.¹⁸¹

Well settled principles of waiver, applied to the trial process, have yielded the

179. See *infra* text accompanying notes 202-04.

180. Even though we label errors as "plain" for very different reasons than we label errors as "structural," to the extent both descriptions reflect a judgment about the effects the errors are likely to have on trial outcomes, the two labels may, in the end, describe the same set of increasingly rare errors. See *infra* notes 184-93 and accompanying text.

181. See *supra* text accompanying notes 52-55.

common law rule that appellate courts will not generally consider trial errors if a party failed to object during the trial to the procedure or ruling giving rise to the claimed error. This rule—often called the “contemporaneous objection rule”—is not only grounded in basic principles of waiver, it also reflects the sound institutional policy that trial courts should be given an opportunity to correct their own errors by having those errors pointed out by counsel. The contemporaneous objection rule is codified in Federal Rule of Criminal Procedure 52(b), Federal Rule of Evidence 104, and in similar rules in virtually every state.¹⁸²

But the contemporaneous objection rule was never absolute. As early as 1896, the Court recognized that if certain “plain error was committed in a matter so absolutely vital to defendants,” then the error could be reviewed on appeal even though it had not been raised in the trial court.¹⁸³ By focusing on errors “vital to defendants,” the Court’s early plain error cases, like its later harmless error cases,¹⁸⁴ appeared to be grounded on reliability: certain errors will be reviewed, notwithstanding the lack of a trial objection, if those errors are likely to have had an adverse impact on a defendant, that is, to have contributed to the conviction.¹⁸⁵ Indeed, Rule 52(b), which codified the common law of plain error, described those errors that are reviewable despite the lack of a trial objection as not only being “plain errors” but also “defects affecting substantial rights.”¹⁸⁶ The phrase “substantial rights” is identical to the phrase used in Rule 52(a) to describe harmless error, reinforcing the notion that although these two inquiries are on their face very different and deal with different portions of the process, plain error and structural error may, at bottom, be two ways at looking at the same fundamental problem: when will we reverse convictions without examining the effect the error had on the trial outcome?¹⁸⁷

The plain error doctrine has undergone an evolution that in many ways mimics the evolution of harmless error. Just as the Orthodox English Rule focused the harmless error inquiry on reliability, so too did the early plain error cases.¹⁸⁸ Just as the Exchequer Rule moved the harmless error inquiry away from reliability and toward the protection of a defendant’s rights for the sake of those rights, cases

182. See, e.g., KAN. STAT. ANN. § 60–404 (stating that error may not be predicated on a ruling admitting evidence unless a substantial right of a party is affected and a timely objection or motion to strike is made); MINN. R. EVID. 103(a)(1) (same); N.C. R. EVID. 103(a)(1) (same); OHIO. R. EVID. 103 (A)(1) (same); OR. R. EVID. 103(1)(a) (same); WASH. R. EVID. 103(a)(1) (same).

183. *Wilborg v. United States*, 163 U.S. 632, 658–59 (1896).

184. See *supra* text accompanying notes 159–69.

185. Jeffrey L. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1994) (discussing early plain error cases).

186. FED. R. CRIM. P. 52(b) (“Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”) (emphasis added).

187. See *supra* note 180.

188. See also *Clyatt v. United States*, 197 U.S. 207, 221–22 (1905).

beginning in the 1930s did the same for plain error.¹⁸⁹ Just as *Fulminante* has taken the harmless error inquiry full circle back to reliability, so too have the Court's plain error cases.¹⁹⁰ Indeed, in *United States v. Young*, the Court stated that the doctrine of plain error must be used "sparingly," because any unwarranted expansion "would skew [Rule 52(b)'s] 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'"¹⁹¹

In *United States v. Olano*, the Court completed this evolution back to reliability by articulating a three-part test for plain error: 1) there must be error; 2) the error must be "plain" (that is, "obvious" or "clear"); and 3) the error must "affect substantial rights."¹⁹² The Court described the third prong as requiring the defendant to prove that the error "affected the outcome of the district court proceedings."¹⁹³ We cannot imagine a clearer articulation of the reliability standard. Errors are now "plain," just as errors are now "structural," not because they trampled on a defendant's important rights, but rather because the trampling affected the reliability of the conviction.

Currently, the small list of plain errors expressly approved by the Court includes defense counsel's failure to make a motion for judgment of acquittal at the close of the prosecution's case,¹⁹⁴ failure to object to a jury instruction that erroneously requires the jury to presume malice,¹⁹⁵ and the failure to object to confusing sentencing instructions in a death penalty case.¹⁹⁶ The much larger list of errors the Court has held are not plain errors includes defense counsel's failure to object to improper prosecutorial closing arguments,¹⁹⁷ failure to object to the trial court's

189. In *United States v. Atkinson*, 297 U.S. 157, 160 (1936), the Court added two additional considerations to the reliability test: the "obviousness" of the error, and its impact on "the fairness, integrity or public reputation of judicial proceedings." Certainly the latter of these two considerations shifted the focus of the inquiry from the reliability of a particular defendant's conviction to the impact on the process as a whole. Even the "obviousness" of an error relates to external issues like public reputation; a myriad of obvious errors have no impact at all on trial outcomes.

190. See *United States v. Frady*, 456 U.S. 152, 163 (1982) (returning to the reliability standard by describing the plain error inquiry as whether it would be a "miscarriage of justice" to decline to review an error to which a defense lawyer had not objected at trial); see also *United States v. Young*, 470 U.S. 1, 15 (1985) (reiterating the "miscarriage of justice" test). Neither *Frady* nor *Young* addressed the tension between the narrow reliability standards they expressed and the much broader "public reputation" consideration articulated in *Atkinson*, 270 U.S. at 160. That tension was not expressly addressed until *United States v. Olano*, 507 U.S. 725, 736-37 (1993).

191. 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163).

192. 507 U.S. 725, 733-34 (1993). The *Olano* Court also made it clear that Rule 52(b) is permissive. That is, even if error in a particular case satisfies the three-part test, the appellate court has discretion to decline to review the error. *Id.* at 735.

193. *Id.* at 734.

194. *Atkinson*, 297 U.S. at 159; *Clyatt v. United States*, 197 U.S. 207, 221-22 (1905).

195. *Frady*, 456 U.S. at 166 (dictum).

196. *Jones v. United States*, 527 U.S. 373, 394-95 (1999) (dictum).

197. *United States v. Young*, 470 U.S. 1, 20 (1985).

order allowing two alternate jurors to be present during jury deliberations,¹⁹⁸ failure to object to jury instructions in a perjury case that left out the element of materiality,¹⁹⁹ and the failure to object to the exclusion of the defendant from an in camera hearing during trial.²⁰⁰

As we discuss below, there is a long tradition of enforcing the contemporaneous objection rule when it comes to jury selection errors; that is, jury selection errors are rarely deemed to be plain errors.²⁰¹ Because the plain error inquiry is once again an inquiry based on the reliability of the process, these holdings are entirely consistent with our contention that the sorts of jury selection errors analyzed in this article seldom have any adverse impact on trial outcomes. Thus, they are not only harmless but they should never even be reviewed if a defendant fails to object to them or, more particularly in the case of curative peremptory challenges, if a defendant fails to cure a cause error with an available peremptory challenge.

VI. THE PROBLEM OF THE CURATIVE PEREMPTORY CHALLENGE

Courts have had trouble with the problem of the curative peremptory challenge because they have had trouble articulating the purpose of the peremptory challenge and identifying its role in securing an impartial jury. It is a decidedly odd problem. Defendants are constitutionally entitled to an impartial jury, but they are not constitutionally entitled to peremptory challenges. The peremptory challenge is, in the words of the *Martinez-Salazar* Court, “auxiliary” to a defendant’s right to an impartial jury.²⁰² So exactly when does a denial of this auxiliary rule-based or statute-based “right” to peremptory challenges rise to the level of a constitutional violation, and a reversible violation at that?

As we suggest below, the judicial ambivalence on this issue reflects a deeper and unarticulated ambivalence about peremptory challenges themselves.²⁰³ On the one hand, if peremptory challenges have any constitutional significance at all, it must be because they serve as a check on the trial court’s erroneous rulings on challenges for cause, and therefore act as a screen to increase the chances that biased jurors will not sit. And yet the Court in *Martinez-Salazar* holds that a defendant is not required under the federal rules to use peremptory challenges curatively. On the other hand, if we concede that peremptory challenges really have very little to do with the selection of an impartial jury, then errors that result in a compromise of a defendant’s “right” to peremptory challenges will almost always be harmless. As discussed below, we believe the Court’s most recent decisions, first in *Ross* and now in *Martinez-Salazar*, portend an acknowledgment

198. *Olano*, 507 U.S. at 740-41.

199. *Johnson v. United States*, 520 U.S. 461, 470 (1997).

200. *United States v. Gagnon*, 470 U.S. 522, 529 (1985).

201. See *infra* note 219 and accompanying text.

202. *United States v. Martinez-Salazar*, 528 U.S. 301, 311 (2000).

203. See *infra* text accompanying notes 234-47.

that peremptory challenge errors are by their very nature harmless precisely because they do not have, and have never had, much to do with selecting impartial jurors.²⁰⁴

In addition to this underlying doctrinal ambivalence about the role of the peremptory challenge, there is a more mundane, but just as important, factor that has confused the law in this area. The problem of the curative peremptory challenge can come up, and has come up, in a variety of different circumstances. Courts have not been terribly good at recognizing, let alone distinguishing, these different circumstances.

We suggest there are four variables to consider: (1) whether the error at issue was the erroneous granting of a prosecution challenge for cause or the erroneous denial of a defense challenge for cause;²⁰⁵ (2) whether, in the former case, the prosecution exhausted its peremptory challenges; (3) whether, in the latter case, the defendant exhausted his or her peremptory challenges;²⁰⁶ and (4) whether, again in the latter case, the defendant peremptorily excused the very juror who should have been excused for cause. These four variables in turn generate the following six scenarios:

Scenario 1: The trial court erroneously grants a prosecution challenge for cause, and the prosecution exhausts its peremptory challenges.

204. *Id.*

205. There are, of course, two additional possibilities: the erroneous denial of a prosecution challenge for cause and the erroneous granting of a defense challenge for cause. But because these two errors devolve to the benefit of the defendant, and because the prosecution in such circumstances may only have a limited right to an advisory appeal in the event of an acquittal, we do not address them here. However, as post-*Batson* cases have expanded the equal protection horizons to include a consideration of the rights of prospective jurors as well as litigants, perhaps we should not be so quick to dispense with cause errors that favor a defendant but that still affect the exercise of peremptory challenges. See, e.g., *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to defense challenges as well as prosecution challenges); *Powers v. Ohio*, 499 U.S. 400 (1991) (applying *Batson* regardless of the race of the defendant or the race of the challenged juror). See generally Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808 (1989); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725 (1992). The juror erroneously excused on the defendant's challenge for cause suffers the same injury to his or her "right" to sit on the jury as the prospective juror in *McCollum* peremptorily excused because of his race. Neither prospective juror is allowed to sit on the jury, and both should sit. Somewhat more indirectly, the prospective juror excused with the prosecution's "extra" peremptory challenge, after the trial court erroneously grants a prosecutorial challenge for cause, suffers an identical injury.

206. We do not consider, within variables two and three, the issue of when the peremptory challenges are exhausted vis-à-vis the cause error. In the so-called "strike" method of exercising peremptory challenges, all challenges for cause would have been raised and resolved before the beginning of the peremptory challenge phase, so the defendant whose challenge for cause was erroneously denied will know before beginning peremptory challenges that he or she may have to use a peremptory challenge curatively. See *supra* note 18. The so-called "sequential" method puts the defendant in a substantially more delicate position. Since in this method challenges for cause are interlaced with peremptory challenges, the defense may well have to make its decision about whether to use a peremptory challenge curatively before it has any idea whether it will or will not end up exhausting its peremptory challenges. *Id.* Indeed, in such a circumstance a defendant may have no peremptory challenges left when the trial judge erroneously denies a defense challenge for cause. Although we are aware of no cases that discuss this scenario, we concede that such an error—which results in the biased person actually sitting on the jury—is probably structural error, for the same reasons the Court has labeled the presence of a biased judge as structural error. See *supra* note 196 and accompanying text.

- Scenario 2: The trial court erroneously grants a prosecution challenge for cause, but the prosecution does not exhaust its peremptory challenges.
- Scenario 3: The trial court erroneously denies a defense challenge for cause, the defendant exhausts all his or her peremptory challenges, and the defendant uses one of the peremptory challenges on the erroneously retained juror.
- Scenario 4: The trial court erroneously denies a defense challenge for cause, the defendant exhausts his or her peremptory challenges, but the defendant does not use one of the peremptory challenges on the erroneously retained juror.
- Scenario 5: The trial court erroneously denies a defense challenge for cause, the defendant does not exhaust his or her peremptory challenges, but the defendant does use one of the peremptory challenges on the erroneously retained juror.
- Scenario 6: The trial court erroneously denies a defense challenge for cause, the defendant does not exhaust his or her peremptory challenges, and the defendant does not use one of the peremptory challenges on the erroneously retained juror.

As we examine the issues of harmless error, structural error, waiver, and the relationship between challenges for cause, peremptory challenges, juror impartiality and due process, we believe it is important to distinguish these six scenarios.

*A. AN ANALYSIS OF SCENARIOS 1, 2, 3 AND 5 AFTER
MARTINEZ-SALAZAR: HARMLESS ERROR, STRUCTURAL
ERROR OR NO ERROR AT ALL?*

Let us first address the Court's fiction that these kinds of errors are not errors at all. There is some potency to the idea that an error, if cured, is no longer error. But, of course, that is true only if the cure itself does not inflict another kind of error. In each of these four scenarios the cause error is cured, but the price is the loss, or relative loss, of a peremptory challenge.

In Scenario 3, surely the defendant has been "deprived" of a peremptory challenge when he or she is forced to use a peremptory challenge on a prospective juror that the trial judge should have removed for cause. The palpable error is the denial of the challenge for cause; the immediate effect is that the defense has one fewer peremptory challenge than it otherwise should. This error is as much of an "error," and the deprivation of the peremptory challenge as much of a "deprivation," as when a trial judge simply decides to give the defendant one less

peremptory than the rules or statutes provide.²⁰⁷

If Scenario 3 error is “error,” then Scenario 1 error is also “error,” because the effect of both “errors” is an imbalance in peremptory challenges to the defendant’s detriment. It is the *relative* number of peremptory challenges that is important in gauging a litigant’s power to shape the jury. A defendant who retains a measly six peremptory challenges in the face of a trial judge’s wholly unfounded and erroneous decision to give the prosecution 100 peremptory challenges has surely suffered “error.”

We concede that the question of whether Scenario 2 and 5 error is really “error” is a marginally more complex inquiry. The Scenario 2 defendant must contend with the argument that the prosecution did not really get an “extra” peremptory challenge because it did not exhaust its peremptory challenges. Another way to state this argument is that even had the trial court not erroneously granted the prosecution’s challenge for cause, the prosecution could still have removed that juror with its unused peremptory challenge. This scenario is *Gray v. Mississippi*,²⁰⁸ and the Court expressly, and we think quite correctly, rejected the prosecution’s “unexercised peremptory” argument.²⁰⁹

Scenario 5 error is the counterpoint to Scenario 3. There is no doubt that the Scenario 5 defendant was deprived of a peremptory challenge by being forced to use one on the erroneously retained juror. However, the argument is that such a defendant is hardly in a position to complain about the loss because he or she did not choose to exhaust the remaining peremptory challenges. This is an argument about the effect of the error, not about whether there is reviewable error in the first instance.

Notwithstanding that Scenario 1, 2, 3 and 5 errors are in fact “errors,” we nevertheless contend that the general rule in each of these four scenarios should be that the jury selection error is harmless and that the convictions must be affirmed.²¹⁰ In each of these scenarios, no demonstrably biased prospective jurors end up sitting on the jury, so none of the scenarios involves any violation of a

207. Whether the error is harmless is, of course, another matter entirely. The *Martinez-Salazar* and *Ross* Courts were able to avoid the harmless question by engaging in the fiction that neither case involved any error at all. See *supra* text accompanying notes 58-66.

208. 481 U.S. 648 (1978), discussed in *supra* text accompanying notes 16-26.

209. *Id.* at 665-66.

The practical result of adoption of this unexercised peremptory argument would be to insulate jury selection error from meaningful appellate review. But simply stating during *voir dire* that the State is prepared to exercise a peremptory challenge if the court denies its motion for cause, a prosecutor could ensure that a reviewing court would consider any erroneous exclusion harmless.

Moreover, the “unexercised peremptory” argument in Scenario 2 is not really an argument about whether there has been error, but instead is an argument that the error is harmless.

210. We say “general rule” because there may be unique circumstances in a particular case that might rise to the level of a due process violation without regard to harmless error. For example, a trial judge might intentionally and substantially interfere with a defendant’s peremptory challenges. Justice Ginsburg acknowledged as much in her majority opinion in *Martinez-Salazar*: “[W]e note what this case does not involve. It is not asserted that the

defendant's right to an impartial jury under the Sixth Amendment. In other words, all the jurors who actually sit in a Scenario 1, 2, 3 or 5 case were properly passed for cause.

The only effect of a Scenario 1, 2, 3 or 5 error is an imbalance in peremptory challenges.²¹¹ Is this really the kind of error, and really the kind of "right," that justifies reversing otherwise perfectly valid convictions returned by perfectly impartial jurors? The answer must be no. This error is not constitutional, is not structural and is harmless by any measure of that inquiry.

Scenario 1, 2, 3, and 5 error is certainly not constitutional error. Because a criminal defendant has no right to any peremptory challenges, it is difficult to understand how an imbalance in peremptory challenges could rise to the level of constitutional error. Legislatures and supreme courts could abolish *all* peremptory challenges tomorrow without inflicting constitutional injury on criminal defendants. They could probably even eliminate all defense peremptory challenges and retain all prosecution peremptory challenges.²¹² A trial court's unintentional elimination of a single defense peremptory challenge likewise inflicts no constitutional injury.

Defendants nevertheless incant the mantra of due process in these cases, as they often do when an error that has no palpable constitutional reverberations is nevertheless generically claimed to have deprived them of the minimum process required for a fair (that is, reliable) trial. But these incantations ring particularly hollow in Scenarios 1, 2, 3 and 5. We cannot imagine an error with less due process implications than one that results in a defendant still being tried by an impartial jury, in a trial containing all the procedural and evidentiary protections upon which our system is built.²¹³

Moreover, since *Chapman* and *Fulminante*, it is also clear that Scenario 1, 2, 3 and 5 errors are not structural errors and are therefore subject to harmless error

trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error." 528 U.S. at 316; *see also* *Ross v. Oklahoma*, 487 U.S. 81, 91 n.5 (1988).

211. We use the word "imbalance" to indicate a shift, in the prosecution's favor, in the allocation of peremptory challenges established by statute or rule. But of course in non-capital felonies in the federal courts, and many state courts, the number of peremptory challenges does not start out equal. *See supra* note 127 and accompanying text. Whether or not a particular scheme gives the prosecution and defense the same number of peremptory challenges, Scenario 1, 2, 3 and 5 error results in a shift in the original allocation to defendant's detriment.

212. Clearly, states may constitutionally reduce defense peremptory challenges while retaining the level of prosecution peremptory challenges. That is what virtually every state that now provides an equal number of peremptory challenges has done, since the English and colonial practice was typically to give the defendant more peremptory challenges than the prosecution. Whether a reduction to zero might offend due process has never been tested. Modern proposals to reduce peremptory challenges have all been aimed at ending up with an equal, though smaller, number of peremptory challenges for each side. *See supra* note 123. Of course, even though peremptory challenges are not constitutionally required, a trial court could not dole them out in an unconstitutional manner.

213. It is particularly difficult to take seriously a due process challenge from a Scenario 5 defendant. In that Scenario, though the cause error may have forced the defendant to expend a peremptory challenge, the loss didn't matter at all because the Scenario 5 defendant never gets around to exhausting the remaining peremptory challenges.

review, even if by some stretch of the imagination we might label them “constitutional” errors. An error is no longer structural just because it is constitutional error or because it involves some other especially important right, or even just because its impacts may be difficult to gauge.²¹⁴ The inquiry is *reliability*. How can it be said that the reliability of a trial is likely to be compromised when a defendant loses a single peremptory challenge, but when all the jurors who actually hear the case are fair and impartial? It cannot. By any sensible measure of “structural error,” and certainly by the Court’s increasingly strict measures, jury selection error of this sort is not “structural.”

This brings us to the harmless error inquiry. If ever there were a category of errors that borders on “harmless as a matter of law,” it is the errors in Scenarios 1, 2, 3 and 5. The juries in these Scenarios were vetted for cause, and all of them were, by definition, fair and impartial. Yet they returned convictions. By any measure of harmlessness, depriving a defendant of a single peremptory challenge will surely be harmless in most if not all cases.²¹⁵

The uniqueness of jury selection errors is that by their very nature they offer no resistance to the evidentiary or instructional counterweights we typically place on the scales of harmlessness. Ordinarily, the harmless error inquiry requires an appellate court to ask whether the same jury would have reached the same result with different evidence or different instructions. However, under these scenarios, an impartial jury has *already* determined, based on all the evidence and the instructions of law, that the prosecution has proved defendant’s guilt beyond a reasonable doubt. The jury selection errors in Scenarios 1, 2, 3 and 5 require appellate courts to ask whether a different but equally impartial jury would have reached the same result with the same evidence and the same instructions. The very foundations upon which our system is built—that cases are decided based on the law and the evidence, and not on the peccadilloes of the fact-finders—will almost always require us to conclude that such errors are harmless.

214. See *supra* text accompanying notes 157-80.

215. Scenario 5 defendants must not only face the argument that the loss of one peremptory challenge is harmless, they must also explain why they did not bother to exhaust the ones they had left. Scenario 5 represents the paradigmatic “harmlessness as a matter of law” error. How can a defendant complain that the trial court’s cause error effectively reduced the defense peremptories from six to five, when the defendant does not even bother to use all five?

We have tried to imagine a situation in which the state would be unable to convince an appellate court that Scenario 1, 2, 3 or 5 error is harmless beyond a reasonable doubt, but have had difficulty doing so, apart from situations where a trial judge is acting with demonstrable malice. See *supra* note 212. One could argue that the sheer number of Scenario 1, 2, 3 or 5 errors might at some point cease to become harmless. For example, if a trial judge erroneously denies six defense challenges for cause and thereby deprives a defendant of *all* of his or her peremptory challenges, the due process Maginot Line might be said to have been crossed, even in the absence of proof of malice. Even then, the error is probably harmless in the strict sense of the word. The error becomes reversible because the trial judge’s behavior was intolerable, not because the conclusion was unreliable.

B. AN ANALYSIS OF SCENARIOS 4 AND 6 AFTER MARTINEZ-SALAZAR: WAIVER, INVITED ERROR, AND THE COURT'S STRANGE INVITATION

Even though *Martinez-Salazar* was not a Scenario 4 or 6 case, the majority went considerably out of its way, as discussed above, to hold that Federal Rule 24(b) does not require a defendant to use peremptory challenges curatively.²¹⁶ Under this view, Scenario 4 and 6 defendants can never be said to have waived the challenge for cause argument by failing to cure the claimed error with a peremptory challenge. As a result, what had once been relatively well-settled rules of waiver in Scenarios 4 and 6 are now in great doubt, at least in the federal courts.

We contend that the Court in *Martinez-Salazar* was wrong in its “no waiver” holding, and that under the most basic principles of waiver Scenario 4 and 6 defendants have waived the cause errors by failing to take advantage of the opportunity to cure the errors with available peremptory challenges.²¹⁷ This position is not only compelled by the doctrines of waiver, plain error and invited error, but the contrary position encourages defense lawyers to engage in the very kinds of games playing that puts the trial system in public disrepute.

Scenario 4 and 6 defendants take Justice Ginsburg’s advice and elect not to peremptorily excuse a palpably biased juror. Instead, they keep that biased juror on the jury, save the peremptory challenge for use on other prospective jurors, then try to obtain a reversal on appeal on the ground that the juror was biased. The only difference between Scenario 4 and 6 is that in the former the defendant ends up exhausting all peremptory challenges and in the latter he or she does not. By making this “hard choice,” the Scenario 4 and 6 defendants suffer no imbalance in peremptory challenges. The issue is a much more direct and traditional one: does the defendant waive the cause error on appeal because he or she elected not to peremptorily excuse the very juror whom the defendant later claims on appeal to have been biased? Just asking the question makes the answer evident, but let us analyze these two waiver scenarios a little more comprehensively.

We begin with the well-established principle that cause errors themselves are not plain errors. That is, if a defense lawyer fails to challenge a juror for cause during jury selection, the cause error is ordinarily waived on appeal.²¹⁸ If a lawyer

216. See *supra* notes 52-55 and accompanying text (describing the majority’s reasoning in holding that Rule 24(b) does not mandate curative use of peremptory challenges).

217. Scenario 4 and 6 error may not be harmless, because in those Scenarios, unlike in Scenarios 1, 2, 3 and 5, the erroneously retained biased juror actually ends up sitting on the jury. But, of course, he or she does so because the defendant chooses not to use an available peremptory challenge to remove that juror: thus, the waiver.

218. See, e.g., *United States v. Polichemi*, 219 F.3d 698, 710–11 (7th Cir. 2000); *Acklin v. State*, 790 So. 2d 975, 994 (Ala. Crim. App. 2000); *State v. Stokes*, 638 S.W.2d 715, 721–22 (Mo. 1982); *Douglas v. State*, 951 P.2d 651, 661 (Okla. Crim. App. 1997); *State v. Ellifritz*, 835 P.2d 170, 177–78 (Utah App. 1992). Similarly, and although the Supreme Court has not expressly addressed the issue, most courts have held that a defendant waives a *Batson* argument on appeal if the *Batson* objection is not made during jury selection. See, e.g., *United States v. Ford*, 498 U.S. 411, 418–19 (1991) (dictum) (opining that “undoubtedly . . . a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its

waives a cause error by not making it during jury selection, we cannot understand how that same lawyer preserves the error by making the challenge for cause, having it erroneously denied, and then failing to remove the juror with an available peremptory challenge. In both cases, the lawyer had the power to remove the biased juror, elected not to do so, and now wants to complain about that election on appeal.²¹⁹

The salutary purposes of the contemporaneous objection rule are particularly important in jury selection. We want to encourage the trial court's opportunities to correct jury selection error for the very reason that we are at the beginning of the whole process. There are obvious and enormous judicial economies in correcting jury selection errors when they are made, rather than with an appeal and re-trial. Moreover, the challenge for cause and *Batson* inquiries are intensely factual. The last kind of system any of us should want is one in which appellate courts are either forced to be the initial finders of fact on these issues or forced to reverse convictions precisely because they do not want to be the initial fact finders. The trial court judge is in a unique, indeed exclusive, position to make the factual calls upon which these assertions of jury selection errors depend.²²⁰ Finally, although

members are selected"); *United States v. Lopez*, 147 F.3d 1, 3 (1st Cir. 1998); *Safeway Stores, Inc. v. Buckmon*, 652 A.2d 597, 602-04 (D.C. App. 1994); *State v. Sutherland*, 859 S.W.2d 801, 803 (Mo. App. 1993); *State v. Wilson*, 868 P.2d 656, 661-62 (N.M. 1993); *State v. Ballew*, 667 N.E.2d 369, 370-79 (Ohio. 1996); *Weddell v. Weber*, 604 N.W.2d 274, 277 (S.D. 2000).

219. Indeed, the failure to use an available peremptory challenge is in one very important sense even more unforgivable than the failure to make a challenge for cause: a lawyer's power to remove a prospective juror peremptorily is almost absolute; the power to remove a prospective juror for cause requires a cogent argument and a receptive trial judge. Twenty-six states have held that a defendant waives any argument that the trial court erroneously denied a defense challenge for cause by failing to use an available peremptory challenge to strike the juror in question. *Singleton v. State*, 921 P.2d 636, 638 (Alaska Ct. App. 1996); *Trotter v. State*, 377 S.W.2d 14, 23 (Ark. 1964); *People v. Ayala*, 1 P.3d 3, 24-25 (Cal. 2000); *Pentecost v. State*, 545 So.2d 861, 863 n.1 (Fla. 1989); *State v. Mitchell*, 660 P.2d 1336, 1344 (Idaho 1983); *People v. Collins*, 478 N.E.2d 267, 271-72 (Ill. 1985); *Vaughn v. State*, 559 N.E.2d 610, 614 (Ind. 1990); *State v. Hickock*, 363 P.2d 541, 550 (Kan. 1961); *State v. Brown*, 742 So. 2d 1051, 1054-55 (La. Ct. App. 1999); *State v. Pelletier*, 434 A.2d 52, 55 (Me. 1981); *Booth v. State*, 507 A.2d 1098, 1105 (Md. 1980); *People v. Legrone*, 517 N.W.2d 270, 273 (Mich. Ct. App. 1995); *Davis v. Wal-Mart Stores, Inc.*, 724 So. 2d 907, 911 (Miss. 1998); *Howard v. State Farm Mut. Auto. Ins. Co.*, 496 N.W.2d 862, 867-68 (Neb. 1993); *Gibbons v. State*, 634 P.2d 1214, 1215 (Nev. 1981); *People v. Isaac*, 622 N.Y.S.2d 587, 588 (N.Y. App. Div. 1995); *State v. Johnson*, 347 N.E.2d 7, 16-17 (N.C. 1986); *State v. Stallings*, 731 N.E.2d 159, 170 (Ohio 2000); *Young v. State*, 12 P.3d 20, 32-33 (Okla. Crim. App. 2000); *State v. Pettit*, 675 P.2d 183, 185 (Or. Ct. App. 1983); *State v. Patriarca*, 308 A.2d 300, 309-10 (R.I. 1973); *State v. Bittner*, 359 N.W.2d 121, 127 (S.D. 1989); *Sommerville v. State*, 521 S.W.2d 792, 797 (Tenn. 1975); *Lewis v. State*, 911 S.W.2d 1, 3-4 (Tex. App. 1997); *State v. Baker*, 935 P.2d 503, 510 (Utah 1997); *Lattrell v. Swain*, 239 A.2d 195, 198 (Vt. 1968). Only Missouri has held that a defendant does not waive the cause error by failing to remove the juror with an available peremptory challenge. *State v. Taylor*, 602 S.W.2d 820, 822 (Mo. Ct. App. 1980).

220. The standard of review for rulings on challenges for cause is whether the trial court abused its discretion. *See, e.g., Patton v. Yount*, 467 U.S. 1025, 1038-39 (1984) (noting that "special deference" is given to trial judge's decision); *State v. Esposito*, 613 A.2d 242, 248-49 (Conn. 1992) (same). Similarly, review of *Batson* step three (whether the proffered constitutionally neutral reason is a pretext) is subject to a clearly erroneous standard of review. *See Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("great deference"); *United States v. Blackman*, 66 F.3d 1572, 1575 (11th Cir. 1995) ("clearly erroneous"). Even *Batson* step one (whether the objector has made out a prima facie case of discrimination) is reviewed in many circuits under a clearly erroneous standard. *See, e.g.,*

challenges for cause and *Batson* challenges are not always easy decisions for trial judges, once a decision favorable to the challenger is made the corrective action is easy. Challenges for cause are granted and the challenged jurors removed; *Batson* challenges are sustained and either the wrongfully excused juror returned to the jury or a new venire brought in.²²¹

The point is that there are many powerful institutional reasons for having these issues raised early, raised before the judge who is in the best position to rule on them, and corrected early. The same arguments apply to Scenario 4 and 6 errors. The defendant is in a position to correct the trial judge's cause error early and easily, simply by using an available peremptory challenge to strike the problem juror. That corrective action is far superior, by any legitimate institutional measure, to letting the biased juror sit through an entire trial and then reversing the conviction and ordering a new trial.

Even without analogy to these two other kinds of non-plain jury selection errors, Scenario 4 and 6 error is precisely the kind of error that has no bearing on reliability and thus could never join the increasingly exclusive club of plain errors. Indeed, these kinds of errors are not only not plain errors, they are a special category of self-induced errors—often called “invited errors”—that appellate courts have traditionally been loath to entertain. Some of the most obvious examples of invited errors include: a party offering evidence at trial and having it admitted, then objecting to its admission on appeal;²²² a party successfully keeping out evidence at trial by way of a motion in limine, then objecting on appeal to its exclusion;²²³ a party successfully resisting the other side's motion to recuse the trial judge, then arguing on appeal that the judge was biased;²²⁴ a defendant successfully requesting a particular jury instruction, then objecting to the giving of

United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994), *cert. denied*, 514 U.S. 1055 (1995); United States v. Casper, 956 F.2d 416, 418 (3d Cir. 1992). *But see* Mahaffey v. Page, 162 F.3d 481, 484 (7th Cir. 1998) (*de novo* review of step 1); State v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989) (same).

221. There are two possible remedies when a trial judge concludes that a party has violated *Batson* by exercising its peremptory challenges in a constitutionally impermissible manner: re-seat the peremptorily excused jurors or start over with a new panel. Although most appellate opinions have expressed a preference for the latter, *see, e.g.*, State v. McCollum, 433 S.E.2d 144 (N.C. 1993), State v. Walker, 453 N.W.2d 127 (Wis. 1990), the decisions in those cases may depend very much on the particular mechanics of jury selection. In cases where the peremptory challenges are exercised by the so-called “strike” method, *see supra* note 18, and where the lawyers do not announce their peremptory challenges in open court but rather indicate them on paper, there is no reason the peremptorily struck jurors—who never knew they were struck—cannot be unstruck. *See* Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY, 1, 61 n.322 (1988). Of course, even bringing a new panel in and starting jury selection over is much preferable to never giving the trial judge a chance to rule on the *Batson* error, going through an entire trial, reversing the conviction on appeal and re-trying the case.

222. *See, e.g.*, Wactor v. Spartan Trans. Corp., 27 F.3d 348, 350 (8th Cir. 1994); United States v. Reyes-Alvarado, 963 F.2d 1184, 1187 (9th Cir. 1992); United States v. Pina, 844 F.2d 1, 8 (1st Cir. 1988).

223. *See, e.g.*, American Life & Cas. Co. v. Oceanic Trade Alliance Council, Inc., 756 F.2d 474, 479-80 (6th Cir. 1985).

224. *See, e.g.*, First Colonial Corp. of Am. v. Am. Benefit Life Ins. Co. (*In re* First Colonial Corp. of Am.), 693 F.2d 447, 449-50 n.5 (5th Cir. 1987).

that instruction on appeal;²²⁵ a defendant stipulating to an element of the offense (a prior conviction), then objecting on appeal that the trial court instructed the jury that that element had been stipulated.²²⁶ Less obvious examples include a defendant “opening the door” to otherwise inadmissible evidence or improper argument.²²⁷

Scenario 4 and 6 errors are the kind of invited jury selection errors that appellate courts should not review. Defendants in these scenarios had a straightforward and easily exercised opportunity to prevent biased jurors from sitting on their juries, yet they chose not to take that opportunity. Their choice may have been a “hard choice,” but it should not be without consequences.²²⁸ By electing not to remove biased jurors peremptorily, defendants participate in their seating every bit as much as the trial judges who erroneously fail to remove them for cause. Appellate courts should not entertain these self-induced errors.

VII. RETHINKING THE CONNECTIONS BETWEEN PEREMPTORY CHALLENGES AND RELIABILITY

The problem of curative peremptory challenges forces us to come to grips with a fundamental question: what is the purpose of peremptory challenges? The manner in which the *Martinez-Salazar* Court resolved the problem suggests the Court is on

225. See, e.g., *United States v. Thurman*, 417 F.2d 752, 753 (D.C. Cir. 1969).

226. See, e.g., *United States v. Gonzales*, 110 F.3d 936, 944–48 (2d Cir. 1997). This result is not to be confused with the principle that in the absence of such a stipulation a trial court may not direct a verdict, even as to a single element, or with the principle that once a defendant stipulates to an element a trial court may not allow the prosecution to put on evidence about it. See *supra* note 174.

227. See, e.g., *State v. Stuard*, 863 P.2d 881, 892–93 (Ariz. 1993); *State v. Massey*, 730 A.2d 623, 631 (Vt. 1999). Interestingly, the Supreme Court has never explicitly adopted the invited error doctrine, although it is mentioned in many cases in dictum. See, e.g., *Kemp v. Potts*, 475 U.S. 1068, 1071 (1986) (Burger, C.J., dissenting); *Caldwell v. Mississippi*, 472 U.S. 320, 337 (1985); *Lawn v. United States*, 355 U.S. 339 (1958). The majority in *United States v. Young* expressed particular skepticism about the use of the doctrine in cases involving prosecutorial misconduct in closing arguments: “In retrospect, perhaps the idea of “invited response” has evolved in a way not contemplated. *Lawn* and the earlier cases cited above should not be read as suggesting judicial approval or – encouragement – of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process.” 470 U.S. at 12; see also Albert W. Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 657–58 (1972) (contending that courts generally regard invited error as an excuse for a “free for all”). The Court has refused to apply the invited error doctrine to preclude it from reviewing an error invited in the trial court, but addressed by the court of appeals. See *United States v. Wells*, 519 U.S. 482 (1997).

228. The Scenario 6 defendant does not face any choice, “hard” or otherwise. He or she is flush with peremptory challenges, yet still decides not to use them to remove the very juror whom he or she unsuccessfully argued is biased and should be removed for cause. Of course, the distinction between Scenario 5 and Scenario 6 will often not occur until the end of the jury selection process. If the peremptory challenges are exercised by the so-called “sequential” method, see *supra* note 18, then defendants who elect not to use their very first peremptory challenge on the biased juror do not know whether they will end up exhausting their peremptory challenges. That is, the “hard” choice at this stage is whether defendants should trade the chance to remove a palpably biased juror for the chance to stockpile peremptory challenges to be used against jurors with hidden biases or jurors the lawyer simply does not like. As discussed in the text accompanying notes 63–65, this is not a hard choice at all, either professionally or ethically.

the brink of abandoning the myth that peremptory challenges help to achieve impartial juries. That abandonment could be the long-predicted beginning of the end of peremptory challenges.

Some judges and commentators have argued that peremptory challenges are unconstitutional because they violate equal protection,²²⁹ due process²³⁰ and the Sixth Amendment's guarantee of a fair cross-section.²³¹ The counter-arguments have always centered on the value of peremptory challenges as a tool to insure impartial juries.²³² If in fact peremptory challenges have little or nothing to do with the goal of selecting impartial jurors, which is what we think *Martinez-Salazar*

229. Justice Marshall made this argument in his famous concurrence in *Batson*, in which he suggested that no amount of judicial tinkering will save defendants and jurors from the discriminatory power of peremptory challenges, and that the only constitutional solution is to get rid of peremptory challenges entirely:

The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

...

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.

Batson v. Kentucky, 476 U.S. 79, 102–103, 107 (1986) (Marshall, J., concurring); see also *People v. Bolling*, 591 N.E.2d 1136, 1145–46 (Bellacosa, J., concurring); Raymond J. Broderick, *Why the Peremptory Challenge Should be Abolished*, 65 TEMP. L. REV. 369, 416–23 (1992). See generally Robert L. Harris, Jr., *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1034–39 (1991); William T. Pizzi, *Batson v. Kentucky: Curing the Disease and Killing the Patient*, 1987 S. CT. REV. 97, 123–56 (1987).

230. The due process argument is that the state cannot allow lawyers to engage in an irrational procedure that the state could not itself impose. As Professor Alschuler so cogently put it:

Imagine a statute that generalized the principle underlying any specific use of a peremptory challenge to exclude a prospective juror who could not be disqualified for cause. This statute might disqualify from jury service both people who smile at defense attorneys and people who smile at prosecutors, or it might disqualify from a jury anyone with a child the same age as the defendant and anyone with a child the same age as the complaining witness. Although the line drawn by this statute might be less offensive than many of the lines lawyers draw in exercising their peremptory challenges, it probably could not survive constitutional scrutiny. . . . The peremptory challenge is no better and may often be worse.

Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 204 (1989); see also Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1014 (1989) (“[P]rosecutorial challenges, as potentially arbitrary and capricious government action, violate the due process clause of the Fourteenth Amendment.”). This due process argument is particularly powerful because it is not dependent on uneasiness about *Batson*, and in fact gains strength from many post-*Batson* cases relaxing (some would say eliminating) the state action requirement. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 47–49 (1992) (applying *Batson* to defense challenges as well as prosecution challenges).

231. See, e.g., Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1128–36 (1995); see also Hoffman, *supra* note 110, at 867–68 (arguing that because of the small number of jurors and large number of peremptory challenges, lawyers can eliminate entire identifiable groups from the fair cross-section).

232. See, e.g., Barbara A. Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 STAN. L. REV. 545, 552–54 (1975).

may actually mean, then they will not likely survive constitutional attack.²³³

The role of peremptory challenges, and in particular their connection with the goal of selecting impartial jurors, has been rather unclear ever since juror impartiality became fixed in the common law in the fifteenth century.²³⁴ Indeed, the very fact that peremptory challenges antedated the notion of juror impartiality by some 200 years should tell us something about whether juror impartiality and peremptory challenges have much to do with one another.²³⁵ Blackstone's famous and oft-quoted description of the peremptory challenge as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous,"²³⁶ was coupled with a preceding, less famous and seldom quoted description of it "as arbitrary and capricious."²³⁷

We inherited this English ambivalence about peremptory challenges, as well as the English proclivity only to articulate their sunny side. Ever since it acknowledged in *Stilson* that peremptory challenges are not constitutionally required,²³⁸ the Court has consistently spoken about them in reverential, almost constitutional, terms. The irony about these descriptions in dicta is that they have always been coupled with non-dicta limitations on peremptory challenges, either on their discriminatory exercise or on the effect they are deemed to have on trial outcomes.

Thus, in *Swain v. Alabama*, the majority describes the peremptory challenge as having "very old credentials" and as "a necessary part of trial by jury,"²³⁹ but then holds for the first time that peremptory challenges are not entirely peremptory, and that the Equal Protection Clause prohibits prosecutors from systematically using them in a racially discriminatory fashion. In *Batson v. Kentucky*, the Court repeats

233. We recognize that critics of the peremptory challenge have been predicting its demise for decades, buoyed with each extension of *Batson*. See, e.g., Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528; Brian E. Leach, *Extending Batson v. Kentucky to Gender and Beyond: The Death Knell for the Peremptory Challenge?*, 19 S. ILL. U. L.J. 381 (1995); Angela J. Mason, *Discrimination Based on Religious Affiliation: Another Nail in Peremptory Challenge's Coffin?*, 29 GA. L. REV. 493 (1995); Patricia F. Kaufman, *The Beginning of the End of Peremptory Challenges: Georgia v. McCollum*, 112 S. Ct. 2348 (1992), 16 HARV. J.L. & PUB. POL'Y 287 (1993); Edmund L. Quatmann, Jr., *J.E.B. v. Alabama: The Extension of the Equal Protection Clause to Gender-Based Peremptory Challenges—Is This the End?*, 39 ST. LOUIS U. L.J. 1349 (1995); Brian Wilson, *Batson v. Kentucky: Can the "New" Peremptory Challenge Survive the Resurrection of Strauder v. West Virginia?*, 20 AKRON L. REV. 355 (1986). We suggest that if the Court ever does decide that peremptory challenges are unconstitutional, it may not be with the bang of a final irrational extension of *Batson*, but rather with the whimper of recognition that peremptory challenges do not advance the goal of juror impartiality.

234. See *supra* text accompanying notes 68-77.

235. See *supra* text accompanying notes 97-110.

236. 4 BLACKSTONE, *supra* note 71, at *346. Among the courts quoting this portion of Blackstone's description was the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 242 (1965).

237. 4 BLACKSTONE, *supra* note 71, at *346.

238. *Stilson v. United States*, 250 U.S. 583 (1919), discussed in *supra* text accompanying note 114.

239. 380 U.S. at 219.

Swain's refrain in extolling the virtues of the peremptory challenge,²⁴⁰ but then holds that peremptory challenges cannot be used discriminatorily in the single case at hand, whether or not the prosecutor has a history of systematically using them discriminatorily. In all the post-*Batson* cases, the Court continues to pay homage to the role of peremptory challenges, but then continues to extend *Batson's* encroachment into the "peremptoriness" of peremptories.²⁴¹ In *Ross v. Oklahoma*, the Court again describes peremptory challenges as a way to ensure an impartial jury, yet holds that their impairment is not only not reversible error but not error at all.

It is not until *Martinez-Salazar* that the Court begins to talk about peremptory challenges with language that suggests they may not be as important to the re-emerging paradigm of reliability as earlier cases had assumed:

We have long recognized the role of the peremptory challenge in *reinforcing* a defendant's right to a trial by an impartial jury. But we have long recognized, as well, that such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension.²⁴²

Perhaps we read too much into the tea leaves of the Court's language, but we detect a distinct and rather remarkable change in the way the Court has expressed its long-standing ambiguity about the peremptory challenge. What in the days of *Swain* and *Batson* was described as an important tool to ensure jury impartiality, in whose constriction the Court only reluctantly participated to protect more important rights of equal protection, is in the post-*Martinez-Salazar* world an anachronism of common law whose abject violation is not even recognized as error.

VIII. CONCLUSION

Jury selection errors whose only impact is a net reduction in peremptory challenges are harmless. When a criminal defendant uses a peremptory challenge to remove a prospective juror whom the trial court should have removed for cause, the defendant is using peremptory challenges in precisely the curative manner for which they were intended. If the defendant in such circumstances is convicted, he or she is convicted by a fair and impartial, albeit different, jury, and the conviction should be affirmed.²⁴³ If the defendant in such circumstances elects not to expend a

240. "[T]he peremptory challenge occupies an important position in our trial procedures." 476 U.S. 79, 98 (1986).

241. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (extending *Batson* to gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to civil cases).

242. *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000) (citations omitted).

243. As we discuss at length in analyzing all the scenarios, the same harmless conclusion applies when the imbalance is the product of the trial court erroneously granting a prosecutor's challenge for cause. See *supra* text accompanying notes 209-12.

peremptory challenge on the erroneously retained juror, then that defendant should not be allowed to raise the cause error on appeal.

Martinez-Salazar comes as close as the Court has ever come to talking about peremptory challenges in the language of harmless error. We hope it will continue to do so, and that it will continue its commitment to reliability as the pole star of harmless error. We hope the Court will re-think its “no waiver” holding, and return to well-settled principles of waiver and non-plain error that are entirely consistent with the reliability paradigm. Whatever it does in the future, the Court seems finally to be talking about peremptory challenges in a more realistic, less romanticized, way. That is good news for a system that needs less games playing in jury selection and more common sense on appeal.

