1999

The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error

William G. Childs
Western New England University School of Law, wchilds@law.wne.edu

Follow this and additional works at: http://digitalcommons.law.wne.edu/facschol

Part of the Criminal Law Commons, and the Litigation Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error

William G. Childs*

Table of Contents

I. Introduction ............................................. 49

II. Peremptory Challenges and Error Analysis ............ 52
   A. Peremptory Challenges: Unquestionably Important But Not Guaranteed .................. 53
   B. The Proper Role of Appellate Courts in Review: “Harmless Error” ..................... 57

III. Ross and Its Predecessors: Peremptory Challenges and Harmless Error ....................... 59

IV. What Protections Remain For Peremptory Challenges? ...... 66

V. Conclusion ............................................. 75

VI. Epilogue ............................................. 79

I. Introduction

The right of peremptory challenge is “one of the most important of the rights secured to the accused.”1 It is “an essential part of the trial,”2 and, more specifically, “essential to the impartiality of the trial.”3 "The central function of the right of peremptory challenge is to enable a litigant to

* Law Clerk, United States District Judge James M. Rosenbaum, District of Minnesota; J.D., 1998, The University of Texas School of Law; B.A., 1994, Macalester College. I thank Reid Neuriter, Michael E. Tigar, Adam Thurschwell, George Dix, Michael Gordon, and the editors of the American Journal of Criminal Law for their valuable assistance in developing and editing this Article. I also express my enormous thanks to Dena Childs for her patience.

2. Lewis v. United States, 146 U.S. 370, 376 (1892).
3. *Id.* at 378.
remove a certain number of potential jurors who are not challengeable for cause, but in whom the litigant perceives bias or hostility."4 Despite their importance—indeed, despite their characterization as "essential" to fairness, a term often used in describing constitutional protections—and their long-standing prominence,5 peremptory challenges are not guaranteed by the Constitution.6 Instead, they are provided by state statute7 or by Act of Congress.8

Unique among the rights guaranteed to litigants,9 the peremptory challenge is extraordinarily important yet not constitutional in nature. Although Congress or state legislatures could presumably refuse to allow peremptory challenges at all,10 every jurisdiction has recognized their perceived essential nature in the general effort to provide fair trials. Every jurisdiction has provided for peremptory challenges in one form or another.11

But what happens when the right to peremptory challenges is abridged or denied in a way which is more or less arbitrary? Can a jury resulting from such abridgment or denial be acceptable, or must any conviction or

4. United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996).
5. See Lewis, 146 U.S. at 376 ("The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury."); Swain v. Alabama, 380 U.S. 202, 212–13 (1965) ("The peremptory challenge has very old credentials.") (citing The Ordinance for Inquests, 33 Edw. 1, Stat. 1 (1305)).
9. The use of the term "litigant," rather than "defendant," is intentional. It is important to remember that the strength of the right to peremptory challenge, in whatever form it exists, does vary based on whether one is a criminal defendant or a civil litigant. This Article focuses primarily on the criminal context.
10. See Ross v. Oklahoma, 487 U.S. 81, 89 (1988) ("[P]eremptory challenges are a creature of statute and are not required by the Constitution") (citing Gray v. Mississippi, 481 U.S. 648, 663 (1987)); Swain, 380 U.S. at 219 ("[T]here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges"); cf. Stilson, 250 U.S. at 583 (noting the broad power Congress has to regulate the number of peremptory challenges available to defendants, including requiring codefendants to be treated as a single defendant, thus allowing a small proportion of the number of challenges available if tried separately).
11. See Swain, 380 U.S. at 216 & n.18 (cataloging representative peremptory challenge statutes of the states).
verdict resulting from such a jury be reversed? More specifically, to what
extent ought the peremptory challenge process function as a “safety valve”
for errors in deciding challenges for cause—that is, what should happen
when a trial judge erroneously refuses to strike a veniremember for cause
and the litigant to whom that veniremember is adverse is forced (either by
law or by practicality) to exercise one of her peremptory challenges to
eliminate the possibly adverse potential juror? Is being forced to “fix” the
errors of the judge so contrary to the purposes of peremptory challenges
that we ought not allow it if it has the effect of taking away a peremptory
challenge which a litigant would have used? More specifically, on appeal
(direct or collateral), should the trial court's effective denial of a challenge
to which the litigant was otherwise entitled constitute per se reversible
error? If so, in what contexts should it be considered error—that is, should
it matter if a federal court is considering a direct appeal from a federal
proceeding or is instead considering a habeas corpus proceeding arising out
of a state court?12

These are the questions considered by this Article. The issues they
raise are discussed in four Parts. In Part I, I provide a history and
overview of peremptory challenges and their relationship with challenges
for cause. That discussion includes an outline of the various types of state
statutes and state case law related to the mandatory or permissive use of
peremptory challenges to correct perceived error in deciding challenges for
cause. Part II also includes a discussion of the current law of error
analysis in the federal courts and recent trends in that area of law.

Part III consists of a review of the Supreme Court case law involving
error analysis and peremptory challenges. Ross v. Oklahoma13 has been
read by at least one court of appeals (as discussed in Part IV) as definitive-
ly endorsing harmless error analysis for all abridgements or denials of
peremptory challenges; this Part provides the argument for why that may
not be so, and in doing so endorses the approach of the majority of circuit
courts to address the issue. Put simply, the Part examines the specific
situation, and the specific feature of Oklahoma law, that led to Ross. That
feature is critical in limiting Ross.

With that interpretation of Ross in mind, Part IV turns to the courts’
responses to related situations, contrasting those interpreting Ross as a
broad directive with those that limit it to its procedural posture. I conclude
that the latter courts are correct in viewing Ross as by no means the final

12. This Article does not consider what should happen in state appellate courts on direct
review, except tangentially. Individual states' precedents regarding trial error vary and are
beyond the scope of this Article. Thus, I will only consider the various situations likely to be
faced by a federal court.
word in consideration of error involving peremptory challenges. The former courts fail to recognize the unique situation faced by the Ross court as laid out in Part III; without such recognition, they fail to distinguish the cases they face from Ross.

Part V combines the conclusions of the previous Parts and presents my conclusions. I argue that Ross can and should be limited in a principled way to the context in which a state, in its peremptory challenge scheme, has chosen to impose two separate policy goals for peremptory challenges by requiring a litigant to use a peremptory challenge to preserve error in deciding a challenge for cause. I conclude that Ross can be limited to situations where a jurisdiction specifically requires the use of peremptory challenges to strike jurors whom a litigant believes should have been struck for cause, thus eliminating its applicability to most state court judgments and all federal appeals of federal convictions.  

II. Peremptory Challenges and Error Analysis

Two long-standing and evolving areas of law intersect when considering the appropriate responses to the questions posed above: the law of peremptory challenges and the doctrine of harmless error. Specifically regarding peremptory challenges, explored in the first subpart, we must consider the policies furthered by allowing such challenges, as well as any distinction between federal peremptory challenge law and state peremptory challenge law. This second area is not limited to the rather obvious differences in schemes, but also includes consideration of whether federal interests in peremptory challenges ought to be given any more weight by federal courts than state interests in the same. As for harmless error, considered in the second subpart, we must explore the development of the doctrine and examine how courts generally, and the United States Supreme Court specifically, determine whether a particular variety of error is properly the subject of harmless error analysis. As it turns out, how this determination is made is, not surprisingly, largely dispositive of the result of the determination. Also highly relevant to—and often predictive of—the result is the party on whom the burden of proof is placed in establishing harm or the lack thereof while on appeal.

---

14. As discussed in Part V, this is not really quite my complete proposal. If a litigant still holds unused peremptory challenges at the end of jury selection, her use of peremptory challenges has not been hampered and no harm can be shown. Without any showing of even the potential for harm, no analysis is necessary.
A. Peremptory Challenges: Unquestionably Important But Not Guaranteed

For at least a century, the Supreme Court has acknowledged that the right of a criminal defendant to peremptory challenge is “one of the most important of the rights secured”\(^\text{15}\) to her. Though the right is generally framed as important to criminal defendants, its nature as “a means to achieve the end of an impartial jury”\(^\text{16}\) is applicable also to civil litigants.\(^\text{17}\)

Legislatures have also consistently recognized the importance of peremptory challenges. Congress first provided for their existence for defendants in 1790\(^\text{18}\) and virtually all of the states followed suit in the next eighty years.\(^\text{19}\) The prosecution’s right to peremptory challenge is long-standing as well. Early cases concluded that the prosecutors had retained the English practice of the Crown’s right to set aside jurors,\(^\text{20}\) which was essentially identical to the peremptory challenge. The accepted view endorsing the peremptory challenge was well-stated by Blackstone: “No man should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.”\(^\text{21}\)

Despite judicial and legislative recognition of the importance of peremptory challenges to the selection of a jury, it has not been held to be constitutionally guaranteed.\(^\text{22}\) Though there have been various arguments presented for constitutionalizing the right to make peremptory strikes,\(^\text{23}\)

\(^{15}\) Pointer v. United States, 151 U.S. 396, 408 (1894).


\(^{17}\) Of course, other rights and protections—i.e., due process rights under the Fifth and Fourteenth Amendments, the right against compelled self-incrimination, and so on—attach in a criminal proceeding, any or all of which may affect an error analysis.

\(^{18}\) See Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 112, 119 (1790) (allowing 35 peremptories in treason trials and 20 for other felonies punishable by death).

\(^{19}\) See Swain v. Alabama, 380 U.S. 202, 216 & n.18 (cataloging state cases and statutes related to the allowance of peremptory challenges).

\(^{20}\) See id. at 216 & n.17 (citing Waterford & Whitehall Turnpike Co. v. People, 9 Barb. 161 (Sup. Ct. N.Y. 1850)) (noting a common-law right to peremptory challenges for the prosecution based on the similar English right); Commonwealth v. Eisenhower, 37 A. 521 (1897) (same); Jewell v. Commonwealth, 22 Pa. 94, 100 (1853) (same); State v. Arthur, 13 N.C. 217, 219 (1829) (same).

\(^{21}\) 4 WILLIAM BLACKSTONE, COMMENTARIES 442 (David S. Berkowitz et al. eds., 1978).


the Court has steadfastly refused to do so, despite its willingness in other contexts to label long-standing rights important to the fairness of trials as constitutional.24 Thus, these rights are in a unique and somewhat uncomfortable position: everyone (or at least almost everyone) feels they are very important to a fair trial, but they exist solely at the whim of the states and of Congress.

Against this emphatically nonconstitutional backdrop, states have chosen a variety of schemes providing for peremptory challenges. The numbers of challenges allowed varies, as does the number of challenges granted to the governments as compared to the defendant in criminal cases. Most important to this Article, however, are how the provisions regarding the peremptory challenges and challenges for cause intersect.

In many states, challenges for cause are separate conceptually from peremptory challenges.25 Challenges for cause, which are constitutionally protected,26 are inherently required for the provision of an unbiased jury: 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.

24. See, e.g., In re Winship, 397 U.S. 358, 368 (1970) (adopting the "beyond a reasonable doubt" standard in criminal cases); Ballew v. Georgia, 435 U.S. 223, 243-45 (1978) (setting the minimum number of jurors in a criminal case at six); Burch v. Louisiana, 441 U.S. 130, 138-39 (1979) (requiring unanimity in criminal juries with six members). An alternative approach which the Court has not apparently considered would be to treat the use of peremptory challenges as a means to the constitutionally-required end of a fair trial, in the same way the Court established the Miranda rule as a means to implementing the constitutionally-required end of obtaining confessions constitutionally. See Miranda v. Arizona, 384 U.S. 436 (1966). In that case, the Court noted that it was possible that another way to achieve the goal might be possible, but until a state came up with it, the Court would require the exclusion of evidence obtained from custodial interrogations without the Miranda safeguards (with numerous exceptions, of course). See id. at 467. Here, the Court could hold that peremptory challenges are not required by the Constitution, but that until a state can demonstrate that another means is as effective at affording a fair trial, peremptory challenges will be required. In any case, that issue is beyond the scope of this Article.

25. See, e.g., Commonwealth v. Auguste, 605 N.E.2d 819 (Mass. 1992) (holding that the "wasted" peremptory challenges correcting the judges' error should result in automatic reversal); State v. Ramos, 564 N.W.2d 328 (Wisc. 1997) (same). In my examination of the issue, roughly one-third of the states which have decided the issue keep peremptories and challenges for cause conceptually separate, as does the federal system.

26. See, e.g., Ross v. Oklahoma, 487 U.S. 81, 85 (1988) ("It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial
if a litigant cannot have biased veniremembers removed, any verdict is constitutionally unacceptable. Ordinarily, peremptory challenges are considered as intended to be used for jurors who are not so biased as to deserve a for-cause strike but still cause concern for one litigant or another. Thus, the portion of the venire likely to be targeted by peremptory challenges is ordinarily a different one than that targeted by challenges for cause. Certainly the peremptory challenge process is relevant to the for-cause strike process: if a veniremember is undesirable enough to cause a litigant to wish her to be struck for cause, she will usually be a desired target of a peremptory challenge as well if the for-cause challenge is denied. But the important issue is to what extent a state can require the peremptory process to serve as the “backup” for the for-cause process.

Other states—including Oklahoma, at issue in Ross—require the use of a peremptory challenge to preserve the perceived error in the for-cause strike. Unless the defendant complaining of an erroneous denial of a challenge for cause strikes the veniremember with a peremptory challenge, runs out of peremptory challenges, and is again denied a challenge for cause erroneously, the makeup of the jury will be essentially unchallengeable. In having such a requirement, Oklahoma and other similar states have blurred the distinction between challenges for cause and peremptory challenges, requiring the use of a peremptory challenge as a safety valve for error by the judge.

At first blush, this requirement seems sensible, and there is no reason to think it is not a permissible choice for a state to make. It helps ensure that “close call” jurors are removed from the jury one way or another. It provides an obligation to litigants to help the judge hold a “clean” trial, one free of constitutional errors. In any case where the litigants do not end up using all of their peremptory challenges, the requirement has no apparent ill effects, and I do not propose that such litigants have any claim, as no harm can be shown, even though an error was made.

But the effects of such a policy—especially post-Ross—can be more pernicious if we really consider peremptory challenges to be essential to a fair trial and if a litigant is forced to use a peremptory challenge to remove a juror when she would otherwise use the challenge elsewhere (and she

---

27. See Ferrell v. State, 475 P.2d 825, 828 (Okla. Crim. App. 1970). The statute in Oklahoma is silent as to this requirement; it has been implemented as a matter of Oklahoma judge-made law. See also e.g., People v. Samaya, 938 P.2d 2 (Cal. 1997); State v. Barlow, 541 N.W.2d 309 (Minn. 1995). Roughly two-thirds of the states I have examined have so held.
runs out of peremptory challenges). In fact, it has the potential to fully insulate a judge's decisions on for-cause challenges from review, even if obviously wrong, so long as the errors do not outnumber a litigant's peremptory challenges. It therefore can essentially eliminate, in some cases, any right to peremptory challenges in the traditional sense.\textsuperscript{28} In other words, if a judge in a capital case in Oklahoma refuses to strike nine veniremembers whose answers in voir dire make it evident that they would automatically vote to impose the death penalty without consideration of mitigating circumstances,\textsuperscript{29} the defendant would be forced to exercise a peremptory challenge for each of the nine to have any hope of appellate review of the error. Even then, only if the judge made another mistake on a for-cause challenge would reversal be mandated. Thus, the defendant would in fact have \textit{none} of the peremptory challenges to which she is entitled, because all nine of them would have been used in correcting the judge's error. Moreover, even this arguably arbitrary denial of peremptory challenges would not be error under \textit{Ross} if considered on federal review, so long as the judge's errors were limited to those nine veniremembers. This problem, and the facts of \textit{Ross}, are discussed more fully in Part III, so for now it will do to point it out as a source of concern.

It is too early to see if \textit{Ross} will be seen by states as an invitation to change their statutes or case law to reduce the power of peremptory challenges for criminal defendants. Of course, if states are inclined to reduce defendants' ability to use peremptory challenges, they could choose to simply eliminate the peremptory process entirely. However, a structure such as Oklahoma's has an advantage of appearance over one in which no peremptories exist at all—that is, it does not look like the state is eviscerating the defendants' rights and the trials still look like trials with which the public is familiar. Perhaps this assumes more concern about appearances than state legislatures truly have (and more concern about defendants' rights than legislatures or the voting public actually possess), but it is at least not laughable to see this structure as appealing to image-conscious state politicians.

\textsuperscript{28} By "in the traditional sense" I mean to acknowledge that, even in these cases, the litigants will ordinarily exercise the statutory number of peremptory challenges in a purely literal way—that is, they will strike the appropriate number of veniremembers using peremptory challenges. However, the traditional sense of peremptory challenges is that they are used to strike veniremembers not removable for cause. In that sense, the litigants are without some or all of their peremptory challenges.

\textsuperscript{29} Such consideration is required by the Supreme Court's capital jurisprudence, including (but by no means limited to) \textit{Furman v. Georgia}, 408 U.S. 238 (1972) (per curiam) (striking down all capital sentencing schemes as unconstitutional due to the unbridled and unguided discretion given juries), and \textit{Gregg v. Georgia}, 428 U.S. 153 (1976) (affirming a death sentence imposed under a "balancing" procedure with a separate sentencing phase to consider aggravating and mitigating evidence).
Federal law does not require the use of peremptory challenges to "cure" trial court error in deciding for-cause challenges.\textsuperscript{30} As discussed in the next subpart, this results in three possible scenarios in which a federal court would be considering these questions. These scenarios have important distinctions among them.

\section*{B. The Proper Role of Appellate Courts in Review: "Harmless Error"}

The various questions posed by the various schemes providing peremptory challenges arise in more than one procedural posture. They can arise on direct appeal in state appellate courts, on direct review to the United States Supreme Court (as in \textit{Ross}), on direct appeal in federal appellate courts from federal district courts, or on collateral review in the federal courts from state or federal proceedings. The rigor with which alleged error will be examined varies, of course, in different contexts, as does the placement of the burden on appeal. Additional deference is given to state court conclusions in the habeas corpus context.

The harmless error approach was described in \textit{Chapman v. California}.\textsuperscript{31} "Under \textit{Chapman}, a constitutional error requires reversal [on direct review] unless the state—the ‘beneficiary of the error’—can ‘prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’"\textsuperscript{32} In contrast, on collateral review, \textit{Brecht v. Abrahamson}\textsuperscript{33} mandates that a constitutional error requires reversal only if it "had [a] substantial and injurious effect or influence in determining the jury’s verdict,”.\textsuperscript{34}

Beyond the standard applied, another critical issue is on which party the burden of establishing or refuting that standard is placed. For an error whose "natural effect is to prejudice a litigant’s substantial rights,"\textsuperscript{35} the burden to establish the lack of a substantial influence or grave doubt is on

\begin{itemize}
  \item \textsuperscript{30} As noted previously, however, litigants have a great incentive to strike these jurors anyway. If the stock of peremptory challenges is not exhausted, this has no harm and a great deal of value to judicial economy. If however, a litigant runs out of peremptory challenges, the discussion in the text is relevant. It is also worth noting that the government in \textit{Martinez-Salazar}, recently considered by the Supreme Court, has proposed adding such a requirement in the federal system. This Article does not address this issue in detail, but it seems evident that reading such a requirement would be more construing the rules, but would be instead a significant addition to the rules that perhaps should be left to Congress.
  \item \textsuperscript{31} 386 U.S. 18 (1967).
  \item \textsuperscript{33} 507 U.S. 619 (1993).
  \item \textsuperscript{34} \textit{Id.} at 637 (quoting \textit{Kotteakos v. United States}, 328 U.S. 750, 776 (1946)).
  \item \textsuperscript{35} \textit{Kotteakos}, 328 U.S. at 765.
\end{itemize}
the prosecution,\textsuperscript{36} for technical errors (all others), the burden to establish the presence of a substantial influence or grave doubt is on the defendant.\textsuperscript{37}

\textit{Brecht} did leave some ambiguity as to the allocation of this burden on collateral review. However, when one adds up the concurring and dissenting votes which make evident their view that the burden remains on the state, even on collateral review, it appears that five votes favored that view.\textsuperscript{38} A shift of the burden to the petitioner on habeas corpus review would arguably make it virtually impossible for petitioners on habeas corpus review to prevail on jury issues. Consider the difficulty of establishing, to a higher standard, that an error in jury selection had such a substantial impact on a jury's verdict, with no way to evaluate what happened inside the jury room.

A court considering an appeal must also decide whether to apply harmless error doctrine at all. The primary issue involved in making that decision is "whether the error is a classic 'trial error,'"\textsuperscript{39} or instead structural error. The Supreme Court recently addressed the issue of how to identify which issues are appropriate for harmless error analysis in \textit{Arizona v. Fulminate}.\textsuperscript{40} There, the Court considered whether admission of evidence of a coerced confession could ever be harmless error. Historically, the use of such confessions has always been seen as constitutionally impermissible and grounds for automatic reversal.\textsuperscript{41} In considering whether such erroneous admission warranted reversal, the Court defined "trial error" as "error which occurred during the presentation of

\begin{footnotesize}
\begin{enumerate}
\item 36. See \textit{Chapman}, 386 U.S. at 24 ("[C]onstitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless.") (referencing \textit{Pahy v. Connecticut}, 375 U.S. 85 (1963)).
\item 37. See \textit{Kotteakos}, 328 U.S. at 760-61.
\item 38. See \textit{Brecht}, 507 U.S. at 647 (White, J., dissenting); \textit{id.} at 653 (O'Connor, J., dissenting); \textit{id.} at 641 (Stevens, J., concurring); see also \textit{Sherman v. Smith}, No. 92-6947, 1993 U.S. App. LEXIS 28095, at *9-10 (4th Cir. 1993) (concluding that the burden of establishing harmless error remains on the state when non-'technical' errors are involved); Blume & Garvey, \textit{supra} note 32, at 166–69 (concluding that the burden should remain on the state post-Brecht).
\item 39. United States v. Annigoni, 96 F.3d 1132, 1143 (9th Cir. 1996) (quoting \textit{Arizona v. Fulminate}, 499 U.S. 279, 309 (1991)).
\item 41. See \textit{Fulminate}, 499 U.S. at 288 (White, J., dissenting in part). The Court stated: The majority today abandons what until now the Court has regarded at the 'axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . .'
\item \textit{id.} (alteration in original) (citations omitted) (quoting \textit{Jackson v. Denno}, 378 U.S. 368, 376 (1964)).
\end{enumerate}
\end{footnotesize}
the case to the jury, and which may therefore be quantitatively assessed in
the context of other evidence presented in order to determine whether its
admission was harmless beyond a reasonable doubt."42 On the other
hand, "structural errors" are "defects in the constitution of the trial
mechanism, which defy analysis by 'harmless-error' standards. . . . [and
affect] the framework within which the trial proceeds, rather than simply
an error in the trial process itself."43 The error in question—the errone­
ous introduction of a coerced confession—fell into the former category,
according to the Court, contrary to the long-held rule treating such
introduction as automatically reversible error.44 Applying harmless-error
analysis, the conviction was affirmed.45

Thus, a number of rabbit trails can be followed in considering a
harmless-error claim. One must determine if the error is amenable at all
to harmless-error analysis, considering the trial-structural error definition
dichotomy. Even if the doctrine does apply, the burden of establishing
harm may be on the defendant if the error is deemed technical. Addicional­
ly, when the error is being considered on habeas review, the level of
scrutiny is somewhat lower and the Court may eventually decide to shift
the burden to the defendant, though for now it appears to remain on the
prosecution for nontechnical errors.

As a whole, the trend in recent years has been toward the increased
use of harmless-error analysis to insulate state court decisions from reversal
by federal courts on constitutional grounds. It is remarkably easy to draft
an opinion that says, "Even if this was indeed error, we cannot say that the
outcome would have been any different had the decision been made in the
defendant's favor. Affirmed." Such an opinion is even easier to write if
a court can conclude that the error was technical and thus that the burden
was on the defendant. The question now is what impact this trend has
had—and should have had—on peremptory challenge jurisprudence. Part
III addresses that question.

III. Ross and Its Predecessors: Peremptory Challenges and Harmless
Error

The Supreme Court has considered the intersection of peremptory
challenges, challenges for cause, and error analysis a number of times.
The case providing the greatest hope for defendants is Gray v. Mississip­

42. Id. at 307-08.
43. Id. at 309-10.
44. See id. at 285.
45. See id. at 302.
pi,\cite{46} in which the Court reversed a death sentence based on errors in the jury selection process\cite{47} and considered whether the improper excusal of a juror for cause could ever be subjected to harmless error analysis.\cite{48}

During that process in the lower court, the State had used all of its peremptory challenges to excuse jurors who were opposed to the death penalty and who, as the Court concluded, should have been excused for cause, despite the trial court's conclusion to the contrary.\cite{49} A later potential juror indicated that she could vote to impose the death penalty in certain circumstances, but that she was generally opposed to it.\cite{50} The state's attorneys argued (correctly) that the previous rulings on the challenges for cause had been erroneous, and thus asked the trial court to restore one peremptory challenge to allow the state to remove the veniremember.\cite{51} The trial court did not do so, but instead excused the veniremember for cause as a way to make up for the previous mistakes.\cite{52}

The \textit{Gray} Court concluded that the resulting death sentence could not stand.\cite{53} \textit{Davis v. Georgia}\cite{54} had established that a misapplication of \textit{Witherspoon v. Illinois}\cite{55} constitutes per se reversible error.\cite{56} \textit{Witherspoon} held that a potential juror who has conscientious scruples against the death penalty but who has shown that she can still serve (as the veniremember here had done) ought not be removed for cause.\cite{57} In a series of summary reversals in subsequent years, the Court made clear just how broad a constitutional mandate \textit{Davis} was.\cite{58} \textit{Gray} reiterated that breadth by "present[ing] yet another opportunity for [the] Court to adopt a harmless-error analysis."\cite{59} The Court chose not to avail itself of the opportunity: "[O]nce again we decline to do so."\cite{60}

Two arguments were presented to the Court to entice it to apply harmless error, and both were rejected.\cite{61} The first, not directly relevant

\begin{footnotes}
\item[47] See \textit{id.} at 668.
\item[48] See generally \textit{id.}.
\item[49] See \textit{id.} at 653.
\item[50] See \textit{id.}
\item[51] See \textit{id.} at 654.
\item[52] See \textit{id.} It is not explained why the court thought this was wise.
\item[53] 481 U.S. at 668.
\item[54] 429 U.S. 122, 123 (1976) (per curiam).
\item[55] 391 U.S. 510 (1968).
\item[56] See \textit{Davis}, 429 U.S. at 123.
\item[57] See \textit{Witherspoon}, 391 U.S. at 522.
\item[58] See \textit{Gray}, 481 U.S. at 664 n.14, 666 n.16 (cataloging summary reversals of death sentences reached with a jury from which a \textit{Witherspoon}-eligible juror had been excluded).
\item[59] \textit{id.} at 660.
\item[60] \textit{id.}
\item[61] See \textit{id.} at 660-61.
\end{footnotes}
here, pointed to the state's retention of unused peremptory challenges as an indication that the erroneous for-cause exclusion was harmless, relying on the state's representation that it would have removed the veniremember by peremptory had the trial court refused to do so for cause.\textsuperscript{62} The Court's language rejecting this argument provides defendants useful language (though it was later disavowed in \textit{Ross}): "[T]he relevant inquiry is 'whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error.'"\textsuperscript{63} Based on the lack of assurance that the State really would have used its peremptory challenges in the way it claimed, the Court concluded that the panel indeed could possibly have been affected.\textsuperscript{64}

The second argument is more clearly relevant to the situation discussed in this Article. The State urged the Court "to treat the erroneous exclusion as an isolated incident without prejudicial effect if it cannot be said that the ultimate panel did not fairly represent the community anyway,"\textsuperscript{65} that is, to apply harmless error analysis. Though later accepted in \textit{Ross}, the \textit{Gray} Court was unconvinced by this argument. The Court noted that it had rejected the same conclusion in \textit{Davis v. Georgia} when reached by the Supreme Court of Georgia,\textsuperscript{66} and with it rejected the application of harmless error analysis.

In a plurality portion of the opinion,\textsuperscript{67} Justice Blackmun and three other justices made their conclusion explicit:

> [B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, the \textit{Chapman} harmless-error analysis cannot apply. We have recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never by treated as harmless error."
>
The right to an impartial adjudicator, be it judge or jury, is such a

\begin{flushright}  
\textsuperscript{62. See id. at 660. This actually is somewhat relevant when one considers my eventual conclusion. I argue that a threshold question ought to be whether the defendant ended up using all of his peremptory challenges. If not, he can show no possible harm, as he received all the peremptory challenges he desired. However, when a defendant does use all of his peremptory challenges, the Court's concern about the inability to say definitively that the prosecution would have used another to strike a particular veniremember is relevant. The situation is somewhat different factually, but still relevant.}

\textsuperscript{63. Id. at 665 (quoting Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (specially concurring opinion)).}

\textsuperscript{64. See id.}

\textsuperscript{65. Id. at 661.}

\textsuperscript{66. See id. at 666 (citing Davis v. Georgia, 429 U.S. 122, 123 (1976) (per curiam)).}

\textsuperscript{67. See id. at 670. Justice Powell joined all but one subpart of the opinion. See id. He objected to the plurality's focus in that subpart on the pattern with which the prosecutors used their peremptory challenges, but his concurrence appears consistent with the statement I quote from the plurality.}
That broad language was disavowed just one year later in Ross, another capital conviction and death sentence on certiorari to the Supreme Court. The posture of Ross was significantly different from that in Gray. Put briefly, the trial court erroneously refused to strike a veniremember named Darrell Huling, who “declared that if the jury found petitioner guilty, he would vote to impose death automatically.” Failure to strike a veniremember with such views is error under Wainwright v. Witt. The State in Ross conceded that “Huling should have been excused for cause and that the trial court erred in failing to do so.”

Ross was forced under Oklahoma law to exercise a peremptory challenge to remove Huling. Without doing so, he would have waived any claim of error. Even using the peremptory strike virtually removed any effective review unless he had both used all of his peremptory challenges and the judge had made another erroneous ruling such that an unqualified juror was seated.

---

68. Id. at 668 (quoting Chapman v. California, 386 U.S. 18, 23 (1967)) (citation omitted).
71. Ross, 487 U.S. at 85.
72. See id. at 89. The Court stated:
   It is a long settled principle of Oklahoma law that a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. Even then, the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him.

73. See Ross, 487 U.S. at 85; Ferrell, 475 P.2d at 828; Stott, 538 P.2d at 1064-65. Of course, litigants must show some form of harm from claimed error on appeal, and the use of a peremptory challenge to remove an erroneously-retained juror will ordinarily be the only way to do so. Thus, Ross's lawyers were not acting differently from how they presumably would have acted in another jurisdiction; the only difference here is the fact that Oklahoma required it expressly. In any trial, Oklahoma or otherwise, harm would not occur if a litigant still had unused peremptory challenges at the end of the jury selection process, even had she been forced to use one or more of her peremptory challenges to remove jurors who should have been removed for cause. Without some showing of harm—i.e., the loss of the use of a peremptory challenge and perhaps an indication in the record of a juror who defense counsel would have removed, had a peremptory challenge not been used to cure an erroneous ruling on a challenge for cause—review is irrelevant.

Oklahoma, however, goes further, and the extra requirement, and the Court's focus on it, makes a difference. Not only must a defendant show that she has used every one of her peremptory challenges (and at least one of them to remove a veniremember who should have been removed by the judge); the judge must make yet another mistake and refuse to grant an extra peremptory challenge to the defendant, so that an incompetent juror is forced upon the defendant. Thus, the harm of running out of peremptory challenges before the defendant's
Thus, as noted earlier, Oklahoma law allows a judge in a capital case to make up to nine unquestionably erroneous for-cause rulings, exhaust entirely the defendant's peremptory challenges (while allowing the state its full complement), and yet be immune from appellate review. Despite Gray's language just a year before that "the relevant inquiry is "whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error,""74 the Ross court dismissed that view as "def[y]ing literal application."75 To establish its argument, the Court provided an example of a situation in which the view would not be applied: "If, after realizing its error, the trial court in Gray had dismissed the entire venire and started anew, the composition of the jury would undoubtedly have been affected by the original error. But the Gray majority concedes that the trial court could have followed that course without risking reversal."76 Because literal application would be inappropriate in one rather extreme situation, the Court dubiously concludes that the language should have no application whatsoever. The Court's reaching that conclusion suggests more a desire to reject Gray wholesale rather than to respect its precedential value. It would have been quite simple to modify the statement in a more moderate way by supplementing the test to read: "The relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error, and whether that effect would most likely be detrimental to the party against whom the erroneous ruling was made."

The Court, however, did not change the test in that way, instead limiting Gray specifically to its situation—that is, a court's incorrect excusal of an acceptable veniremember—and what the Ross Court claimed was Gray's rationale: "the inability to know to a certainty whether the prosecution could and would have used a peremptory challenge to remove the erroneously excused juror."77 Though that was certainly part of the Gray Court's discussion, it is hard to say that it was "principal," given the extensive discussion concerning the alternative argument which focused on a lack of prejudice. The Gray Court rejected both arguments, and did not reject the first one explicitly conditioned on the inability to know a prosecutor's intentions.

After discarding the Gray language, the Ross Court emphasized the nonconstitutional nature of peremptories and the fact that they are a...
creature of state statute. They function only as "a means to achieve the end of an impartial jury." "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."

Ross also claimed a due process violation by the trial court by "arbitrarily depriving him of the full complement of nine peremptory challenges allowed under Oklahoma law." Citing the Swain majority to the effect that "[t]he denial of impairment or the right is reversible error without a showing of prejudice," Ross, quite sensibly, claimed he was not required to show prejudice. The Court, however, disagreed. Noting that the Swain court cited only federal cases in support of that statement, it continued:

[Even assuming that the Constitution were to impose this same rule in state criminal proceedings, petitioner's due process challenge would nonetheless fail. Because peremptory challenges are a creature of statute and are not required by the Constitution . . . it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise.]

This argument, though facially appealing, is problematic. As the dissent points out, "everyone concedes that the trial judge could not arbitrarily take away one of the defendant's peremptory challenges. Yet, that is in effect exactly what happened here." The majority latches onto the fact that the denial of the use of a peremptory challenge was not direct—that is, the judge did not say, "Mr. Ross, because I don't like your outfit, you'll only get eight peremptory challenges rather than nine." Instead, the judge made what is conceded by all parties involved to have been a mistake, and that mistake, combined with Oklahoma's required use of peremptory challenges, had the same effect as the judge randomly denying peremptory challenges. But, apparently because there was an extra step between the judge's mistake and the deprivation of a peremptory challenge...

---

78. See id. at 88–89.
79. Id. at 88.
80. Id.
81. Id. at 89.
82. Id. (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)).
83. See id.
84. Id. (citations omitted).
85. Id. at 91–92 (Marshall, J., dissenting).
86. See id. at 90–91 (Marshall, J., dissenting) (stating that because the defendant was required by Oklahoma law to use one of his peremptory challenges to rectify the trial court's error, his due process rights were not violated even though he was left with only eight peremptory challenges to use at his "unfettered discretion" instead of nine).
87. See id. at 92 (Marshall, J., dissenting)
88. See id. at 91-92 (Marshall, J., dissenting).
challenge for the defendant, the majority saw no due process problems with a nearly arbitrary denial of a peremptory challenge.\textsuperscript{89}

This is, of course, overstating things somewhat. A fairer view of it is that Oklahoma has chosen two policy goals for peremptory challenges. First, as is most commonly accepted, they help obtain an impartial jury by allowing litigants to exclude veniremembers who are merely suspected of being partial. Second, and less typically, they help to make errors by a trial judge harmless even when doing so results in litigants having fewer peremptory challenges left to further the first goal. Because the second goal is presumably a legitimate state interest (and there is no reason to believe it is not), Ross did not in fact have a peremptory challenge taken away arbitrarily; it was in the name of a valid state goal. It is not, in fact, as arbitrary as basing it on the color of his shirt. He received all to which he was entitled under Oklahoma law.

In any case, \textit{Ross} is now the law and \textit{Gray} is limited in its scope, and the focus in claims of error in jury selection may have changed. Under \textit{Gray}, courts focused on the errors themselves and the potential effects of those errors.\textsuperscript{90} Under \textit{Ross}, unless a qualified juror has been erroneously excused under \textit{Witherspoon} in a capital case, courts are to focus on the actual effects of the trial court's errors, even if the defendant has used all of his peremptory challenges and requests more.\textsuperscript{91} Unless an unqualified juror is seated and the jury is thus biased—and that seating is a result of a trial court error—the erroneous denial of a for-cause challenge and the subsequent forced use of a peremptory challenge is unreversible if state law requires the use of peremptory challenges to remove jurors who a litigant believes ought to have been removed for cause.

However, though \textit{Ross} is the law, it is by no means the last word in some situations. The Courts specifically left two questions open, both relevant to current due process challenges. First, what standard ought to be applied in federal courts reviewing federal courts? Second, "in the absence of Oklahoma’s limitation on the ‘right’ to exercise peremptory challenges, [does] ‘a denial or impairment’ of the exercise of peremptory challenges occur if the defendant uses one or more challenges to remove

\textsuperscript{89} See id. at 96 (Marshall, J., dissenting).

\textsuperscript{90} See id. at 87 (stating that “the relevant inquiry is ‘whether the composition of the jury panel as a whole could possibly have been affected by the trial court’s error”’) (quoting \textit{Gray} v. Mississippi, 481 U.S. 648, 665 (1987)) (emphasis in original) (citations omitted).

\textsuperscript{91} See id. at 86-87, 91 (stating that the Court declines to extend the rule of \textit{Gray} beyond its context with respect to the erroneous “\textit{Witherspoon} exclusion” of a qualified juror in a capital case and holding that Ross was not deprived of an impartial jury or any interest provided by the State when he had to exercise one of his peremptory challenges to rectify the trial court’s error).
jurors who should have been excused for cause”?92 Given the number of jurisdictions, including the federal courts, which do not have Oklahoma’s requirements about the use of peremptory challenges to fix judges’ errors, these are important questions indeed—as recognized by the Supreme Court in granting certiorari recently in a case out of the Ninth Circuit, United States v. Martinez Salazar.93 The next Part addresses the answers given by Courts of Appeals leading up to the imminent conclusion of the Court.

IV. What Protections Remain For Peremptory Challenges?

Various courts of appeals have interpreted Ross in different contexts, some narrowly and some broadly. This Part will outline these interpretations and present the arguments given by both the courts which have agreed with my view that Ross can be rationally limited and those given by courts which consider Ross to be dispositive in a wide range of situations.94

The Ninth Circuit came to consider erroneous denials of peremptory challenges in United States v. Annigoni.95 However, it was not in the posture of Ross or other similar cases. In the district court below, the defense attempted to strike a Mr. Horn with a peremptory challenge.96 The prosecution objected, claiming that the strike was racially motivated.97 The defendant put forth a race-neutral explanation for the strike based on Hom’s investment in a limited partnership that had been involved

---

92. Id. at 91 n.4.
93. 146 F.3d 653 (9th Cir. 1998), cert granted 119 S. Ct. 2365 (1999). The Ninth Circuit’s decision, which came after some four years in the circuit court, including multiple rearguments, will be further discussed below.
94. Some courts have referred to this issue in dicta. Given the extensive discussion provided in Annigoni and other cases, I will not provide a full discussion of these cases in the text. See, e.g., Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363, 1369 (7th Cir. 1990) (“It is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him, although it will rarely if ever be possible to show that the trial would have come out differently with a different jury.”) (citing United States v. Ruuska, 883 F.2d 262, 268 (3d Cir. 1989)); Tankleff v. Senkowski, 135 F.3d 235, 240 (2d Cir. 1998); United States v. Love, 134 F.3d 595 (4th Cir.), cert denied, 519 U.S. 1093 (1997); United States v. McFerron, 163 F.3d 952 (6th Cir. 1998); United States v. Underwood, 122 F.3d 389 (7th Cir. 1997), cert denied, 118 S. Ct. 2341 (1998).
95. 96 F.3d 1132 (9th Cir. 1999).
96. See id. at 1135.
97. See id. See also Batson v. Kentucky, 476 U.S. 79, 96-97 (1986). Batson held that a party challenging a peremptory strike must make a prima facie case of race-based use of peremptory challenges, after which the burden shifts to the party making the strike. See id. at 96. If the user of the peremptory challenge can come forward with a race-neutral explanation, the trial court must decide whether purposeful racial discrimination has been proved. See id. at 97. See also Purkett v. Elem, 514 U.S. 765, 767 (1995) (explaining the three-step analysis of Batson); Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (same).
in litigation, but the court refused to allow the exercise of the strike anyway.98 A panel of the circuit court concluded that the refusal to allow the defendant’s use of the peremptory challenge was error, but went on to use harmless-error analysis.99 The court granted a rehearing en banc and rejected the panel’s use of harmless-error analysis.100

After reviewing the history of peremptory challenges and their interplay with challenges for cause, the court noted the long-standing principle that “[a]n error in restricting the exercise of peremptory challenges results in an automatic reversal. The defendant need not show that he was prejudiced by the error.”101 It then turned to the government’s invitation to apply harmless error in this case, despite the history to the contrary.102

After reviewing the trial-structural error spectrum, the court turned to whether the erroneous denial of peremptory challenges could be harmless error—that is, whether it could be deemed trial error.103 It concluded that it could not.104 First, the error in the case before the court did not occur during the presentation of the case to the jury, unlike most trial errors.105 Second, this error was not amenable to the quantitative assessment of harmlessness suggested by Fulminate.106 “[I]t would be virtually impossible to determine whether the denial of a peremptory challenge was harmless enough to warrant affirming the conviction.”107 Indeed,

[i]to apply a harmless-error analysis in this context would be to misapprehend the very nature of peremptory challenges. The peremptory challenge is used precisely when there is no identifiable basis on which to challenge a particular juror for cause. . . . Although a litigant may suspect that a potential juror harbors an unarticulated bias or hostility, that litigant would be unable to demonstrate that bias or hostility to an appellate court reviewing for harmless error. Similarly, the government would be hard-pressed to bear its burden of proving that the seating of a peremptorily challenged juror did not harm the defendant.108

This lack of information about the potential harm led to the court’s

98. See Annigoni, 96 F.3d at 1136.
99. See id.
100. See id. at 1134.
101. Id. at 1141 (quoting United States v. Turner, 558 F.2d 535, 538 (9th Cir. 1977)) (alteration in original).
102. See id. at 1142.
103. See id. at 1143.
104. See id. at 1144.
105. See id.
106. See id. (referencing Arizona v. Fulminate, 499 U.S. 279, 308 (1991)).
107. Id.
108. Id. at 1144–45.
conclusion, combined with "the dearth of information concerning what went on in the jury room. To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation." 109

After concluding, based on the rationales and history of harmless-error analysis, that such analysis ought not apply to erroneous denials of peremptory challenges, the circuit court turned to Ross and its potential application. 110 It found Ross unavailing for the government's position that harmless-error analysis should apply, finding three important distinctions.

The first distinction the court made was that Ross did not involve the erroneous direct denial of a peremptory challenge, unlike the case at bar which presented the outright denial of such a challenge. 111 This is, at some level, a distinction without a difference, as it opens the door to a court's prevention of the use of any peremptory challenges, but the court is correct at least in that it looks different.

More significantly to the court, the juror involved in Ross did not end up sitting on the jury, thus, according to the court, eliminating the difficulty of predicting the effects of the error on the eventual result. 112 This distinction is not in fact particularly impressive, either, given that some juror against whom the defense would otherwise have exercised a peremptory in Ross sat on the jury. Nonetheless, the case facing the Annigoni court did present a more specific veniremember who sat on the court who the defense would have preferred not to be there. The harm was more visible.

The final factor on which the court relied was Ross's emphasis on peremptory challenges as a creature of statute. 113 In Ross, the defendant did, at a literal but not entirely meaningful level, receive all of the peremptory challenges to which he was entitled under state law. 114 In Annigoni, he was arbitrarily denied outright a peremptory. 115 There is no law commanding federal judges to deny the use of peremptory challenges to criminal defendants accused of racial bias even when the defendants can present plausible race-neutral reasons for the challenges; indeed, such an action was indisputably error. The district court took away something to which the defendant had a statutory right. This final

109. Id. at 1145.
110. See id. at 1146.
111. See id.
112. See id.
113. See id.
115. See Annigoni, 96 F.3d at 1146.
distinction is the most convincing, given the arguments provided above as to the first two.

Though Annigoni is not, as noted, directly relevant to either of the questions left open by Ross, it strongly suggests that the Ninth Circuit looks askance at attempts to avoid harmless error analysis when the error claimed makes unavailable a peremptory challenge in some way. Thus, it hints that the Ninth Circuit would not apply harmless error in situations except those precisely like Ross: that is, only when a state requires the use of a peremptory challenge to remove a juror who a litigant ought to remove for cause.\textsuperscript{116}

The Ninth Circuit's hint in Annigoni became reality in United States v. Martinez-Salazar,\textsuperscript{117} a case which was recently heard by the Supreme Court. Facing a now-familiar factual situation, where the trial court erroneously denied a for-cause challenge and a defendant used a peremptory challenge to remove the juror, the court held specifically that the defendant's due process rights were violated, despite acknowledging that the jury seated was constitutionally permissible.\textsuperscript{118}

The Third Circuit concluded in a 1989 case, United States v. Ruuska,\textsuperscript{119} that "the denial or impairment of the right to peremptory challenges is reversible error per se."\textsuperscript{120} In that case, the judge apparently misunderstood an attempt made by the defense attorney to exercise a peremptory challenge which the judge had granted him.\textsuperscript{121} Thus, the

\textsuperscript{116} See id. at 1139. Again, it is fair to say that even the Ninth Circuit would be skeptical of such claims if a defendant still had peremptory challenges at the end of jury selection and chose not to use them to remove the juror about whom he complains on appeal. When harm could so easily be avoided, without any deleterious effects on the defendant, sympathy is not likely. It is possible that defendants would then attempt to implant error by using all of their peremptory challenges on other borderline veniremembers to keep the complained-of veniremember on the jury. To the extent this happens, it may simply be a cost of fair trials and impossible to avoid.

\textsuperscript{117} 135 F.3d 653 (9th Cir. 1998), cert granted 119 S. Ct. 2365 (1999).
\textsuperscript{118} See id. at 658-59.
\textsuperscript{119} 883 F.2d 262 (3d Cir. 1989).
\textsuperscript{120} Id. at 268 (citing Swain v. Alabama, 380 U.S. 202, 219 (1965)).
\textsuperscript{121} See id. at 267-68. The veniremember involved came up in a rather unusual situation, which increased the confusion. "After voir dire and the seating of the jury, but before the jury was sworn, the juror in seat Number 9, William Nichols, rose and stated 'I feel that I have sympathies for the defendant there; possibly, if I could be excused from this panel.'" Id. at 266. After an interview in chambers, the judge excused Nichols. See id. Instead of using one of the alternates obtained through the prior selection process, the judge (without explanation) chose to draw another veniremember and to give each side an additional peremptory challenge to use if either side was displeased with the person. See id. at 266-67. Upon being presented with the potential juror, the defendant's attorney chose to say "we are objecting." Id. at 267. The government argued that such a statement did not constitute an attempt to exercise a peremptory challenge. See id. The Third Circuit rejected that view, stating "We conclude that this constituted a timely attempt by the defense to exercise the peremptory challenge granted
issue presented by Ross and this Article was not present, but the court used broad language without any indication that exceptions existed. Oddly, the government apparently did not cite Ross, nor did the circuit court cite it or address the potential difficulties created by it.\textsuperscript{122} Had the issue been presented, the final rationale used by the Ninth Circuit in Annigoni may have been successful here as well. The judge granted the defendant an additional peremptory challenge, the argument goes, so he could not arbitrarily take it away again. The defendant did not receive all of the peremptory challenges to which he was entitled, and so harmless error analysis is arguably inappropriate.

That potential argument reached fruition in the Third Circuit in Kirk v. Raymark Industries, Inc.\textsuperscript{123} There, the court simply noted that Ross left open the question of the appropriate result when the law in the jurisdiction does not mandate the use of peremptory challenges to preserve error in for-cause rulings. Because that was absent in federal court, the court concluded that it was "not . . . a difficult issue,\textsuperscript{124} holding "that compelling a party to use any number of its statutorily-mandated peremptory challenges to strike a juror who should have been removed for cause is tantamount to giving the party less than its full allotment of peremptory challenges\textsuperscript{125} and "a showing of prejudice is not required to reverse a verdict after demonstrating that a statutorily-mandated, peremptory challenge was impaired.\textsuperscript{126}

Presumably, the Third Circuit's result hinted at in Ruuska and reached in Kirk would also apply to state schemes which do not mandate the use of peremptory challenges to remove veniremembers challenged unsuccessfully for cause. In such a case, it seems likely that the impairment of a "statutorily-mandated, peremptory challenge\textsuperscript{127} would result in automatic reversal, assuming the full complement of peremptory challenges was used so the defendant could establish actual impairment.

In a 1993 case, the Fifth Circuit declined to extend Ross as well. In United States v. Broussard,\textsuperscript{128} the court considered whether the Batson line of cases should extend to peremptory challenges allegedly based on gender.\textsuperscript{129} Though it turned out that the court got that question wrong in concluding that such challenges were not in violation of the Constitu-

\textsuperscript{122} See generally Ruuska, 883 F.2d 262.
\textsuperscript{123} 61 F.3d 147 (3d Cir. 1995).
\textsuperscript{124} Id. at 157.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 160.
\textsuperscript{127} Id.
\textsuperscript{128} 987 F.2d 215 (5th Cir. 1993).
\textsuperscript{129} See id. at 217 (referencing to Baston v. Kentucky, 476 U.S. 79 (1986)).
tion,\textsuperscript{130} it went on to consider whether harmless-error analysis would apply to an erroneous ruling on that issue by a district court.\textsuperscript{131} In concluding that it should not, the court echoed the theme outlined above: that harmless-error analysis only applies if the defendant receives all of that to which he is entitled.\textsuperscript{132} "Applying the doctrine in this context would eviscerate the right to exercise peremptory challenges, because it would be virtually impossible to determine that these rulings [were not] injurious to the perceived fairness of the petit jury."\textsuperscript{133}

The First Circuit, though it affirmed a conviction in \textit{United States v. Cambara},\textsuperscript{134} actually provided additional support for the idea that impairment of a statutorily provided peremptory challenge is reversible per se. There, the trial court had granted an extra two peremptory challenges to the defendant beyond those guaranteed by statute.\textsuperscript{135} The court had refused a challenge for cause against a veniremember against whom the defendant ended up using one of his "extra" peremptory challenges.\textsuperscript{136} The circuit court noted that the decision on the challenge for cause was close enough to likely not be error, but emphasized also that the peremptory challenge the defendant was forced to use was not statutorily guaranteed.\textsuperscript{137} "[Defendant] cites no cases holding that the impairment of an additional peremptory challenge violates any rights of the defendant."\textsuperscript{138} However, the general rule remained true for the court: "[R]estricting a defendant's use of the lawful number of peremptory challenges is reversible error if a challenge for cause is erroneously denied."\textsuperscript{139}

Thus, again, in the federal system and those state systems without an Oklahoma-like rule, the use of a peremptory challenge to remove a juror who should have been removed for cause is reversible error per se under these cases' rationales, if the defendant can show actual impairment of his statutorily-provided peremptory challenges by using all of them.

\begin{footnotesize}
\begin{enumerate}
\item See \textit{J.E.B. v. Alabama}, 511 U.S. 127, 143 (1994) (overruling \textit{Broussard}, holding that litigants are barred from using peremptory challenges to strike veniremembers based on gender).
\item See \textit{Broussard}, 987 F.2d at 221.
\item See id.
\item Id.
\item 902 F.2d 144 (1st Cir. 1990).
\item See id. at 147.
\item See id. at 145-46, 147.
\item See id. at 147-48.
\item Id. at 148.
\item Id. at 147. Here it appears that the First Circuit is somewhat less generous to defendants than the Third Circuit in \textit{Ruuska}. The Third Circuit held that the impairment of peremptory challenges legitimately granted to a criminal defendant by a judge to be reversible error, whereas the First Circuit here relies on that distinction to find no harm when the challenge in issue is an "extra" one.
\end{enumerate}
\end{footnotesize}
At least two courts of appeals have reached a contrary result, a situation which has resulted in the Supreme Court's current consideration of the issue. The Tenth Circuit faced the issue in Getter v. Wal-Mart Stores, Inc. In this personal injury case in federal court, the judge refused to dismiss a prospective juror for cause despite the fact that the veniremember owned stock in and his wife was employed by the defendant company. The plaintiff exercised a peremptory challenge to remove the juror. The circuit court concluded that the district court abused its discretion in failing to grant the challenge for cause, but affirmed under a harmless-error theory based on Ross.

The analysis provided is disappointingly brief, noting only that the plaintiff did receive the full number of peremptory challenges granted to him by law, as did Ross. Although this is true in a surface sense, it ignores the important differences between the Oklahoma law at issue in Ross (which requires the use of the peremptory challenge) and the federal rules at issue in the case at bar (which do not). The court, however, merely noted that the plaintiff's lawyer got up and uttered something like the phrase "We would like to use a peremptory challenge to strike that veniremember" the appropriate number of times, and chose not to distinguish between removing jurors who should have been struck for cause and removing those who should not. Based on the view that the

---

140. The Eleventh Circuit has considered the issue at least twice, in United States v. Farmer, 923 F.2d 1557, 1566 (11th Cir. 1991) and Heath v. Jones, 941 F.2d 1126, 1132-33 (11th Cir. 1991), both times rejecting the defendant's argument. Neither case appears to have presented a clear opportunity to examine Ross with any care, however, with Farmer addressing Ross only as a fallback position, apparently not even raised by the defendant, because the defendant (erroneously) claimed that certain jurors had sat whom had not. See Farmer, 923 F.2d at 1566. Thus, the Ross argument was reached only by implication and dismissed quickly. See id. In Heath, a habeas review of a state conviction, it again appears from the brief discussion that Ross was not centrally discussed, as the court failed to recognize that Ross left open the appropriate result outside of Oklahoma. See Heath, 941 F.2d at 1132-33. Although the Tenth and Eighth Circuit discussions are somewhat lacking in discussion, I find the Eleventh Circuit to be even less complete in its analysis, and so I leave it here, tentatively in the Ross-extension column but not strongly so.

141. 66 F.3d 1119 (10th Cir. 1995).

142. This is a situation where the distinction between criminal and civil litigation might be relevant. The Tenth Circuit indicated no limitation on its opinion to civil cases; in fact, it didn't even recognize the question. Because its opinion does not rest upon any distinction, I do not explore it here except to note that the relatively weaker protections for civil litigants could impact some courts' consideration of the issue.

143. See id. at 1122.

144. See id.

145. See id. at 1122-23.

146. See id. at 1123.


148. See Getter, 66 F.3d at 1123 ("[P]laintiff received all the peremptory challenges
plaintiff got all to which he was entitled, the court applied harmless-error analysis. This, not surprisingly, resulted in no reversible error being found because no constitutionally impermissible jurors sat.

Given the fact that the court was “troubled that one result of [its] holding may be the creation of a formidable barrier to appellate review of denials of for-cause challenges,” it is particularly unfortunate that the only attempt to reduce the harm of its decision was to rather lamely note that “there may be instances in which a party can show that the erroneous denial of a for-cause challenge substantially affected the outcome of a trial.” When that instance would occur is difficult to conceive; perhaps if a judge was so incompetent that he made more erroneous for-cause challenge rulings than a litigant had peremptory challenges, the Tenth Circuit would find that the error was not harmless. In any case, the court failed to recognize the important differences between its case and the Ross case, thus distinguishing itself from the other circuit courts. In the Tenth Circuit, the erroneous refusal to strike veniremembers for cause is virtually unreviewable unless a defendant also runs out of peremptory challenges and the judge makes yet another mistake. While the resulting jury may be constitutionally sound, it seems evident that such an impairment of the right to peremptory challenge is not what the legislatures and Congress intended.

The Eighth Circuit has been more complete in its discussion of the Ross question. A recent summary of its cases can be found in United States v. Sithithongtham, where a three-judge panel considered the appeal of a conviction for various firearms violations. Three veniremembers indicated a tendency to believe the police officers’ testimony more readily than others; the district court refused to remove those jurors on defendant’s challenge for cause, and the defendant removed all three with peremptory challenges. The circuit court had little difficulty concluding that such refusal was an abuse of discretion, but the Ross issue remained.

After reviewing Ross, the court turned to the Eighth Circuit’s precedent in the context, which turned out to be controlling. United States v. Amerson looked to be helpful for the defendant. In that 1991 case,
a conviction was reversed under similar circumstances: the defendant was forced to use peremptory challenges to remove veniremembers who should have been removed for cause.\textsuperscript{158} Such a result implied that the court considered the erroneous denial of challenges for cause to be automatically reversible even if the objectionable veniremember was removed via peremptory challenge, but, importantly, the issue was not expressly discussed.

Unfortunately for the defendant, later Eighth Circuit cases did discuss the issue and reached a contrary result. Both \textit{United States v. Cruz}\textsuperscript{159} and \textit{United States v. Horsman}\textsuperscript{160} faced essentially indistinguishable situations and affirmed the convictions, ruling that, because the panel that actually convicted the defendant was unbiased, the Sixth Amendment was not offended, and because peremptory challenges are not constitutional, neither was the Fifth Amendment.\textsuperscript{161}

Under those cases, the panel in \textit{Sithithongtham} found itself bound to affirm the conviction as well. Interestingly, two of the three panel members filed concurring opinions, one expressing his dislike for the \textit{Cruz-Horsman} rule\textsuperscript{162} and one enthusiastically endorsing it.\textsuperscript{163}

None of the pro-affirmance opinions in the trio of cases recognized the fundamental difficulty in applying the \textit{Ross} approach to federal criminal cases: the Oklahoma approach to peremptory challenges, with two policies being furthered, is different from the federal system. In Oklahoma, cleaning up after the judge is one of the purposes for peremptory challenges, and has been for some time. The federal system has no such history or policy, and the courts applying \textit{Ross} to such situations fail to recognize the structural disjunction, even though \textit{Ross} itself recognized it. The Eighth and Tenth Circuits focused on the lack of a Sixth Amendment violation, because the jury seated was unbiased, but barely even address the significant due process concerns raised by arbitrarily denying the use of a defendant’s full complement of peremptory challenges.

A second, and somewhat ancillary, problem with extending \textit{Ross} can

\begin{itemize}
\item \textsuperscript{158} See id. at 117-18.
\item \textsuperscript{159} 993 F.2d 164 (8th Cir. 1993).
\item \textsuperscript{160} 114 F.3d 822 (8th Cir. 1997).
\item \textsuperscript{161} See Cruz, 993 F.2d at 169; Horsman, 114 F.3d at 825.
\item \textsuperscript{162} See id. at *5 (Gibson, J., concurring specially) ("To be required to use peremptory challenges to remove such venire members [who should have been removed for cause] was fundamentally unfair and is grounds for reversal.").
\item \textsuperscript{163} See id. at *5-6 (Bowman, J., concurring) ("Adoption of a rule contrary to the one we have applied to the peremptory challenge issue in this case could only result in a grave disservice to the administration of justice, with verdicts reached by juries after scrupulously fair and error-free trials being reversed for no better reason than that the defendant used one or more peremptory challenges to strike one or more potential jurors whom the trial judge, exercising his or her discretion, has declined to remove for cause.").
\end{itemize}
be seen in a very recent Eighth Circuit case, *United States v. Jones.*\(^{164}\) There, the defendant challenged two of the trial court’s denials of challenges for cause, both based on a belief that police officers are less likely to testify falsely.\(^{165}\) The defendant peremptorily struck one of the two veniremembers, but not the other, who ended up being seated on the jury.\(^{166}\) After noting that there was no allegation that the defendant had failed to strike the juror as an attempt to implant error in the trial (though such a conclusion does not seem unreasonable), and after noting that the federal common law does not require the use of a peremptory challenge to correct the court’s error (unlike Oklahoma’s), the court reversed because the refusal to strike was an abuse of discretion and the veniremember actually sat on the panel.\(^{167}\)

If *Ross* is indeed extended as in the Eighth Circuit’s previous cases, defense lawyers may well make the strategic decision to leave one “bad” juror on the panel to have a built-in appellate issue. If the mistake of the trial court is bad enough, the defendant will get to strike other less obviously objectionable veniremembers and maintain a chance of review if a conviction ensues. Of the various consequences of such a decision, this one would seem to balance out any improvement in judicial economy and undercut the goals of the system, where we do not want to encourage intentionally implanted error. This additionally points to a serious flaw in the logic of extending *Ross* to situations in which the jurisdiction does not require the use of peremptory challenges to have any chance to preserve error on appeal. Unlike in Oklahoma, where leaving the objectionable juror on the panel would waive any right to appeal that issue, in the Eighth Circuit and anywhere *Ross* has been extended, leaving the veniremember on the jury is the *only* way to appeal it. This perverse incentive makes evident that *Ross* just does not fit outside its context, and any attempt to force a fit results in such unintended consequences.

V. Conclusion

*Ross v. Oklahoma* appears to have the potential of great harm for the jury process, at least if one believes that peremptory challenges are essential for a fair trial. On its surface, it holds the possibility of removing from effective review a large percentage of judges’ decisions on challenges for cause. It need not be read so broadly, however.

\(^{164}\) 193 F.3d 948 (9th Cir. Oct. 13, 1999).
\(^{165}\) See id. at 950.
\(^{166}\) See id.
\(^{167}\) See id. at 952.
The important basis on which *Ross* can be distinguished from many other situations is the unique facts and legal requirements underlying it. The typical understanding of peremptory challenges is that they are used tactically and help advance the goal of a fair trial. Oklahoma and a significant number of other states, however, have a second, and presumably permissible, agenda for the challenges to further, enlisting their aid in reducing the harm caused by error-prone judges. By having a specific requirement that defendants use their peremptory challenges to remove jurors who are not removed for cause, and by holding harmless any error unless it results in a juror being seated who ought to have been removed for cause, Oklahoma may have improved judicial efficiency. Because Oklahoma has made that choice, defendants who lose peremptory challenges to judicial mistakes have not lost anything to which they were entitled: there is not even a possibility of harm, as long as no jurors who ought to have been removed for cause are seated. A lack of harm can be quantified as zero; thus, under harmless error analysis, no reversal is necessary.168

This should not, however, be read as an endorsement of the practice adopted by Oklahoma. I view peremptory challenges somewhat ambivalently, but it intuitively seems wrong when a defendant (or the state, for that matter, though review issues are obviously less relevant) loses a peremptory challenge due to a judge’s error. If we are to have peremptory challenges, I certainly prefer a system other than Oklahoma’s.

In these other systems, *Ross* does not necessarily eviscerate appellate review of for-cause rulings, despite the Eighth and Tenth Circuits’ conclusion to the contrary. Unlike *Ross*-type cases, defendants in other states and in the federal system can show harm to a right they actually possess, the (mostly) unencumbered right to exercise peremptory challenges on veniremembers not otherwise challengeable for cause. The *Ross* Court left the question of such situations open for a reason, for they truly are different. When that right is infringed, defendants can open the door to consideration of whether or not to apply harmless-error analysis.

168. Perhaps a better approach for the Court to take in this situation is not to decide whether harmless error analysis ought to apply under the structural-trial error dichotomy, but instead to, as a threshold matter, determine if any harm could have occurred. In the *Ross* situation, though there was a mistake by the judge, the defendant received all to which he was entitled, and made no claim that anyone on the jury should have been struck for cause. *See* Ross v. Oklahoma, 487 U.S. 81, 91 (1988). The question thus was not really whether harmless-error analysis ought to apply, but whether under any analysis the defendant’s rights were harmed by the judge’s error. Because they were not, the Court could have avoided reaching the discussion of harmless error in the first place, merely rejecting the defendant’s arguments based on the fact that he could show no harm at all, and so could not even get in the door. However, the Court did not follow this approach. *See id.* at 88-91.
A necessary result of the presence of harm (which should get defendants in that door) is the recognition that such harm is not amenable to anything like quantifiable analysis as required for the application of harmless-error analysis. While in Ross the defendant had no right infringed and so no harm to quantify, defendants in other systems who exhaust their peremptory challenges in part due to judge error have been harmed but in a rather fuzzy way. The jury room is a secret place and will remain so, and no court can predict what would have happened with on different juror on any jury. Such errors must then be classified as structural errors and not amenable to harmless error analysis.

Even if the error is classified as a trial error—which seems unlikely, but possible—and thus harmless error analysis is applied, neither Ross nor any other cases should lead to a conclusion that a defendant whose peremptory challenges were infringed in violation of the jurisdiction's laws cannot have the verdict reversed. Whether on direct or collateral review, the error is almost certain to be seen as one whose "natural effect is to prejudice a litigant's substantial rights" and thus, assuming that Brecht left the burden allocation untouched, the prosecution will have to prove the lack of harm. On direct review, this means that the prosecution would be forced to prove beyond a reasonable doubt that the error did not contribute to the verdict, a burden almost certain to be impossible to meet. On habeas corpus, the prosecution has a slightly easier job—they must prove that it did not have a "substantial and injurious effect or influence in determining the jury's verdict"—but again, proving the negative seems impossible, given the closed nature of jury deliberations. Both results, in fact, provide a strong argument as to why the error should be seen as structural, as it is quite obviously difficult to quantify. The fact that the burden distribution is so dispositive—that is, that the party on whom the burden is placed is almost certain to lose—emphasizes the inherently nonquantitative nature of the issue. Regardless of its classification, however, criminal defendants should still win on the issue in most situations. The effectively arbitrary denial of peremptory challenges, to which defendants have a clear right, should be considered a due process violation under the Fifth or Fourteenth Amendments.

This conclusion has the potential to be even stronger in cases wholly

170. See Brecht v. Abrahamson, 507 U.S. 619, 647 (White, J., dissenting); id. at 653 (O'Connor, J., dissenting); id. at 641 (Stevens, J., concurring); see also Sherman v. Smith, No. 92-6947, 1993 U.S. App. LEXIS 28095, at *9-10 (4th Cir. 1993) (concluding that the burden of establishing harmless error remains on the state when non-"technical" errors are involved); Blume & Garvey, supra note 32, at 166-69 (concluding that the burden should remain on the state post-Brecht).
171. Brecht, 507 U.S. at 623 (referring to Kotteakos, 328 U.S. at 776).
within the federal system. Federal appellate courts have a particularly strong interest in furthering the goals of Congress as reflected in statutes and procedural rules; with such an interest, requiring reversal of cases involving the impairment of peremptory challenges could be even more appealing to circuit courts and the Supreme Court. Even without such an interest, though, reversal is appropriate in virtually all cases with such impairment.\textsuperscript{172}

In all cases considering claims such as those discussed here, it seems appropriate to require that defendants exhaust all peremptory challenges before they complain of erroneous refusals of for-cause challenges. When a defendant could readily eliminate any possibility of harm from such an error, it is simply sensible to have such a requirement.\textsuperscript{173}

In sum, the Tenth Circuit in \textit{Getter} and the Eighth Circuit in \textit{Cruz} and \textit{Horsman} got it wrong. In their (brief) consideration of the issue, they recognized surface similarity and failed to recognize the crucial differences in the foundational issues underlying the cases, and in fact introduced an incentive to do the ethically questionable by leaving on the jury veniremembers who should be removed for cause. Holding to the contrary, as most other circuits facing the question have done, is not really even a limitation of \textit{Ross} because \textit{Ross}, which at its core is a recognition that unencumbered peremptory challenges are not guaranteed by the Sixth Amendment and can be modified by states, is not easily or logically extended to other situations where peremptory challenges have not been so modified. \textit{Ross} is a product of its posture, and ought to remain so. When judicial errors encroach on clearly-established rights in jury selection, adverse verdicts should be reversed without showing of effect on the verdict, because such errors violate defendants' due process rights under the Fifth or Fourteenth Amendments. Even if some showing is required, the burden should remain on the prosecution. Such a burden will virtually never be satisfied, thus resulting in reversal.

In almost all cases, peremptory challenges will remain a means for litigants to remove jurors "who are not challengeable for cause, but in whom the litigant perceives bias or hostility"\textsuperscript{174}—that is, a protection separate and distinct, though related to, challenges for cause. Such separate protection is what was intended by the majority of jurisdictions in

\begin{itemize}
\item\textsuperscript{172} As noted previously, the government has proposed implementing such a rule as Supreme Court-made law in \textit{Martinez-Salazar}.
\item\textsuperscript{173} It has been suggested that defendants should be required to request additional peremptory challenges as well. This is certainly appropriate in most situations, but it should be noted that some states, including Oklahoma, have held that a trial court has no authority to grant additional peremptory challenges. \textit{See} Denham v. State, 192 P. 241, 244 (Okla. Crim. App. 1919).
\item\textsuperscript{174} United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996).
\end{itemize}
adoption of peremptory challenges, and their interests should be respected and facilitated by allowing for reversal of cases involving the impairment of those interests. Hopefully, the Supreme Court will do so in *Martinez-Salazar*.

VI. Epilogue

As this Article goes to press, the Supreme Court issued its opinion in *United States v. Martinez-Salamr*. The unanimous opinion, to put it bluntly, rejects or ignores the arguments presented by the defendant, which paralleled those in this Article.

As noted previously, the government in *Martinez-Salazar* first proposed reading an Oklahoma-like requirement into federal peremptory challenge law, so that a defendant would be required to exercise a peremptory challenge to remove any veniremember whom the defendant believed should be excused for cause. So holding would have put the case squarely within the universe controlled by *Ross*. The Court declined to read such a requirement into the Rule, noting that the only control previously read into peremptory challenge usage was preventing their discriminatory usage, and choosing not to explicitly require more.

With that resolved, the Court turned to the issue discussed in this Article. In a discussion taking fewer than three Westlaw textual columns, the Court, in a unanimous opinion written by Justice Ginsburg, found no violation of the defendant's rights. The fundamental determination underlying the decision can be found in the first paragraph addressing the issue: “The Court of Appeals erred in concluding that the District Court’s for-cause mistake compelled Martinez-Salazar to challenge [the veniremember] peremptorily, thereby reducing his allotment of peremptory challenges by one. A hard choice is not the same as no choice.” In the Court’s view, Martinez-Salazar received “all he is entitled to under . . . Rule [24].”

The conclusion reversing the Ninth Circuit is thus unsurprising. If the Court is correct that Martinez-Salazar received all to which he was entitled, then he can clearly point to no harm. The basis upon which the Court concluded that he did receive all to which he was entitled—he could have

---

175. 120 S. Ct. 774 (2000). The opinion came out less than two months after the November 29, 1999, argument.
176. See id. at 781.
177. See id.
178. See id. at 782.
179. Id. at 781 (citation omitted).
180. Id.
left the veniremember on the jury and "tak[en] his chances on appeal." 181 and thus "did not lose a peremptory challenge." 182—opens a can of worms which perhaps would have been better left closed. As I argue in this Article, such an approach invites defense lawyers to intentionally implant error (and potentially commit malpractice) by leaving objectionable veniremembers on the jury to preserve an appellate issue. 183 This conclusion seems to misapprehend the realities of jury selection: not only is it, as the Court rightly notes, "fast paced" 184 but, more importantly, when a for-cause challenge is rejected, no trial lawyer in her right mind would leave that veniremember on the panel. It is not simply a "hard choice." It is the lawyer’s professional duty as an advocate. It is, in fact, no choice at all, notwithstanding the Court’s claims to the contrary. 185

Nonetheless, once the use of a peremptory challenge is framed as a choice, just like the remainder of a defendant’s peremptory challenges, the question dissolves and, as Justice Ginsburg notes, harmless error analysis becomes irrelevant. 186 In that view of the case, Martinez-Salazar did receive all to which he was entitled and was not harmed by his judge’s error. In so ruling, the Court has further blurred the distinction between challenges for cause and peremptory challenges, and, whether the opinion acknowledged it or not, imposed a de facto requirement to use peremptory challenges to correct judges’ errors in deciding for-cause challenges. Peremptory challenges, and their unique place in our jurisprudence, are weaker for it.

181. Id. at 781.
182. Id. at 782.
183. Indeed, Justice Scalia, in a concurrence joined by Justice Kennedy, recognizes the difficult issues presented by such a conclusion, arguing first that the question was not before the Court (which is true) and second, that principles of waiver and volenti non fit injuria (roughly the equivalent of assumption of risk) should preclude such a course of action. See id. at 783 (Scalia, J., concurring).
184. Id. at 782.
185. Justice Souter, in his concurrence, seems to recognize the harshness of the Court’s conclusion. He notes that Martinez-Salazar does not decide what would happen if the trial court refuse[d] to afford a defendant a peremptory challenge beyond the maximum otherwise allowed, when he has used a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of the peremptory right.
186. See id. at 782 n.4.