CRIMINAL PROCEDURE—THE QUINTESSENTIAL EXERCISE OF THE PEREMPTORY CHALLENGE: DENIAL OF PEREMPTORY STRIKE POSSIBLY VIOLATES SECTION ONE OF THE KENTUCKY CONSTITUTION. *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006), *overruled by Shane v. Commonwealth*, No. 2006-SC-000096-MR, 2007 WL 4460982 (Ky. Dec. 20, 2007).

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I. INTRODUCTION

In *Morgan v. Commonwealth*,[1] the Supreme Court of Kentucky divided on whether the peremptory strike in jury selection was a substantial right or a procedural right under the Kentucky Constitution.[2] Substantial rights are essential because they have the potential to affect the outcome of a lawsuit, and they are capable of legal enforcement and protection.[3] Procedural rights derive from administrative procedures and they function to help in the protection or enforcement of a substantial right.[4] The *Morgan* majority decided the peremptory strike is procedural[5] and, in doing so, overruled *Thomas v. Commonwealth*.[6] The majority reasoned that the peremptory strike was merely a means to an end, the right to a trial by an impartial jury.[7] The

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1. 189 S.W.3d 99 (Ky. 2006), *overruled by* Shane v. Commonwealth, No. 2006-SC-000096-MR, 2007 WL 4460982 (Ky. Dec. 20, 2007).
2. *Id.* at 105.
3. *Id.* (citing BLACK'S LAW DICTIONARY 1324 (7th ed. 1999)).
4. *Id.* (citing BLACK'S LAW DICTIONARY 1323 (7th ed. 1999)).
5. *Id.* at 104-07.
6. 864 S.W.2d 252 (Ky. 1993).
7. *Morgan*, 189 S.W.3d at 105.

Morgan majority concluded that the trial court's denial of a motion to excuse a juror for cause amounted to harmless error, even though this caused Morgan to excuse the juror peremptorily.[8] In his dissent, Justice Cooper argued that peremptory strikes are substantial rights under the Kentucky Constitution,[9] and that the denial of this right is per se reversible error requiring a new trial as a matter of law.[10]

II. STATEMENT OF THE CASE

Late one night in October 2002, Darryl Morgan surreptitiously observed his victims, a woman and her boyfriend, engage in sexual intercourse.[11] A few hours after the two fell asleep; Morgan entered the woman's trailer.[12] Waking the couple, he put a gun to the man's head and ordered the woman to get out from beneath the covers.[13] Morgan informed them that he wanted to see the woman naked, and ordered her to retrieve her vibrator.[14] When the woman went to retrieve the vibrator, she dialed 911 from the phone on her dresser.[15] Morgan then forced the woman to engage in autoerotic behavior with the vibrator.[16] When the police chief arrived, Morgan ordered the woman to send him away.[17] The police chief extricated the woman from the trailer, and Morgan fled but was apprehended.[18]

During voir dire, one of the members of the jury pool disclosed that he knew the victim's ex-husband.[19] He opined that the case was "open and shut."[20] When asked the "magic question,"[21] whether he could render a fair

8. *Id.* at 104-05.

9. *Id.* at 132 (Cooper, J., dissenting).

10. *Id.* at 137.

11. *Id.* at 103 (majority opinion). He watched the two through the window of her trailer. *Id.*

12. *Id.* Before entering, he cut a phone line to the trailer. *Id.*

13. *Id.* Morgan ordered them onto the floor and threatened to kill them. *Id.*

14. *Id.* Morgan knew she had a vibrator because he had been in the trailer before, and threatened to kill the boyfriend if she disobeyed. *Id.*

15. *Id.* Unknown to Morgan, the trailer had two separate phone lines, and he only cut one of them before his entry. *Id.*

16. *Id.* Morgan rubbed her foot and leg as she complied. *Id.*

17. *Id.* She whispered to the police officer that Morgan was armed with a gun. *Id.*

18. *Id.*

19. *Id.* at 104. This juror disclosed that he had heard many of the details of the crime from the victim's ex-husband. *Id.*

20. *Id.* He indicated that he "would feel like [he] was betraying [his friend, the ex-husband]" and informed the defense that he "probably wouldn't be [their] best choice." *Id.*

verdict based solely upon the evidence presented,[22] the juror waffled back and forth until he concluded, "I think I can, yeah."[23] The court denied the defendant's motion to dismiss the juror for cause, but, in the end, he never sat on the jury because Morgan used one of his eight peremptory challenges to remove him.[24]

The jury that heard the case convicted Morgan of first-degree burglary, second-degree stalking, two counts of kidnapping, first-degree sexual abuse, terroristic threatening, and first-degree criminal trespass.[25] The court sentenced Morgan to thirty-five years imprisonment.[26]

On appeal, the Supreme Court of Kentucky acknowledged that the juror was biased, and determined that the trial court should have granted the defendant's motion to strike the juror for cause.[27] The Kentucky high court concluded, however, that since the jury as a whole was ultimately unbiased, the failure to strike the juror for cause was harmless error and the peremptory strike had fulfilled its intended purpose.[28]

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21. *Id.* A myth that has developed around the process of jury selection is that a juror with prejudicial personal knowledge can be rehabilitated by asking whether he can put aside foregone conclusions and decide the case on the evidence presented in court with the jury charge. *See id.*

22. Despite the myth of the magic question, "'[i]mpartiality is not a technical conception. It is a state of mind.'" *Id.* (alteration in original) (quoting United States v. Wood, 299 U.S. 123, 146 (1936)); *see also* Montgomery v. Commonwealth, 819 S.W.2d 713, 718 (Ky. 1991). In *Montgomery*, the court stated:

> There is no "magic" in the "magic question". . . . We declare the concept of "rehabilitation" is a *misnomer* in [voir dire] . . . and direct trial judges to remove it from their thinking and strike it from their lexicon. . . . [O]bjective bias renders a juror legally partial, despite his claim of impartiality.

Id. at 718.

23. *Morgan*, 189 S.W.3d at 104. The juror explained:

> Maybe I should not . . . I would like to think I could, but I have formed a pretty strong opinion, but I don't know him. I would like to hear his side of it actually . . . . Well, I hope I can [make a decision strictly based on the evidence and the law].

Id. (internal quotation marks omitted).

24. *Id.*

25. *Id.* at 102.

26. *Id.*

27. *Id.* at 104. The court reasoned that the Kentucky Constitution guarantees an impartial jury, and that the juror's answers established an inference of bias so pervasive that his eventual answer to the magic question was insufficient to rehabilitate him. *Id.*

28. *Id.*

III. HISTORY OF THE PEREMPTORY STRIKE

The peremptory strike in criminal trials by jury has a long history, dating to thirteenth-century England.[29] The Crown, in essence, handpicked the earliest juries through the exercise of peremptory challenges.[30] However, finding this "obnoxious to their idea of justice,"[31] Parliament reserved the peremptory as a right for defendants[32] only[33] and prohibited its use by the

29. *Id.* at 126-27 (Cooper, J., dissenting).

30. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977).

31. *Id.*

32. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346-47 (facsimile ed. 1979) (1766). The peremptory challenge was available only to the accused in criminal cases. *Id.* at 346. Distinguishable from the more restrictive "challenge[] for cause," which limited the Government vis-à-vis the accused, the peremptory challenge was exercised without a demonstration of cause by the defendant. *Id.* at 346-47. The peremptory challenge was a manifestation of the extent to which English Law placed the life of the accused paramount to all else. *Id.* at 346. Blackstone justified the allocation of the peremptory strike only to the defendant on two grounds: (1) the defendant should have a good opinion of his jury; and (2) to prevent ill consequences to the defendant. *Id.* at 346-47. During voir dire, if either (1) the venire member was indifferent; or (2) the questions provoked venire member resentment, but the court denied a motion for cause, the accused was permitted to strike the venire member without a requirement of showing cause. *Id.* at 347.

33. Blackstone explained that this exemplified the "tenderness and humanity to prisoners, for which our English laws are justly famous." *Id.* at 346. *But see id.* at ix, xiv n.35 (asserting that that criminal procedural law was not nearly as liberal as Blackstone described because Blackstone's familiarity derived from private law practice and the great state trials as opposed to trial of common-run felonies). Other scholarship demonstrates the gradual and slow evolution of the evidentiary and substantive criminal law in England from severity to relative "tenderness and humanity." *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974-1026 (1931-1932) (surveying the development of substantive English criminal law from its earliest primitive concepts of liability into a system struggling to adequately define mens rea as a material element). *See generally* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980) (describing broad phases in development of mens rea in criminal law starting with recognition of new conceptual distinctions, evolution into discretionary exercise, followed by gradual institutionalization, and finally official adoption into substantive law). In his Article, Professor Robinson explained that early English criminal common law inhibited full expression of any intuitive sense of communal justice by precluding evaluation of subjective criminal intent and preventing the defendant to call any witnesses. *Id.* at 845, 849 n.159. Furthermore, Professor Robinson demonstrated the "extreme severity of the old criminal law" by referring to early English laws of evidence "peculiar to criminal proceedings . . . [which treated] the prisoner and his wife [as] incompetent witnesses." JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 439 (London, MacMillan 1883); *see also* Sayre, *supra*, at 1021 ("Hidden mental phenomena are difficult to prove at best; and in a day when those being tried for felony were not allowed to take the stand in their own defense, courts were almost compelled to

Crown[34] until 1989 when Parliament repudiated the peremptory challenge completely.[35]

American colonists continued the English practice regarding the peremptory challenges.[36] In early Kentucky, as in England, criminal

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evolve *rough and ready rules and external tests* to determine capacity for criminal liability." (emphasis added)). This form of "rough justice" hardly amounted to "tenderness." Statutory reform progressively eroded the common law evidentiary restrictions, allowing the defense to call oath-bound witnesses similar to witnesses for the Crown. Robinson, *supra*, at 845 (citing BLACKSTONE, *supra* note 32, at 360).

> [A]ll and every Person and Persons, who shall be produced or appear as a Witness or Witnesses on the Behalf of the Prisoner, upon any Trial for Treason or Felony, before he or she be admitted to depose, or give any Manner of Evidence, shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth, in such Manner, as the Witnesses for the Queen are by Law obliged to do . . . .

1701, 1 Ann., St. 2, c.9, § 3 (Eng.). By 1898, the defendant was permitted to testify on his own behalf and under oath, which also allowed the introduction of evidence of the defendant's state of mind. Robinson, *supra*, at 845. Blackstone published his work in the year 1769. This was 703 years after the Norman Conquest, only sixty-eight years after criminal defendants were finally permitted to call witnesses to testify under oath, and 129 years before defendants were permitted to take the stand and testify under oath on their own behalf. *Id.* at 821-50. Although the peremptory strike was permitted only to the defendant until it was finally abolished, this brief survey demonstrates that procedural safeguards were denied to the criminal defendant. *Id.* Furthermore, substantive criminal law contemplated and developed mens rea as an unrefined principle in determining guilt over the course of centuries. *Id.* This tends to dispel Blackstone's proposition. Although the peremptory strike was allocated only to the accused, Blackstone's assertion, that the life of the accused was paramount to all else, was not a panacea. After all, the force of Blackstone's general assertion is significantly diminished by the substantive and evidentiary law. Thus, the appearance of "tenderness" in English law emerges only in contrast to its own past. *See generally* Robinson, *supra*. In contrast to practices elsewhere, *see* STEPHEN, *supra*, at 441 n.2. This liberality developed slowly over approximately seven- to nine-hundred years.

34. *See* Ordinance for Inquests, 1305, 33 Edw. 1 (Eng.) (requiring the Crown to excuse jurors only on a motion for cause) ("[I]f they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause Certain, and the Truth of the same Challenge shall be enquired of according to the Custom of the Court . . . .").

35. Criminal Justice Act, 1988, c. 33, § 118(1) (Eng.) (abolishing the peremptory strike). "The right to challenge jurors without cause in proceedings for the trial of a person on indictment is abolished." *Id.*

36. VAN DYKE, *supra* note 30, at 148-49. The first draft of the Sixth Amendment to the Federal Constitution included "the right of challenge." *Id.* at 142. The Framers, however, decided that the text granting "an impartial jury," in conjunction with the reservation of unmentioned rights to the states and the people in the Ninth Amendment, was sufficient to protect the right to challenge jurors. *Id.* at 142. Today, many trial attorneys believe that the outcome of their case is actually determined during the stage of empanelling the jury, so they devote a significant amount of strategy when challenging for cause and exercising their peremptory strikes. *Id.* at 139.

defendants were allotted peremptory challenges by statute, depending on the crime charged, while the challenges were completely denied to the prosecution.[37] Today, the peremptory challenge is a part of modern trial practice. The Constitution of Kentucky guarantees "the accused . . . shall have a speedy public trial by an impartial jury of the vicinage."[38] The unlimited challenges for cause and the allotment of peremptory strikes to the accused and the prosecution are intended to secure this crucial right.[39]

IV. THE COURT'S REASONING IN *MORGAN V. COMMONWEALTH*

The *Morgan* majority held that peremptory challenges were not constitutionally protected.[40] The high court distinguished substantial rights from technical rights,[41] and reasoned that the historical fluctuation in allotting peremptory challenges necessarily precluded it from having constitutional status.[42] The court determined that unless a biased juror actually sat on the panel, the erroneous denial of a challenge for cause was harmless and the right to an impartial jury had not been violated.[43] In so holding, the court tied the state constitutional standard to the Sixth Amendment regarding the right to an impartial jury.[44] The high court

37. *Morgan v. Commonwealth*, 189 S.W.3d 99, 132-34 (Ky. 2006) (Cooper, J., dissenting) (citing 1 WILLIAM LITTELL, STATUTE LAW OF KENTUCKY ("LITTELL'S LAWS"), ch. 262, §§ 18-19 (1809), and subsequent legislative and adjudicative history to demonstrate the peremptory strike as "inviolate" of Kentucky law).

38. KY. CONST. § 11.

39. VAN DYKE, *supra* note 30, at 139 ("The purpose of challenges is to eliminate jurors who may be biased about the defendant, the prosecution, *or the case*, and who thus might threaten the jury's impartiality . . . ." (emphasis added)).

40. *Morgan*, 189 S.W.3d at 106 (majority opinion). Writing for the majority, Deputy Chief Justice Scott asserted that the current rule, which authorizes the peremptory challenge, "is something we created and we allow to exist." *Id.* at 106-07. Deputy Chief Justice Scott is chair of the Supreme Court Criminal Rules Committee. *See* Press Release, Ky. Court of Justice, Deputy Chief Justice Scott to Chair Supreme Court Criminal Rules Comm. (Sept. 20, 2006), *available at* http://courts.ky.gov/pressreleases/PR09202006A.htm.

41. *Morgan*, 189 S.W.3d at 105 (defining a technical right based on *Black's Law Dictionary* as one "derived from a legal . . . procedure . . . that helps in the protection or enforcement of a substantial right" as opposed to a substantial right "which is essential and that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection").

42. *Id.*

43. *Id.* at 121.

44. *See* United States v. Martinez-Salazar, 528 U.S. 304, 317 (2000) (extending Ross v. Oklahoma, 487 U.S. 81, 88-91 (1988), which determined that peremptory challenges are auxiliary to an impartial jury and due process under the Sixth and Fourteenth Amendments,

reasoned that in all circumstances the peremptory challenge, even when triggered by an erroneous denial of a challenge for cause, is only a means to achieving the constitutionally required end of an impartial jury. In doing so, the Supreme Court of Kentucky overturned *Thomas v. Commonwealth*,[45] which held that the peremptory strike was a substantial right under the State's due process clause.[46]

In dissent, Justice Cooper drew a distinction between "substantial" rights and "constitutional" rights and criticized the majority not only for blurring the distinction,[47] but also for relying on *United States v. Martinez-Salazar*.[48] The dissent roundly condemned *Martinez-Salazar* as a holding that "not only reflects a misconception of the realities of the practice of law in 'real world' courtrooms, it thankfully applies only to federal cases and is not binding precedent on state courts."[49] The dissent argued that each peremptory challenge is a substantial right, "i.e., one to which a party is clearly entitled and the . . . denial of which cannot be deemed harmless for purposes of our harmless error and palpable error rules."[50] The dissent contended that the peremptory strike is substantial to the "inviolate" right of securing a trial by impartial jury under section seven.[51] Accordingly, Justice Cooper drew from the wellsprings of legal history to demonstrate the role of the peremptory strike in jury empanelment and its substantial quality under the "inviolate" right to trial by jury.[52] He also argued tacitly that where, as here, a defendant

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and holding that even an erroneous denial of a challenge for cause that forces a defendant to exhaust all his peremptory challenges is not a constitutional violation).

45. 864 S.W.2d 252 (Ky. 1993), *overruled by Morgan*, 189 S.W.3d at 106.

46. *Morgan*, 189 S.W.3d at 106 ("Many have said change *Thomas* or change [the rule governing peremptory challenges in criminal trials]. One or the other is not working. We now join the chorus—it is time to overrule *Thomas*. And we do.").

47. *Morgan*, 189 S.W.3d at 123 (Cooper, J., dissenting).

48. *Id.* at 124; United States v. Martinez-Salazar, 528 U.S. 304 (2000).

49. *Morgan*, 189 S.W.3d at 124.

50. *Id.* at 123; *see also* William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430-31 (1986) ("The most enduring dissents, . . . seek to sow seeds for future harvest. . . . [They] soar with passion and ring with rhetoric . . . . [and] at their best, straddle the worlds of literature and law."). The *Morgan* dissent summarizes the history of the peremptory strike in England, America, and Kentucky, draws on textual provisions in the Kentucky Constitution, including personal experiences as a civil trial lawyer, and quotes Dickens. *Morgan*, 189 S.W.3d at 123-42 (Cooper, J., dissenting).

51. KY. CONST. § 7 ("The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate . . . .").

52. Although the Kentucky Supreme Court majority rejected the historical argument, other states have based their decisions on originalism for questions framed around the "inviolate" right to trial by jury. *See, e.g.*, Lakin v. Senco Prods., Inc., 987 P.2d 463, 463-76 (Or. 1999) (striking legislative cap on civil damages as a violation of the "inviolate" right to

has not voluntarily, knowingly, and competently waived his right to trial by jury, the peremptory strike is substantial to the "inviolate" right to trial by jury in criminal cases.[53]

V. ANALYSIS AND RECOMMENDATIONS

The *Morgan* majority determined that the peremptory challenge during voir dire is only a technical right for securing an impartial panel.[54] The *Morgan* majority based its holding on *United States v. Martinez-Salazar*[55] and *Ross v. Oklahoma*.[56] In these two cases, the United States Supreme Court declined to assign constitutional character to the peremptory strike.[57] The Supreme Court considered not only whether the right to an impartial jury had been violated, but also whether due process had been violated when a defendant exercised a peremptory strike to excuse a juror who should have been excused for cause.[58] Even though the United States Supreme Court held that there was no violation of due process in either of these cases, the *Ross* majority expressly invited state courts to experiment with this right in their own jurisdictions.[59]

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trial by jury *in civil cases* because damage determination had historically been a question of fact left to the jury); *see also* 5 WILLIAM B. BARDENWERPER, WEST'S KENTUCKY PRACTICE: METHODS OF PRACTICE § 61.1 (3d ed. 1991) (analogizing intent of section seven of the Kentucky Constitution to the text of the Seventh Amendment to the United States Constitution with jury trial guarantee *in civil cases*).

53. Short v. Commonwealth, 519 S.W.2d 828, 833 (Ky. 1975), *superseded by statute*, KY. R. CRIM. P. 9.26(1), *as recognized in* Jackson v. Commonwealth, 113 S.W.3d 128 (Ky. 2003) (allowing criminal defendants to statutorily waive constitutional right to jury trial derived from common law mandate of a criminal trial by jury and originally intended in section seven to the Kentucky Constitution as "inviolate"); *see* KY. R. CRIM. P. 9.26(1) ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Commonwealth.").

54. *Morgan*, 189 S.W.3d. at 105 (majority opinion).

55. 528 U.S. 304, 307 (2000).

56. 487 U.S. 81, 88-91 (1988) (holding that the peremptory challenge is only an auxiliary right to the guarantees of trial by an impartial jury and due process under the Sixth and Fourteenth Amendments). *Martinez-Salazar* extended *Ross* to include erroneous denials of challenges for cause that force a defendant to exercise all of the peremptory strikes allotted. *See Martinez-Salazar*, 528 U.S. at 317.

57. *Morgan*, 189 S.W.3d. at 116-17.

58. *Id.*

59. *See Ross*, 487 U.S. at 91 ("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*." (citations omitted) (emphasis added)).

Although our federalist system provides a dual barreled source of rights under (1) the Constitution of the United States and (2) state constitutions, the *Morgan* majority intentionally adopted Federal Constitutional jurisprudence for the Kentucky Constitution.[60] In the process, *Morgan* repudiated both the holding and the reasoning enunciated in *Thomas v. Commonwealth*.[61] In *Thomas*, the Kentucky high court accepted the invitation extended to the states in *Ross*.[62] Before *Thomas*, Kentucky reviewed issues arising during jury empanelment to the extent provided by federal law.[63] The dual analysis enunciated in *Sanders v. Commonwealth*[64] accorded with the dual analysis of *Ross*.[65] *Thomas* acknowledged that a dual analysis had been established under *Sanders*.[66] However, the *Thomas* court did not devote resources to the question of a violation of the impartial jury requirement. Instead, the *Thomas* court held that the exercise of a peremptory strike is a substantial right under the right to due process under the Kentucky Constitution.[67] *Thomas* explained that the object of voir dire is to level the playing field.[68] *Thomas* reasoned that a defendant who has been forced to peremptorily strike a juror

60. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (presuming in the context of ambiguously-worded state-court opinions that the state court holding is under the Federal Constitution, and exercising jurisdiction when state courts fail to plainly state adequate and independent state grounds); *see also* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 26 (1991) (explaining the goals of *Long* are "conformity in federal constitutional law and independence in the development of state law"). *Morgan* conformed to federal constitutional law instead of acting independently to develop rights under state law. *See Morgan*, 189 S.W.3d at 105. Therefore, the *Morgan* majority's express statements intentionally adopting federal constitutional law for analogous provisions in the Kentucky Constitution made strategic judicial sense. It would have been necessary for the *Morgan* majority to base its holding on adequate and independent state grounds only if acting to liberalize rights beyond the guarantees of the Federal Constitution in order to preclude review by the United States Supreme Court. Instead, the *Morgan* majority went out of its way to show not only that it was not liberalizing rights under their state constitution, but also that it intentionally adopted federal law as the law of their state. The message they sent was clear: Under the Kentucky Constitution guarantee of an impartial jury, we will give the accused exactly what the Federal Constitution requires, and nothing more.

61. 864 S.W.2d 252 (Ky. 1993).

62. *Id.* at 259; *see also supra* note 59 and accompanying text. *But see Morgan*, 189 S.W.3d at 116 (Roach, J., concurring) (criticizing the *Thomas* court as having "side-stepped" the impartial jury issue by engaging only in due process analysis).

63. *See Sanders v. Commonwealth*, 801 S.W.2d 665, 668-69 (Ky. 1991) (analyzing the denial of challenges for cause under (1) impartial jury and (2) due process).

64. *Id.*

65. 487 U.S. 81, 85 (1988).

66. *Thomas*, 864 S.W.2d at 259; *see supra* note 63.

67. *Thomas*, 864 S.W.2d at 259.

68. *Id.*

who should have been excused for cause has been denied the number of strikes procedurally allotted to him.[69] *Thomas* proclaimed that the "rules specifying the number of peremptory challenges are not mere technicalities, *they are substantial rights* and are to be fully enforced."[70] Having considered the analytical precedent under *Sanders*, the *Thomas* court did not address the factual question whether any biased juror actually participated in the decision under the right to an impartial jury. Rather, the *Thomas* court boldly stated that the right to peremptorily strike "is not an 'impartial jury' question, but a 'due process' question."[71] Thus, *Thomas* granted greater due process protection to criminal defendants under the Kentucky Constitution than *Ross* recognized under the Federal Constitution.

With this background, the reasoning of the *Morgan* court is open to question. *Morgan* purported to rely on *Martinez-Salazar* and *Ross*, which did, in fact, hold that peremptory challenges are only auxiliary under the Sixth and Fourteenth Amendments.[72] However, *Martinez-Salazar* and *Ross* both analyzed this question under (1) the right to an impartial jury and (2) due process. Kentucky case law requires the same analysis.[73] Although its ultimate holding accorded with *Martinez-Salazar*, the *Morgan* majority analyzed the peremptory challenge only as it relates to the question of impartial jury and not due process.[74] In this regard, the *Morgan* court adhered to the federal baseline only as to the final result, but not by the method of reasoning.[75] Furthermore, *Morgan* not only overturned *Thomas*, but also jettisoned its "due process" analysis under the Kentucky Constitution.[76] Therefore, the failure in *Morgan* to conduct the dual analysis enunciated by both the federal and state precedent relating to the peremptory strike under the rights to (1) impartial jury and (2) due process undermines the vitality of the *Morgan* holding.

Another problem that arises from the holding of the *Morgan* majority in particular, and the line of cases that preceded it, relates to its impartial jury analysis. The right to an impartial jury in the text of the Kentucky

69. *Id.*
70. *Id.* (emphasis added).
71. *Id.*
72. *See supra* note 56 and accompanying text.
73. *See Thomas*, 864 S.W.2d at 259; Sanders v. Commonwealth, 801 S.W.2d 665, 668-69 (Ky. 1991).
74. Morgan v. Commonwealth, 189 S.W.3d 99, 105 (Ky. 2006).
75. *Id.*
76. *Id.* at 116-17 (Roach, J., concurring).

Constitution is substantially similar to the text of the Sixth Amendment.[77] Textual similarity, however, does not mandate judicial conformity. Nevertheless, the line of decisions in Kentucky relating to this constitutional right systematically follows the reasoning of the United States Supreme Court established first in *Ross* and reaffirmed in *Martinez-Salazar*. As a result, the right to an impartial jury under the Kentucky Constitution offers the identical protection afforded under the Sixth Amendment. But there need not be this tight correlation in the interpretation of these two texts. On the contrary, the Kentucky judiciary interpreting the impartial jury provision of the Kentucky Constitution may grant defendants more protection than the United States Supreme Court offered under the Sixth Amendment of the United States Constitution in both *Martinez-Salazar* and *Ross*. Despite this authority to interpret the Kentucky Constitution independently of the Federal Constitution, the Kentucky judiciary never considered the peremptory strike as a substantial right under the State's constitutional guarantee of an impartial panel. *Thomas*, after all, elevated the peremptory strike to a substantial right under due process in the Kentucky Constitution.[78]

Justice Brennan, in his Article titled *State Constitutions and the Protection of Individual Rights*, stated:

> [D]ecisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding the rights guaranteed by counterpart provisions of state law . . . . [O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.[79]

The Kentucky Constitution guarantees its citizens a right to an impartial jury as a counterpart to the Sixth Amendment.[80] The New Judicial Federalism[81] recognizes the United States Supreme Court only sets the floor,

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77. *Compare* KY. CONST. § 11 ("In all criminal prosecutions the accused . . . shall have a speedy public trial by an impartial jury of the vicinage . . . ."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

78. *See Thomas*, 864 S.W.2d at 260 (stating that the right to peremptorily strike "is not an 'impartial jury' question, but a 'due process' question"); *see also supra* notes 67-71 and accompanying text (discussing *Thomas*).

79. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

80. *See supra* note 77.

81. LATZER, *supra* note 60, at 7; *see also* Barry Latzer, *The New Judicial Federalism and Criminal Justice*: *Two Problems and a Response*, 22 RUTGERS L.J. 863, 864 (1991).

and States are free to provide much more.[82] Furthermore, Supreme Court majority opinions are not the final word on the issue when they are rebutted by dissenting judges.[83]

One purpose of dissenting opinions from the United States Supreme Court is to "furnish litigants and lower courts with practical guidance."[84] In *Ross*, the Supreme Court did not speak with a single unified voice. Rather, the issue of the peremptory strike roused a strong dissent from Justices Marshall, Brennan, Blackmun, and Stevens against the reasoning of the majority regarding the right to an impartial jury.[85] In his dissent, Justice Marshall provided practical guidance for courts to determine whether the exercise of a peremptory strike, predicated upon the erroneous denial of a motion for cause, infringed upon the right to an impartial jury.[86] In order to avoid reversal, the dissent in *Ross* required certainty beyond a reasonable doubt that the composition of the panel was unaffected by the loss of a peremptory challenge after a motion for cause was erroneously denied.[87]

In his Lecture, *Defense of Dissents*, Justice Brennan stated: "[I]n this present era of expanding state court protection of individual liberties, . . . probably the most important development in constitutional jurisprudence today, dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions."[88]

However, the *Morgan* majority did not adopt this analysis in determining whether the peremptory challenge is a substantial right to an impartial jury under the Kentucky Constitution. That said, *Ross* dealt with a capital offender sentenced to death,[89] and *Morgan* dealt with a felony offender sentenced to thirty-five years in prison.[90] Justice Brennan, one of the *Ross*

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82. *See* LATZER, *supra* note 60, at 4. Professor Latzer stated:

> [S]tate courts are not bound to follow the Supreme Court when they are interpreting nonfederal law. On . . . [questions of] state constitutional law, the state courts may interpret any way they wish. . . . [But] state courts may not *enforce* state law that has the effect of abridging broader federal rights.

Id.

83. Brennan, *supra* note 50, at 428-30.

84. *Id.* at 430.

85. *See* Ross v. Oklahoma, 487 U.S. 81, 91-98 (1988) (Marshall, J., dissenting).

86. *Id.* at 94-95.

87. *Id.*

88. Brennan, *supra* note 50, at 430 (footnote omitted).

89. *Ross*, 487 U.S. at 81 (majority opinion).

90. Morgan v. Commonwealth, 189 S.W.3d 99, 102 (Ky. 2006).

dissenters,[91] was staunchly opposed to the death penalty,[92] and one may speculate whether he would have taken the same position for a felony conviction. However, those speculations aside, in the analytical context of the right to an impartial jury, the *Morgan* majority implied that the *Ross* dissent and its practical guidance did not align with the needs of their State.[93] *Thomas* began the "Kentucky experiment"[94] of recognizing the peremptory strike as a substantial right to the guarantee of due process.[95] In this regard, *Morgan* completed the Kentucky experiment by determining that the peremptory strike was not a substantial right under the right to either due process or an impartial jury.[96] However, criminal defendants are citizens of the State. The fact that the Kentucky Supreme Court declined to expand individual rights under the Kentucky Constitution in light of the clearly articulated dissent in *Ross* deserves comment. After all, the Kentucky judiciary has expanded other rights under the Kentucky Constitution above the federal floor.[97]

In determining that the peremptory is only a technical right,[98] the majority in *Morgan* implied that the voir dire stage is the vehicle that courts drive toward securing an impartial jury under the Kentucky Constitution.[99] On the other hand, the court implied that the peremptory challenge is merely a mechanical part of the voir dire stage for ensuring that voir dire is successful in empanelling an impartial jury.[100] It follows, from the court's definitions,[101] that the voir dire stage itself is a substantial right to securing the constitutionally-guaranteed impartial jury. Thus, a constitutional violation of the guarantee to an impartial jury[102] would result only if a trial court circumvented voir dire. *Morgan* overturned the holding in *Thomas* that

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91. *Ross*, 487 U.S. at 91 (Marshall, J., dissenting).

92. Brennan, *supra* note 50, at 436 ("On the death penalty, . . . the eighth amendment . . . prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses.").

93. *Morgan*, 189 S.W.3d at 107.

94. Justice Donald C. Wintersheimer, *State Constitutional Law*, 20 N. KY. L. REV. 591, 592-95 (1993).

95. Thomas v. Commonwealth, 864 S.W.2d 252, 260 (Ky. 1993).

96. *Morgan*, 189 S.W.3d at 114.

97. *See* Wintersheimer, *supra* note 94, at 598-604.

98. *See supra* note 41.

99. *Morgan*, 189 S.W.3d at 105-06.

100. *Id.*

101. *See supra* note 41.

102. KY. CONST. § 11 ("In all criminal prosecutions the accused . . . shall have a speedy public trial by an impartial jury of the vicinage . . . .").

held the component mechanisms of voir dire, particularly the peremptory strike, were substantial rights under due process.[103]

The foregoing identifies some of the shortcomings in *Morgan*. *Morgan* seems like a defeat to the trend of rights expansion under the New Judicial Federalism. However, in reality the Kentucky Judiciary has elevated many individual rights, including rights of defendants in the criminal context, as part of the New Judicial Federalism.[104] Nevertheless, there is something that is intuitively appealing about the majority's approach to the constitutional right to an impartial jury and substantial rights under the Kentucky Constitution.[105] In an impartial jury analysis regarding substantial rights, it seems sensible to compare voir dire to the vehicle that secures the impartial jury and the peremptory strike as a mere mechanism.

Given its history of familiarity with the New Judicial Federalism, the Supreme Court of Kentucky cannot necessarily be criticized[106] for finding the peremptory strike to be a technical right under due process and overturning *Thomas*.[107] Due process means rule of law.[108] The peremptory strike is a wholly arbitrary power. Consider both the nature of the

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103. *Morgan*, 189 S.W.3d at 106.

104. *See generally* Wintersheimer, *supra* note 94 (discussing holdings under the Kentucky Constitution which have expanded rights beyond the federal floor, as well as holdings which have adhered to the minimum federal requirements).

105. Based on its own definition, the Supreme Court of Kentucky was correct to hold that the peremptory strike is not a substantial right under the constitutional guarantee of an impartial jury.

106. *See* LATZER, *supra* note 60, at 7 ("Given [the] trend toward adopting Supreme Court doctrines, it is *clearly erroneous* to equate the New Federalism with rights expansion." (emphasis added)); *see also* Latzer, *supra* note 81, at 864 (arguing that so long as states independently evaluate the meaning of a state's constitutional provision, "[t]here is nothing improper in concluding that the Supreme Court's construction of similar text is sound"); *see also* Barry Latzer, *Into the '90s*: *More Evidence That the Revolution Has a Conservative Underbelly*, 4 EMERGING ISSUES IN ST. CONST. L. 17, 32 (1991) (concluding "state constitutional law is not just about broadening rights that the Supreme Court has narrowed"). *But see* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine*: *Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1528 (2005) (criticizing lockstepping and advising "[s]tate courts should become more self conscious about . . . differing consequences that flow from . . . adopting federal constitutional doctrine in state constitutional interpretation").

107. Hypothetically speaking, if the *Morgan* court had engaged in a due process analysis, it seems reasonable to conclude that the peremptory strike is not a right of due process.

108. If rule of law is to mean anything, it must mean non-arbitrariness, consistency, accuracy, and fundamental fairness. *See* RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 85-93 (2005).

peremptory strike today, as well as its earliest origins where the Crown alone exercised the peremptory strike in jury selection.[109] To stamp such an arbitrary power as either substantial or constitutional under color of due process would be a paradox.[110]

The *Morgan* dissent argued that the number of peremptory challenge allotted, as a creature of statute, is substantial to the inviolate right under the State's constitution to trial by jury.[111] Additionally, Justice Cooper tacitly argued that this constitutional mandate requiring trial by jury is violated in the absence of waiver.[112] Accordingly, when a criminal defendant stands before a jury of his peers, if he is deprived of a peremptory strike as a result of an erroneous denial of a challenge for cause, he has been deprived of a right that is substantial to the ancient and "inviolate" right of trial by jury. Therefore, according to the dissent, the denial of his "inviolate" right to trial by an impartial jury and his substantial right to each peremptory challenge, which allows him to stand before an impartial jury, is reversible error requiring a retrial.

The majority defined a substantial right as one "which is essential and that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection."[113] The dissent distinguished constitutional rights, which derive from the Kentucky Constitution, from substantial rights, which derive from statute.[114] The definition of substantial rights supplied by the majority and the recognition that statutory law creates substantial rights could justify a finding that the peremptory strike is, in fact, a substantial right under the Kentucky Constitution.

The first section of the Kentucky Constitution proclaims the sovereignty of the people of Kentucky: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . .

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109. VAN DYKE, *supra* note 30, at 147; *see also supra* note 32.

110. *See supra* note 32 and accompanying text (sketching a history of the peremptory strike).

111. Morgan v. Commonwealth, 189 S.W.3d 99, 123 (Ky. 2006) (Cooper, J., dissenting).

112. *Id.* at 123-25.

113. *Id.* at 105 (majority opinion).

114. *Id.* at 123-24 (Cooper, J., dissenting). In his dissenting opinion, Justice Cooper stated:

> The majority opinion seems to equate a "substantial right" with a "constitutional right" . . . . [but] peremptory challenges are a creature of statute and are not required by the Constitution . . . . As such, the "right" to peremptory challenges is "denied or impaired" only *if the defendant does not receive that which state law provides.*

Id. (citations omitted).

[t]he right of enjoying and defending their lives and liberties."[115] A party who stands accused of a felony is, in fact, defending either his life or his liberty. The exercise of the peremptory challenge is substantial to this "inherent and inalienable right" under this provision of the Kentucky Constitution.[116] It is not only "capable of legal enforcement," but more importantly, it is essential to the "right of enjoying and defending life and liberty" which could "potentially" be denied.[117] This reasoning, plainly based on adequate and independent state grounds, would vindicate the goals of the New Judicial Federalism by liberalizing defendant rights under the Kentucky Constitution and Kentucky statute. [118]

The majority expressed concern that granting peremptory challenges with the status of a substantial right only serves one purpose: manufacturing

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115. KY. CONST. § 1.

116. *Morgan*, 189 S.W.3d at 105 (defining a technical right based on *Black's Law Dictionary* as one "derived from a legal . . . procedure . . . that helps in the protection or enforcement of a substantial right" as opposed to a substantial right "which is essential and that potentially affects the outcome of a lawsuit and is capable of legal enforcement and protection"); *see also* BLACKSTONE, *supra* note 32, at 346-47.

117. *Morgan*, 189 S.W.3d at 105.

118. *See generally* BLACKSTONE, *supra* note 32; *see also supra* note 106 and accompanying text. Recognizing the arbitrary right granted by statute to peremptorily strike jurors as substantial to the Kentucky Constitution reaffirms the highest values of American society: life and individual liberty. *See, e.g.*, *In re* Fla. Rules of Criminal Procedure, 272 So.2d 65, 65-66 (Fla. 1972) ("Substantive rights . . . [constitute] the normal legal order of society, [and includes] the rights of life, liberty [and] . . . . those rules and principles which fix and declare the primary rights of individuals as respects their persons . . . .").

reversible error.[119] The degree of concern might be misplaced.[120] Attorney misconduct and the manufacture of reversible error seems highly unlikely.[121]

Consider the first prong of the Kentucky rule, requiring an erroneous denial of a motion for cause. Trial courts evaluating a challenge for cause must consider the probability of bias.[122] In Kentucky, the standard of review for denials of motions for cause is abuse of discretion.[123] The reviewing court must find that the denial was clearly erroneous.[124] Accordingly, trial courts are granted great deference in reviews of a denial of a challenge for cause. Unlike the higher courts, which only have the notes of testimony to read, the trial judge sees the juror in front of him. This provides the trial judge with the advantage of observing the demeanor of the venire member.

Overcoming the hurdle created by this standard of review is difficult. In one Kentucky trial, where the accused was charged with robbery, among other crimes, during voir dire the venire member indicated that he could dutifully carry out his charge.[125] When asked whether there was any reason why he might not be able to be fair or impartial, the venire member answered, "Only that I've been robbed myself with a gun put to my head .

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119. *Morgan*, 189 S.W.3d at 106 (majority opinion) ("'[B]estowing a substantial right upon the exercise of a peremptory challenge serves one function and one function only – it manufactures reversible error in cases where the case has been decided by a fair and impartial jury.'" (quoting Stopher v. Commonwealth, 57 S.W.3d 787, 814 (Ky. 2001) (Keller, J., dissenting))).

120. Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky. 1993). The *Thomas* majority stated:

> Kentucky law has always been . . . that prejudice [to the defendant] is presumed, and the defendant is entitled to a reversal in those cases where a defendant is forced to exhaust his peremptory challenges against prospective jurors who should have been excused for cause. . . . The long-standing rule in Kentucky requires only that: "A party must exercise all of his peremptory challenges in order to sustain a claim of prejudice due to the failure of the court to grant a requested challenge for cause."

Id. (quoting 9 LESLIE W. ABRAMSON, CRIMINAL PRACTICE AND PROCEDURE § 25.50 (1987)).

121. The rule for reversible error requires (1) that the court erroneously deny a motion for cause, (2) which forces the defendant to exhaust all of his peremptory challenges. *Id.* at 259.

122. *Morgan*, 189 S.W.3d at 104 ("'It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause.'" (quoting Pennington v. Commonwealth, 316 S.W.2d 221, 224 (Ky. 1958))).

123. *Id.* (citing Adkins v. Commonwealth, 96 S.W.3d 779, 789 (Ky. 2003); Pendleton v. Commonwealth, 83 S.W.3d 522, 527 (Ky. 2002)).

124. Sanders v. Commonwealth, 801 S.W.2d 665, 670 (Ky. 1991).

125. *Id.*

. . ."[126] Upon further questioning, the juror concluded, "I think I've come out of the trauma."[127] The venire member actually sat on the jury.[128] Even where the operative question on a motion for cause during voir dire is the probability of bias or prejudice, in this case, the Supreme Court of Kentucky affirmed the denial of the challenge for cause as neither clearly erroneous nor an abuse of discretion.[129]

Kentucky's reversible error rule seems sufficiently strong to deter trial lawyers from haphazardly wasting peremptory strikes with the intent of manufacturing a reversal on appeal.[130] Of course, if the current Kentucky law for reversible error created an undue volume of reversals, Kentucky might find a remedy in the rules for reversible error[131] adopted by other states.[132]

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* This example illustrates the extent of the deference accorded a Kentucky trial judge under this standard of review. Reviewing courts will find an abuse of discretion only if the denial was *clearly erroneous*. *See id.* Consequently, under this rule for reversible error, acquiring a reversal for an abuse of discretion is extremely difficult to overcome.

130. Appellate review for palpable error during voir dire is even more stringent than reversible error. *See* Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005). Palpable error review during voir dire can arise when a party waives the motion for cause, exercises a peremptory strike, and argues on appeal that the court should have struck the juror for bias *sua sponte*. *Id.* However, the plain text of the palpable error rule does not suggest that a substantial right to peremptory challenges would manufacture reversals. *See* KY. R. CRIM. P. 10.26 ("A palpable error [is one] which affects the *substantial rights* of a party [and] *may* be considered by . . . an appellate court [despite improper preservation] . . . and appropriate relief *may* be granted upon a determination that manifest injustice has resulted from the error." (emphasis added)). Even if the peremptory strike was a substantial right under section one, the permissive language of the rule's plain text does not lend itself to manufactured reversals. The thrust of palpable error review is to protect the integrity of the judiciary, and the standard of review for palpable error is even higher than reversible error:

> A finding of palpable error *must involve prejudice more egregious than that occurring in reversible error*, and the error must have resulted in "manifest injustice." Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when "a failure to notice and correct such an error would '*seriously affect the fairness, integrity, and public reputation of the judicial proceeding*.'" A court reviewing for palpable error must do so in light of the entire record; the inquiry is heavily dependent upon the facts of each case.

Ernst, 160 S.W.3d at 758 (Ky. 2005) (emphasis added) (citations omitted).

131. Morgan v. Commonwealth, 189 S.W.3d 99, 120 (2006) (Graves, J., concurring) (collecting cases from a minority of states, including Texas, Florida, and Oklahoma, that apply the "harmful error" rule imposing stringent procedural requirements in order to received the benefit of the rule).

This expression of horizontal federalism taken together with relations between the state high court and other institutions of state government might very well lead to this heightened analysis for reviews of erroneous denials of motions for cause. [133] This would allow the Kentucky Supreme Court to serve the interests of defendants whose substantial right under section one of the Kentucky Constitution has been infringed. Simultaneously, the higher standard of review would prevent the manufacture of reversals.

Section one of the Kentucky Constitution has no analogue in the Federal Constitution. Therefore, this is not about rights expansion above the federal floor. The text of section one alone is enough to recognize the peremptory strike as a substantial right for the accused in a criminal trial. Furthermore, the high court's reasoning in *Morgan* provides sufficient grounds to recognize the peremptory strike as a substantial right under section one. The peremptory strike is substantial to this provision of the Kentucky Constitution in light of the position of the dissent, which stated that the peremptory strike is a creature of statute derived from the legislature as opposed to the constitution, which expresses the voice of the people.[134] The

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132. *Morgan* cited the Texas "harmful error" rule, which placed two hurdles in prongs one and four of their test. *Id.* Texas' "harmful error" rule test required a party to have: "(1) used a peremptory challenge to strike the challenged, disqualified veniremember; (2) exhausted all remaining peremptory challenges; (3) requested and was denied an additional peremptory challenge; and (4) identified a specific veniremember who would have been removed with the additional challenge, and who thereafter sat as a juror." *Id. Morgan* also cited the Florida "harmful error" rule requiring: (1) an erroneous denial of a motion for cause, (2) the defendant to exhaust all remaining peremptory challenges, and (3) a demonstration that an objectionable juror was empanelled. *Id.* The court in *Morgan* stated: "'The mere fact that the defendant exercised all his peremptory challenges does not provide a sound basis for asserting that the process relating to challenges for cause automatically deprived him of a proper number of peremptory challenges.'" *Id.* at 106 (quoting Thomas v. Commonwealth, 864 S.W.2d 252, 265 (Ky. 1993) (Wintersheimer, J., dissenting)).

133. *See* LATZER, *supra* note 60, at 17 (concluding "many . . . state courts are under considerable intrastate pressure *not* to expand defendants' rights"); *see also* Earl Maltz, *The Political Dynamic of the* "*New Judicial Federalism*," 2 EMERGING ISSUES IN ST. CONST. L. 233, 233-34 (1989) (distinguishing "lockstep" and "new federalism"). The "lockstep approach" adopts the general rule that state courts will "be no more activist than required by the federal Constitution." *Id.* at 234. New federalists "call upon the state courts to make ad hoc determinations on the question of whether the applicable state constitutional provision requires greater activism than its federal counterpart." *Id.* Professor Maltz criticized the latter for ignoring the fact that the legislature, not the judiciary, is the principal branch of government that creates citizen rights. *See id. But see Morgan*, 189 S.W.3d at 119-20 (Roach, J., concurring) (lock-stepping *reflectively* by considering the approaches of other states before rejecting the view of the dissent and adopting the federal baseline).

134. *Morgan*, 189 S.W.3d at 124 (Cooper, J., dissenting).

Morgan majority concluded that "[Morgan's] guilt and abhorrent conduct [were] overwhelming."[135] On the issue of the peremptory strike, the high court purported to have arrived at their conclusion based on the facts.[136] But which set of facts led to their conclusion: the evidentiary record of his overwhelmingly abhorrent conduct or the procedural facts of the voir dire?

Deputy Chief Justice Scott asserted that the rule authorizing the peremptory strike "is something we created and we allow to exist."[137] According to Justice Cooper, however, the peremptory strike is a creature of statute.[138] Whether separation of powers prevents the high court from exercising its rulemaking authority to craft the peremptory strike as a substantive or hybrid right outside of the context of judicial review is beyond the scope of this analysis.

If separation of powers constrains the Kentucky Supreme Court in this regard, then the high court might consider prospectively collaborating with the Kentucky Legislature on future developments in the law governing criminal trials.[139] The *Morgan* majority inferred from a post-*Thomas* statutory amendment, which increased the peremptory challenges allotted to the prosecution, that the legislature had signaled that the peremptory strike is not a substantial right.[140] However, the Kentucky high court makes this bald assumption of intent without any evidence.[141] The plain text of the amended rule lends no support to this interpretation.[142] Furthermore, this legislative action is just as equivocal as legislative silence.[143] Although the rule's

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135. *Id.* at 107 (majority opinion).

136. *Id.*

137. *Id.* at 106-07; *see supra* note 40.

138. *Morgan*, 189 S.W.3d at 123-24 (Cooper, J., dissenting); *see supra* note 114 and accompanying text.

139. *See, e.g.*, Busik v. Levine, 307 A.2d 571, 580 (N.J. 1973) (describing a process where different government branches cooperatively developed an area of law that could arguably have been labeled substantive, procedural, or hybrid).

140. *Morgan*, 189 S.W.3d at 105 ("In 1994, [the rule allotting peremptory strikes] was amended to allow both the defense and the Commonwealth an equal number, eight (8) peremptory challenges each.").

141. *Id.* ("If the peremptory challenge was intended to be a substantial right afforded to the defendant, as *Thomas* holds, *we suspect* amendments as drastic as those made to [the rule allotting peremptory strikes] would never have been allowed to stand." (emphasis added)).

142. *See* KY. R. CRIM. P. 9.40(1) ("If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges.").

143. *See Morgan*, 189 S.W.3d at 138 (Cooper, J., dissenting) (offering an alternate rationale for the 1994 amendment). The dissent stated:

amendment in 1994 was substantially contemporaneous with the *Thomas* decision in 1993, in the absence of more pre-amendment evidence of intent, the assumption that the legislature amended the rule in response to *Thomas* evokes more questions than it answers. Alternatively, if prospective collaboration with the state legislature is not feasible, and as a result the high court must wait for the issue to arise in litigation in order to exercise its authority, then, upon review, the high court should recognize the peremptory strike as a substantial right under section one.

Irrespective of the course chosen, the peremptory strike should be recognized as a substantial right under section one of the Kentucky Constitution for at least two reasons: (1) the presumption of innocence until proven guilty beyond a reasonable doubt; and (2) the simple fact that some people accused of crimes are actually innocent. If the constitution is to protect an individual whom is either presumed innocent or actually innocent, then the accused should have every possible weapon to fight for life or liberty. This is not mere rhetoric. This is section one of the Kentucky Constitution.

VI. CONCLUSION

Vertical federalism breeds uniformity between the federal and state judiciaries. One way for states to break free from the gravitational pull is to follow Supreme Court dissents. Alternatively, horizontal federalism helps to break free by seeking guidance from sister states that have resolved similar issues under their constitutions.[144] Ultimately, however, the State should develop its own law under its own constitution.[145] Section one of the

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> [The amendment] does not mean that entitlement to the number allotted by law is no longer a "substantial right." It only means that the General Assembly and, subsequently, this Court have gradually recognized that in criminal cases, as has always been true in civil cases, there should be a level playing field between prosecution and defense. The purpose of specifically limiting and allocating peremptory strikes by statute or rule is so one side cannot unfairly "stack the deck" against the other.

Id. (citation omitted).

144. *See* Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1133-42 (1992).

145. *Id.* at 1134 ("Ideally, when deciding state constitutional issues, state courts should develop an independent interpretation of their state constitution."); *see also* Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 173 (1986-1987) ("The desired end is a reasoned, independent analysis of state

Kentucky Constitution may be considered an example of a "'great ordinance,'" deserving treatment that is not necessarily bound strictly by history and precedent, but rather evolving in response to the changing needs of society.[146] This Comment is intended to prompt Kentucky decisionmakers to take a second look at the the Kentucky Constitution with respect to those accused in criminal trials.[147] However, the second look should be conducted with care and prudence. Specifically, justices should proceed with the intent to protect all of the state citizens and with an awareness of the inherent power of their position.[148] After all, it is the *Kentucky* Constitution they are expounding.[149]

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constitutional claims, based on the state constitution's text, history, and state judicial interpretation.").

146. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 552-53 (4th ed. 2006) (quoting *Vreeland v. Byrne*, 370 A.2d 825 (N.J. 1977) (explaining that rights provisions are "great ordinances" that must be interpreted as an evolving and on-going task)).

147. When the United States Supreme Court rejects asserted federal challenges, as it did in both *United States v. Martinez-Salazar* and *Ross v. Oklahoma*, "the decision now triggers a series of 'second looks' at the question by state-level decisionmakers, including the courts, based on state legal and policy arguments." Robert F. Williams, *In the Supreme Court's Shadow*: *Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 361 (1984).

148. In *New Jersey v. T.L.O.*, 469 U.S. 325, 325-48 (1985), the United States Supreme Court determined the scope of the Fourth Amendment with respect to public school students. *T.L.O.* addressed the authority of public school officials to conduct warrantless searches of students. *Id.* Notably, the Court majority devoted approximately twenty-three pages to this issue. *See generally id.* at 325-48. The United States Supreme Court ultimately reversed the New Jersey Supreme Court. *Id.* at 348. The majority opinion in *T.L.O.* commented, "[We] believe that the New Jersey court's . . . standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness." *Id.* at 343. Justices of the New Jersey Supreme Court noticed this statement. In State v. Lund, 573 A.2d 1376 (1990) the New Jersey Supreme Court adopted *Michigan v. Long*, *supra* note 60, 463 U.S. 1032 (1983). *Long* stands for two propositions. First, *Long* permits police to conduct warrantless searches of constitutionally protected areas, like cars, based on reasonable suspicion. *Id* at 1049-51. The factual circumstances provide the justification for the search, which in turn establishes the permissible scope of the warrantless search. *Id.* Second, *Long* deals with the authority of state courts to develop state law independent of federal law. *See supra*, note 60, and accompanying text. In *Lund, supra*, 573 A.2d at 1383 the New Jersey Supreme Court adopted the first proposition in *Long*, allowing the police to search constitutionally protected areas. "[The] *Michigan v. Long* rule is sound and compelling precedent and should be followed to protect New Jersey's police community." *Id.* Justice Pollock wrote a concurring opinion. *Id.* at 1385-87 (Pollock, J., concurring). Although Justice Pollock concurred in the result, suppressing the evidence, he devoted approximately two pages to criticizing the majority for ignoring the second proposition in *Long*, namely the justification for states to develop state

law instead of adopting federal law. *Id.* Justice Pollock explained his underlying reason for insisting on developing state law independent of federal jurisprudence. *Id.* at 1385. His reasoning was due to the reversal in *T.L.O.* Id. Justice Pollock stated, "The reversal [in T.L.O] resulted solely from the Court's perception that our opinion reflect[ed] a somewhat crabbed notion of reasonableness." *Id.* (internal quotations omitted). Justice Pollock clearly felt strongly about the reversal. However the twenty-three page majority opinion in *T.L.O.* demonstrates extensive constitutional jurisprudence. Arguably, the reversal did not result "solely from the Court's perception" of the New Jersey Supreme Court. Constitutional law deals with extremely important issues. When state courts consider the law under their state constitution, they should consider the relevant legal precedents and the impact of their decision on all the citizens of the state.

149. *Cf.* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (Scalia, J., dissenting) ("We must never forget that it is a Constitution *for the United States of America* that we are expounding." (emphasis added)) (asserting that foreign law may, at best, be merely persuasive, while domestic law is determinative of questions under the Federal Constitution). Similarly, sister states may provide persuasive authority for Kentucky decisionmakers who desire justification for breaking free from the force of vertical federalism. However this justification is not a prerequisite. The Kentucky Constitution is the law of Kentucky. Therefore, decisions under it should be faithful, first and foremost, to the law of the state and its people.