

an expert overstates it or discusses it in a misleading way.<sup>83</sup> But judges often deferentially admit expert testimony, leaving it to the jury to assess<sup>84</sup> — making cross-examination essential to defense efforts to prevent improper reliance. Professor Podlas notes that “cross-examination can reveal the biases, distortions, and ‘falsehoods of mendacious witnesses,’ as well as mistakes and failures of perception” and often serves as “the lynchpin of the case.”<sup>85</sup> It is thus a powerful tool to counter juries’ tendency to believe scientific data that is presented in the manner that television has led them to expect.

A number of courts and prosecutors have noted the degree to which the increase in reliance on forensic evidence and juries’ familiarity with it have changed trial practice. In *Delaware v. Cooke*<sup>86</sup> the prosecution “contend[ed] that it want[ed] to demonstrate to the jury that it conducted a thorough investigation,” and “assert[ed] that being able to produce this evidence before a jury address[ed] concerns the State ha[d] that jurors have or may have . . . heightened expectations of what the prosecution must do or show in order to meet its burden of proof.”<sup>87</sup> In a similar vein, the Fifth Circuit recently upheld a trial court’s admission of crime scene photographs showing the victim’s decomposing body over the defendant’s objection that they were more prejudicial than probative because “[t]hey helped explain why little physical evidence was found,” a significant concern because, “[i]n this age of the supposed ‘CSI effect,’ explaining to the jury why the Government had little in the way of physical or scientific evidence was arguably critical to the Government’s case.”<sup>88</sup> *Melendez-Diaz* ought to have recognized more explicitly that the import of forensic testing cuts both ways: scientific evidence can both exonerate and condemn, and fairness requires that it be subject to live testimony to ensure that juries give it the proper weight — and no more.

### B. Due Process

1. *Peremptory Challenges — Harmless Error Doctrine.* — Provided since at least the sixteenth century<sup>1</sup> and historically lauded as showing mercy to criminal defendants,<sup>2</sup> peremptory challenges are

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<sup>83</sup> Garrett & Neufeld, *supra* note 75, at 33; see also Erica Beecher-Monas, *Reality Bites: The Illusion of Science in Bite-mark Evidence*, 30 CARDOZO L. REV. 1369, 1390 (2009) (noting judicial reliance “on the adversary system to challenge suspect expert testimony”).

<sup>84</sup> Garrett & Neufeld, *supra* note 75, at 90.

<sup>85</sup> Podlas, *supra* note 68, at 485 (footnotes omitted).

<sup>86</sup> 914 A.2d 1078 (Del. Super. Ct. 2007).

<sup>87</sup> *Id.* at 1082.

<sup>88</sup> *United States v. Fields*, 483 F.3d 313, 355 (5th Cir. 2007).

<sup>1</sup> See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 509 (4th ed. 2007).

<sup>2</sup> See *Lewis v. United States*, 146 U.S. 370, 376 (1892) (reciting Blackstone’s views).

among the oldest parts of Anglo-American criminal procedure.<sup>3</sup> Today, every U.S. jurisdiction provides them to criminal defendants.<sup>4</sup> Yet the Supreme Court has grown increasingly wary of peremptory challenges, eliminating parties' ability to use them for discriminatory purposes<sup>5</sup> and upholding practices that effectively reduce their number.<sup>6</sup> Last Term, in *Rivera v. Illinois*,<sup>7</sup> the Supreme Court continued in this trajectory, holding that the Constitution allows states to choose between harmless error review and automatic reversal when a judge, acting in good faith, erroneously denies a defendant's challenge.<sup>8</sup> Although the Court reached an apparently correct result, it failed to mention that the kind of harmless error review utilized by the Illinois Supreme Court will almost always result in finding such a denial harmless. The Court therefore implicitly sanctioned both the existence of a state right without an effective remedy and the use of a troubling form of harmless error review. While the Court appears to have been correct in leaving Illinois's harmless error review intact, it could have acknowledged the problematic consequences and explained why they were acceptable here. By not doing so, the Court made questionable *Rivera's* self-described narrowness and lost a chance to cabin a dangerous form of harmless error review.

On January 10, 1998, "Insane Deuces" gang member Michael Rivera shot and killed someone he mistakenly believed belonged to the rival "Stones."<sup>9</sup> During jury selection, Rivera's lawyer asked Deloris Gomez about her work at Cook County Hospital, which is known for its treatment of gunshot victims.<sup>10</sup> Gomez stated that she had some

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<sup>3</sup> Historically, peremptory challenges may have been rarely used. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 165–66 (1989). And Great Britain's gradual elimination of them suggests they are not a necessary part of Anglo-American law. See William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1412–13 (2001) (describing gradual elimination of peremptories).

<sup>4</sup> See, e.g., FED. R. CRIM. P. 24(b) (establishing peremptory challenges for federal criminal defendants); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 147 (1994) (O'Connor, J., concurring) ("The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States.").

<sup>5</sup> See *J.E.B.*, 511 U.S. at 129 (forbidding gender-based peremptory challenges); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (forbidding racially motivated peremptory challenges).

<sup>6</sup> See *United States v. Martinez-Salazar*, 528 U.S. 304 (2000) (holding that a federal "defendant's exercise of peremptory challenges pursuant to Rule 24(b) is not denied or impaired when the defendant chooses to use a peremptory challenge to remove a juror who should have been excused for cause," *id.* at 317); *Ross v. Oklahoma*, 487 U.S. 81 (1988) (upholding statute requiring curative use of peremptory challenges).

<sup>7</sup> 129 S. Ct. 1446 (2009).

<sup>8</sup> See *id.* at 1450.

<sup>9</sup> *People v. Rivera*, 810 N.E.2d 129, 131 (Ill. App. Ct. 2004). Rivera did not contest "the sufficiency of the evidence supporting his murder conviction" on appeal. *People v. Rivera*, 852 N.E.2d 771, 776 (Ill. 2006).

<sup>10</sup> *Rivera*, 852 N.E.2d at 774.

contact with such victims as a hospital supervisor but that she believed such contact would not affect her views of the case.<sup>11</sup> Rivera's lawyer indicated that he wanted to use his fourth peremptory challenge to remove her.<sup>12</sup> The trial judge, *sua sponte*, halted the proceedings and asked counsel and the defendant to meet with him in his chambers.<sup>13</sup>

The judge asked Rivera's lawyer to explain why he wanted to remove Gomez.<sup>14</sup> The lawyer answered by referring to Gomez's contact with crime victims but also intimated that he thought her apparent Hispanic ancestry would benefit his client.<sup>15</sup> The judge stated that he believed Gomez was African American and noted that she was the second African American the defense had challenged.<sup>16</sup> Stating that the defense's explanation did not overcome the "*prima facie* case of discrimination against Mrs. Gomez"<sup>17</sup> under *Batson v. Kentucky*,<sup>18</sup> the judge denied the strike but allowed further questioning.<sup>19</sup> Gomez repeated her connection with gunshot victims and her belief that she could act impartially, and the judge seated Gomez but allowed the defendant's counsel a final comment on the issue.<sup>20</sup> The lawyer declared that his strike was not race-based but rather part of an effort "to get some impact from possibly other men in the case" and to avoid possible bias on account of Gomez's employment at a hospital that was "wall to wall victims and patients."<sup>21</sup> With Gomez seated and acting as jury foreperson, the jury convicted Rivera.<sup>22</sup>

On intermediate appeal, the Appellate Court of Illinois held that the trial court's refusal to dismiss Gomez was not clearly erroneous.<sup>23</sup> The Illinois Supreme Court reversed in part, holding that the trial court failed to abide by *Batson's* three-step framework.<sup>24</sup> Because there was not a sufficient record from which to determine the validity of the *Batson* claim, the court remanded to the appellate court for an evidentiary hearing on whether the trial judge's *Batson* challenge was

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See id.*

<sup>16</sup> *Id.* at 774-75.

<sup>17</sup> *Id.* at 775.

<sup>18</sup> 476 U.S. 79 (1986).

<sup>19</sup> *Rivera*, 852 N.E.2d at 775.

<sup>20</sup> *See id.* at 775-76.

<sup>21</sup> *Id.* at 776.

<sup>22</sup> *Id.* at 777. *Rivera* was sentenced to eighty-five years in prison. *Id.* at 778.

<sup>23</sup> *People v. Rivera*, 810 N.E.2d 129, 138 (Ill. App. Ct. 2004).

<sup>24</sup> *See Rivera*, 852 N.E.2d at 787-88, 791.

spurred by gender, race, or mixed gender-race discrimination.<sup>25</sup> The trial judge stated it was gender discrimination.<sup>26</sup>

After the hearing, the Illinois Supreme Court held that the evidence did not create a prima facie case of discrimination, and thus Gomez should have been peremptorily struck.<sup>27</sup> However, the Illinois Supreme Court then decided that the error did not require automatic reversal, but could instead be subjected to harmless error review.<sup>28</sup> Relying on a footnote from the Supreme Court's decision in *United States v. Martinez-Salazar*,<sup>29</sup> the court held that the dictum in *Swain v. Alabama*<sup>30</sup> that such a denial required an automatic reversal was no longer good law.<sup>31</sup> The court also rejected Rivera's contention that the denial was a "structural" error requiring automatic reversal: although trial before a biased adjudicator would be structural error, because Gomez was not challengeable for cause "there [was] no evidence that [the] defendant was tried before a biased jury, or even *one* biased juror."<sup>32</sup> Finally, the court rejected Rivera's argument that determining the harm he suffered from the mistakenly seated juror was impossible. Because, according to the court, harmless error review asks whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,"<sup>33</sup> the court could assess the harm by asking whether "the evidence [was] so overwhelming that no rational jury . . . would have acquitted [the] defendant."<sup>34</sup> Given the overwhelming evidence, the court held the error to be harmless.<sup>35</sup>

The Supreme Court unanimously affirmed. Writing for the Court, Justice Ginsburg began by framing the issue: "If all seated jurors are qualified and unbiased, does the Due Process Clause of the Fourteenth Amendment nonetheless require automatic reversal of the defendant's conviction?"<sup>36</sup> She also distilled the basic reasoning the Court would use in rejecting Rivera's position: peremptory challenges are creatures of state law, not constitutional law, and "[j]ust as state law controls the

<sup>25</sup> See *id.* at 791–92.

<sup>26</sup> *People v. Rivera*, 879 N.E.2d 876, 879 (Ill. 2007).

<sup>27</sup> *Id.* at 884.

<sup>28</sup> See *id.* at 884–88.

<sup>29</sup> 528 U.S. 304 (2000).

<sup>30</sup> 380 U.S. 202 (1965).

<sup>31</sup> See *Rivera*, 879 N.E.2d at 886 (quoting *Martinez-Salazar*, 528 U.S. at 317 n.4).

<sup>32</sup> *Id.* at 887.

<sup>33</sup> *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)) (internal quotation mark omitted). Technically, harmless error review of nonconstitutional errors requires reversal if and only if "one cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

<sup>34</sup> *Rivera*, 879 N.E.2d at 888.

<sup>35</sup> See *id.* at 888–91.

<sup>36</sup> *Rivera*, 129 S. Ct. at 1450.

existence and exercise of peremptory challenges, so state law determines the consequences of an erroneous denial of such a challenge.”<sup>37</sup>

Rivera argued that even though the Constitution does not require peremptory challenges, states affording extraconstitutional protections to criminal defendants create constitutionally protected liberty interests that may not be burdened in violation of the Due Process or Equal Protection Clauses.<sup>38</sup> But, the Court emphasized, “[t]he Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but ‘the fundamental elements of fairness in a criminal trial.’”<sup>39</sup> In determining the scope of this right to a fair trial in relation to peremptory challenges, the Court discussed its decisions in *Ross v. Oklahoma*<sup>40</sup> and *Martinez-Salazar*. *Ross* held that the right was not violated when the defendant effectively lost a peremptory challenge by virtue of a state law that essentially required defendants to use peremptory challenges to cure erroneous for-cause determinations.<sup>41</sup> *Martinez-Salazar* held that a federal defendant’s choice to strike peremptorily a juror who should have been dismissed for cause did not unconstitutionally deprive the defendant of a peremptory strike afforded him by federal law.<sup>42</sup> Together, these precedents illustrated that the right to a fair trial included only the right to a jury “no member [of which] as finally composed was removable for cause”<sup>43</sup> — one “on which no biased juror sat.”<sup>44</sup> Because Rivera admitted that Gomez was not removable for cause, the improper denial of his challenge did not violate due process.<sup>45</sup>

The Court also rejected Rivera’s attempts to distinguish *Ross* and *Martinez-Salazar*. Unlike the defendants in *Ross* and *Martinez-Salazar*, Rivera challenged a juror who eventually served on the jury. However, according to the Court this distinction was irrelevant because “neither Gomez nor any other member of [Rivera’s] jury was removable for cause. Thus, like the juries in *Ross* and *Martinez-Salazar*, Rivera’s jury was impartial for Sixth Amendment purposes.”<sup>46</sup> The Court also rejected Rivera’s argument that “due process concerns persist because Gomez knew he did not want her on the panel.”<sup>47</sup> Accepting the premise that all jurors aware of a party’s attempts to re-

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<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 1453 (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)).

<sup>39</sup> *Id.* at 1454 (quoting *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967)).

<sup>40</sup> 487 U.S. 81 (1988).

<sup>41</sup> *See id.* at 89–90.

<sup>42</sup> *See United States v. Martinez-Salazar*, 528 U.S. 304, 317 (2000).

<sup>43</sup> *Rivera*, 129 S. Ct. at 1454.

<sup>44</sup> *Id.* (quoting *Martinez-Salazar*, 528 U.S. at 307) (internal quotation mark omitted).

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* (citation omitted).

<sup>47</sup> *Id.*

move them are constitutionally disqualified would allow parties to evade *Batson* by making specious for-cause challenges.<sup>48</sup>

Rivera further argued that, unlike the denials in *Ross* and *Martinez-Salazar*, the denial of his challenge violated state law. Justice Ginsburg rejected this distinction by repeating that not all violations of state law violate the Due Process Clause and by emphasizing the negative consequences of agreeing with Rivera: if automatic reversal must result, judges may refuse to aggressively police *Batson* violations.<sup>49</sup>

The Court also rejected Rivera's arguments that precedent compelled automatic reversal. It agreed with the Illinois Supreme Court that *Martinez-Salazar's* footnote, though admittedly dictum itself, disavowed *Swain's* remark about automatic reversal.<sup>50</sup> The Court also dismissed the argument that an erroneous denial was a "structural" error under the Court's harmless error precedents, noting that automatic reversal is required "only when 'the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'"<sup>51</sup> Although constitutional errors regarding the judge's or jury's qualifications or situations in which judges lack statutory authority to hear the case may rise to reversible error, "[t]he mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here."<sup>52</sup> Because Rivera received a fair trial, the error did not affect the verdict's reliability, leaving Illinois (and other states) free to decide between automatic reversal and harmless error review.<sup>53</sup>

The Court's short opinion thus leaves unstated the major consequence of using this kind of harmless error review for erroneous denials of peremptories: such denials will almost always be found harmless. Harmless error review, according to the Illinois Supreme Court, involves asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."<sup>54</sup> This test focuses on the error's impact on a hypothetical, rational jury rather than its impact on the actually empanelled jury or on the jury that would have been empanelled absent the error.<sup>55</sup> In cases not in-

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<sup>48</sup> See *id.*

<sup>49</sup> *Id.* at 1455.

<sup>50</sup> See *id.*

<sup>51</sup> *Id.* (quoting *Washington v. Recuenco*, 126 S. Ct. 2546, 2551 (2006) (alteration in original)).

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 1456.

<sup>54</sup> *People v. Rivera*, 879 N.E.2d 876, 887 (Ill. 2007) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). As noted above, nonconstitutional errors are subject to a lower standard, see *supra* note 33. However, as that standard also relates to the judgment of the decisionmaker — in jury trials, the jury — what is said here under the constitutional review standard used by the Illinois Supreme Court applies *mutatis mutandis* to the lower standard of review.

<sup>55</sup> See, e.g., *Rivera*, 879 N.E.2d at 888.

volving jury errors, this kind of review could easily lead to reversal. In some ineffective assistance of counsel cases, for example, competent counsel would have introduced evidence that the incompetent counsel did not, and that evidence could have led a hypothetical rational jury to a different conclusion. But in cases like *Rivera*, the problem lies not with what material reaches the jury but with the jury itself. Thus, any reversal under harmless error review would have to stem from a defect that rendered the actual jury's decisionmaking process inconsistent with a hypothetical, rational jury's. However, when jurors removable only through peremptories are at issue,<sup>56</sup> there is little an appellate court could point to as evidence that another rational jury could have come to a different conclusion.<sup>57</sup> By definition, such jurors are not removable for cause, and thus they are presumed to be impartial and rational. They also received all the evidence that the hypothetical rational jury would have received. An appellate finding of harmfulness would thus involve holding that, although the juror was presumed to be rational and received all of the evidence concerning guilt, something about the juror not rising to the level of a for-cause challenge — her place of employment, her avoidance of eye contact with the defendant's attorney, or other such "reasons" for peremptory challenges — creates sufficient doubts about what another rational jury could have found that the prosecution must go through the time and expense of another trial. Such holdings will likely be very rare. Although formally *Rivera* simply allows states to choose between remedying erroneous denials through automatic reversal or through harmless error review, it functionally allows them to eliminate remedies.

Recognizing that this kind of harmless error review will result in almost automatic affirmance does not mean that *Rivera* is unsound. The Due Process Clause does not require states to provide effective

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<sup>56</sup> *Rivera* will only matter in cases where there is no for-cause reason to have dismissed the juror. The erroneous seating of a juror challenged for cause requires automatic reversal, see *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000), though states may require parties with remaining peremptories to use them to cure such errors, see *Ross v. Oklahoma*, 487 U.S. 81 (1988).

<sup>57</sup> See *United States v. Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc) ("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."). Judge Kozinski's dissent in *Annigoni* recognized a related dilemma but took a different horn of that dilemma than the majority:

[The denial of a peremptory challenge] is not amenable to normal harmless error analysis, as we can never figure out what would have happened if one member of the jury had been struck and replaced by some other, unknown, person. Thus, we are forced to choose from two all-or-nothing rules: the error is always harmless or it is never harmless. . . .

Given this choice, I believe the Supreme Court would conclude that this kind of error is always harmless.

*Id.* at 1150 (Kozinski, J., dissenting).

remedies for every state-created right. *Ubi jus, ibi remedium* is indeed a deep-seated principle of Anglo-American law,<sup>58</sup> as illustrated by the thirty-five state constitutions that provide a right to a remedy<sup>59</sup> and by the arguments that the Due Process Clause includes such a right for federal rights violations.<sup>60</sup> But precedent and practice suggest that, despite the maxim, the Due Process Clause contains no such general right. For example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>61</sup> the Court upheld a compensation scheme that displaced common law remedies, noting that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.”<sup>62</sup> Judges and commentators have also highlighted well-established areas, such as immunity doctrines, where even constitutional rights lack effective remedies.<sup>63</sup>

Moreover, such a right costs more than it is worth when enforced in the context of peremptory challenges. The Court correctly pointed out that overturning convictions for erroneous denials could make achieving *Batson*’s worthy goal of ending discriminatory peremptories very difficult.<sup>64</sup> Furthermore, recognizing a *federal* right to a *state* remedy represents a significant intrusion upon state sovereignty. In some criminal procedure contexts this intrusion is warranted: although the federal Constitution does not require state criminal appeals, requiring defendants to pay for records of lower court proceedings and counsel on appeal significantly undermines strong constitutional norms of equal access to justice, justifying the federal requirement that states

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<sup>58</sup> Sir Edward Coke interpreted Magna Carta to require that every violation of a right be legally redressable, and Blackstone argued that rights were vain without an auxiliary right to a remedy. See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1319–23 (2003) (summarizing Coke’s and Blackstone’s views).

<sup>59</sup> See *id.* at 1310 n.7.

<sup>60</sup> See, e.g., Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004); cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”).

<sup>61</sup> 438 U.S. 59 (1978).

<sup>62</sup> *Id.* at 88.

<sup>63</sup> See, e.g., *Webster*, 486 U.S. at 612–14 (Scalia, J., dissenting) (arguing that “it is simply untenable [to suggest] that there must be a judicial remedy for every constitutional violation” in light of the sovereign immunity, political question, and equitable discretion doctrines, *id.* at 613); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779–86 (1991) (describing rights without “individually effective remedies” as a “fact of our legal tradition,” *id.* at 1786).

<sup>64</sup> See *Rivera*, 129 S. Ct. at 1455. Of course, *not* enforcing peremptories has costs, such as the harm to defendants convicted by jurors they unarticulably felt had some bias against them.



provide appellate counsel and transcripts.<sup>65</sup> By contrast, commentators have increasingly come to see peremptories themselves as violating, rather than upholding, constitutional values,<sup>66</sup> suggesting that the harm to constitutional values in denying peremptories does not justify federal intrusion. And finally, a federal requirement that erroneous denials result in reversal may even hurt criminal defendants: if put to the choice of either eliminating peremptories or automatically reversing for incorrect denials, states may well choose the former, eliminating whatever benefits defendants receive from exercising peremptory challenges.<sup>67</sup> Thus, understanding *Rivera's* unspoken consequence does not change the correctness of its ultimate conclusion.

Why worry, then, about *Rivera's* failure to mention this consequence? One reason stems from the value of openness regarding the negative consequences of judicial decisionmaking: given the departure of *Rivera's* consequence from background norms about rights and remedies, acknowledging that states may virtually eliminate remedies respects defendants.<sup>68</sup> Another is that the consequence casts doubts on the Court's assertions that its holding is limited. Justice Ginsburg stated that "[t]he mistaken denial of a state-provided peremptory challenge does not, *at least in the circumstances we confront here*, constitute an error [that necessarily makes the verdict unreliable]."<sup>69</sup> She also mentioned that there was no indication that the judge was acting in bad faith<sup>70</sup> and that only one peremptory was denied.<sup>71</sup> But given the logic of peremptory challenges and the kind of harmless error review upheld by the Court, neither of these distinguishing features should matter. A bad faith denial of a peremptory, under the reasoning of harmless error review, cannot be problematic *because* of the denial of the peremptory; the hypothetical, rational juror, by definition, is just as impartial as the peremptorily challenged juror. Rather, a bad-faith denial is different because the bad faith indicates the *judge's* bias, something the Due Process Clause already protects against.<sup>72</sup> Simi-

<sup>65</sup> See *Evitts v. Lucey*, 469 U.S. 387 (1985) (requiring states to pay for indigents' counsel for the first appeal as of right); *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring states to provide indigent defendants with a trial transcript on appeal).

<sup>66</sup> See Pizzi & Hoffman, *supra* note 3, at 1437-39 (cataloguing arguments that peremptory challenges violate equal protection, due process, and the fair cross-section requirement).

<sup>67</sup> See *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting) ("A rule that turns every peremptory challenge error into a retrial gives a strong incentive to . . . legislators to cut down the number of peremptories — or eliminate them altogether.").

<sup>68</sup> Cf. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-38 (1987) (arguing that the related concept of judicial candor shows respect for those bound by the law, allows appropriate criticism of judicial decisionmaking, and helps retain institutional legitimacy).

<sup>69</sup> *Rivera*, 129 S. Ct. at 1455 (emphasis added).

<sup>70</sup> See *id.* at 1453, 1455.

<sup>71</sup> *Id.* at 1455.

<sup>72</sup> *Rivera* itself noted that such bias already merits automatic reversal. See *id.* at 1455-56.

larly, the number of peremptories erroneously denied does not change the logic: if two jurors sat who should not have, but those jurors were not challengeable for cause and hence impartial, the logic of this kind of harmless error review strongly suggests the errors were harmless.<sup>73</sup> *Rivera*'s logic and the consequences of this kind of harmless error review thus suggest that peremptory challenges will be protected largely where other rights are implicated by the denial of a peremptory; since those protections already exist, *Rivera* knocks out the right to a remedy for a broader category of peremptories than the opinion suggests.

*Rivera*'s opacity about the interaction between different kinds of harmless error review and peremptory challenges also represents a missed opportunity to clarify harmless error review. The Supreme Court has used two conflicting versions of harmless error review, a "guilt-based" approach and an "error-based" approach.<sup>74</sup> The guilt-based approach asks whether a hypothetical jury would have convicted absent the error<sup>75</sup> — the Illinois Supreme Court's method in *Rivera*. The error-based approach instead asks about the impact of the error on the actual jury's decision.<sup>76</sup> *Rivera* implicitly supported the guilt-based method by affirming the Illinois Supreme Court's explicitly guilt-based decision and by citing, without any indication of disagreement, the Illinois Supreme Court's use of the Court's guilt-based test from *Neder v. United States*.<sup>77</sup> But the guilt-based version has serious shortcomings: it "erodes . . . individual rights and liberties" by allowing the felt need to convict the factually guilty to trump defendants' rights,<sup>78</sup> it vitiates the jury trial right,<sup>79</sup> and it eliminates the deterrent effect of remedying rights violations.<sup>80</sup>

Nevertheless, in the peremptory challenge context, the error-based approach also presents serious problems: if the prosecution bears the burden of proof, as precedent suggests it will,<sup>81</sup> harmless error review will lead to automatic reversal because of the impossibility of establishing what the jury would have done if properly composed.<sup>82</sup> Given

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<sup>73</sup> Of course, multiple erroneous denials may suggest bad faith on the judge's part, but, as argued above, that does not provide independent remedial protection to peremptory challenges.

<sup>74</sup> See, e.g., Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1061–62 (2005).

<sup>75</sup> *Id.* at 1062.

<sup>76</sup> *Id.*

<sup>77</sup> 527 U.S. 1 (1999); see *Rivera*, 129 S. Ct. at 1452.

<sup>78</sup> Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1194 (1995).

<sup>79</sup> See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 108 n.195 (2008).

<sup>80</sup> See Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 61–62.

<sup>81</sup> See *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

<sup>82</sup> See *United States v. Annigoni*, 96 F.3d 1132, 1150 (9th Cir. 1996) (en banc) (Kozinski, J., dissenting).

the problems with peremptory challenges mentioned above, automatic reversal may well be too high a price to pay to remedy erroneously denied peremptories. Nevertheless, if the Court had openly recognized that error-based harmless error review would always result in reversal, it could have cabined guilt-based review to cases in which the error-based approach is impossible and the right at issue is itself questionable.<sup>83</sup> Instead, by framing the choice as between automatic reversal and harmless error review, and by quietly supporting Illinois's guilt-based review, the Court missed an opportunity to clarify harmless error doctrine and to prevent the expansion of troubling guilt-based review.

Whether peremptory challenges are worth their accompanying troubles is an open question,<sup>84</sup> and it may be good policy to cut back on them by allowing states to functionally eliminate any remedy for their erroneous denial. Although *Rivera's* refusal to impose a constitutionally required remedy of automatic reversal seems correct, by declining to confront the serious consequences of harmless error review in the peremptory context the Court failed to clarify and confine a troubling kind of harmless error review.

2. *Postconviction Access to DNA Evidence.* — DNA testing has exonerated a small but symbolic cohort of convicts, throwing the American justice system's vulnerability to convicting the innocent into sharper relief.<sup>1</sup> Last Term, in *District Attorney's Office v. Osborne*,<sup>2</sup> the Supreme Court considered whether convicted felons have a constitutional right to access DNA evidence.<sup>3</sup> The Court held that proce-

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<sup>83</sup> Automatic affirmance thus aligns with the Court's dislike for automatic reversal. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 142 n.294 (1996) (arguing that harmless error review for the erroneous denial of a peremptory is "far more consistent with the Supreme Court's clear hostility to rules of automatic reversal for errors that do not plainly undermine the reliability of the jury's verdict," *id.* at 143 n.294). Of course, the statement "the defendant was erroneously denied a peremptory challenge, and therefore the conviction is affirmed" — what the guilt-based model strongly suggests — is a disturbing non sequitur. See Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 774 n.8 (1998) (noting that the "curious notion that some trial errors might require automatic affirmance of a conviction" has appeared in cases such as *Annigoni*). The Court could have filled in the missing premises by discussing the dilemma present in the jury error context.

<sup>84</sup> See Pizzi & Hoffman, *supra* note 3, at 1437–39. Empirical evidence suggests peremptory challenges may not even be worthwhile tools in allowing parties to secure more favorable juries. See Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 513–18 (1978) (finding that jurors who would have been seated if not peremptorily struck by prosecutors voted no differently than the seated jurors).

<sup>1</sup> See, e.g., Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Oct. 3, 2009).

<sup>2</sup> 129 S. Ct. 2308 (2009).

<sup>3</sup> *Id.* at 2316.