ZARELLA, J., with whom was BORDEN, J., dissenting. Because I disagree with the majority's analysis and conclusions with respect to the issue regarding peremptory challenges, I respectfully dissent.

The majority correctly and adequately sets forth the facts surrounding the trial court's award of supernumerary challenges. I therefore will review them only briefly to aid in understanding this dissent. Pursuant to General Statutes (Rev. to 2001) § 51-243,[1] the plaintiff[2] was entitled to eight peremptory challenges and the defendants[3] were entitled to twenty because the trial court found that no unity of interest existed among them.[4] Nevertheless, the trial court, sua sponte, awarded the plaintiff an additional twelve challenges but left the defendants with the statutorily authorized twenty. As a result, the court did not adhere to the statutorily required ratio of challenges between the plaintiff and the defendants but, rather, equalized the number of challenges so that the plaintiff had the same number of challenges as the five defendants did collectively. The trial court explained its decision to award supernumerary peremptory challenges to the plaintiff as necessary to avoid "a gross miscarriage of justice . . . ."[5] The plaintiff exercised fifteen of her challenges whereas the defendants collectively exercised a total of seventeen.

I

The majority concludes that, irrespective of the propriety of the trial court's award of these twelve supernumerary peremptory challenges to the plaintiff, the award (1) is subject to harmless error review, and (2) was indeed harmless because "to [demonstrate] . . . harm . . . the complaining party must exhaust all of her own peremptory challenges and request additional challenges." I disagree with these conclusions. I instead advocate subjecting a disproportionate award of supernumerary peremptory challenges to automatic reversal, a rule that is not only simple and predictable but also is consistent with our prior decisions on this subject and supported by an emerging majority of jurisdictions that have considered this issue in recent years.

"Harmless error is error which does not prejudice the substantial rights of a party. It affords no basis for a reversal of a judgment and must be disregarded." *Hagedorn* v. *Stormont-Vail Regional Medical Center*, 238 Kan. 691, 701, 715 P.2d 2 (1986). Roger J. Traynor, the former chief justice of the Supreme Court of California, however, has posited that certain "errors that carry a high risk of prejudice to the judicial process itself" are neither amenable to, nor appropriate for, harmless error analysis, but instead are so subversive of the judicial process as to make reversal necessary. R. Traynor,

The Riddle of Harmless Error (1970) p. 64; cf. *State* v. *Anderson*, 255 Conn. 425, 445, 773 A.2d 287 (2001) (when case involves error affecting framework within which trial proceeds, rather than simply error in trial process itself, resulting trial is necessarily rendered fundamentally unfair, and structural error doctrine precludes harmless error review).

The right to challenge venirepersons peremptorily is recognized as "one of the most important of the rights secured to the accused." *Pointer* v. *United States*, 151 U.S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208 (1894). Moreover, the right to challenge venirepersons peremptorily is guaranteed by Connecticut's constitution; Conn. Const., amend. IV (guaranteeing "right to challenge jurors peremptorily, the number of such challenges to be established by law"); a fact that "reflects the abiding belief of our citizenry that an impartial and fairly chosen jury is the cornerstone of our . . . justice system." *State* v. *Hancich*, 200 Conn. 615, 625, 513 A.2d 638 (1986). Abridgment of this right is an error of the type described by former Chief Justice Traynor. R. Traynor, supra, p. 66.

First, an abridgment of the right to challenge venirepersons peremptorily is not amenable to harmful error analysis because it is practically impossible to demonstrate that it resulted in actual harm.[6] See, e.g., id. ("an appellate court has no way of evaluating the effect of the error on the judgment"). In *Kentucky Farm Bureau Mutual Ins. Co.* v. *Cook*, 590 S.W.2d 875 (Ky. 1999), the Kentucky Supreme Court declined to apply a harmless error analysis in a case in which the trial court had awarded additional peremptory challenges to only one side, observing that, "[t]o show actual [harm], the complaining litigant would be required to discover the unknowable and to reconstruct what might have been and never was, a jury properly constituted after running the gauntlet of challenge performed in accordance with the prescribed rule[s] of the game." Id., 877; accord *Blades* v. *DaFoe*, 704 P.2d 317, 322 (Colo. 1985); see also *King* v. *Special Resource Management, Inc.*, 256 Mont. 367, 373, 846 P.2d 1038 (1993) (noting that to require objecting party to demonstrate actual harm resulting from grant of additional peremptory challenges to opposing party "places an almost impossible burden on the objecting party"). I would suspect that the defendants in the present case, recognizing that the trial court's award of supernumerary peremptory challenges to the plaintiff had the potential to result in a long voir dire, adopted a conservative approach to exercising their peremptory challenges. Consequently, at the beginning of jury selection, the defendants may have accepted jurors that they otherwise would have rejected if the plaintiff had been given the correct number of statutorily authorized challenges.[7] At the same time, the defendants may have been satisfied with the venirepersons toward the end of jury selection and thus

failed to exhaust all of their peremptory challenges.

Moreover, an abridgment of the right to challenge venirepersons peremptorily is inappropriate for harmless error analysis because such abridgment results in harm not to an individual litigant but, rather, to the integrity of the jury selection process itself. See R. Traynor, supra, p. 66 ("[w]hen the right [to challenge venirepersons peremptorily] is vitiated anew on appeal, in the side alley of harmless error, the gravest injury is to the judicial process"). Connecticut's statutory scheme of providing each litigant with a proportional quantity of peremptory challenges, like comparable statutory schemes in other jurisdictions, reflects a balance and fairness on which litigants rely. *Moore* v. *Jenkins*, 304 S.C. 544, 547, 405 S.E.2d 833 (1991). Any disruption of this balance and fairness—including an award of supernumerary challenges to one party—taints the entire jury selection process, rendering the resulting jury suspect. Cf. *Thompson* v. *Presbyterian Hospital, Inc.*, 652 P.2d 260, 267 (Okla. 1982).

The majority responds to these concerns by decreeing that harm possibly can occur when a party "perceives a need to exclude additional jurors [and] is denied an equal opportunity to do so . . . ." The majority's response, however, reflects an unwarrantedly narrow view of the right to peremptory challenges. That right, as I understand it, guarantees not only a *quantity* of peremptory challenges established by law but also a *proportional allocation* of peremptory challenges in relation to other litigants, as established by law. This latter attribute is a necessary component of the right because "the [party] with the greater number of peremptory challenges clearly has a tactical advantage created by its ability to eliminate potentially unfavorable jurors without cause." *King* v. *Special Resource Management, Inc.*, supra, 256 Mont. 371; see also *Blades* v. *DaFoe*, supra, 704 P.2d 322 ("the side with the greater number of peremptory challenges clearly has a tactical advantage because it will have the power to select a jury presumably balanced in its favor by challenging a greater number of jurors"); *Thompson* v. *Presbyterian Hospital, Inc.*, supra, 652 P.2d 267 ("[t]he greater the number of challenges, the greater the party's chances for organizing a jury for a favorable verdict"); *Randle* v. *Allen*, 862 P.2d 1329, 1334 (Utah 1993) ("[a] side that has additional peremptory challenges has the opportunity to shape the jury to its advantage"). The right to a specified quantity of peremptory challenges is indeed hollow if the challenges are not distributed among litigants according to some proportion established by law.

I would subject a disproportionate award of peremptory challenges to automatic reversal. This rule recognizes that a trial court's disproportionate allocation of peremptory challenges is tantamount to its denial of a litigant's right to exercise the quantity of peremptory

challenges established by law. Moreover, this rule obviates the practically impossible demand that a party demonstrate actual harm resulting from a disproportionate allocation of peremptory challenges. Finally, this rule is simple, predictable and is supported by an emerging majority of jurisdictions that have considered this issue in recent years.[8] See, e.g., *Blades* v. *DaFoe*, supra, 704 P.2d 321–22; *Kentucky Farm Bureau Mutual Ins. Co.* v. *Cook*, supra, 590 S.W.2d 877; *Alholm* v. *Wilt*, 394 N.W.2d 488, 493–94 (Minn. 1986); *King* v. *Special Resource Management, Inc.*, supra, 256 Mont. 371–74; *Gestring* v. *Mary Lanning Memorial Hospital Assn.*, 259 Neb. 905, 916–17, 613 N.W.2d 440 (2000); *Thompson* v. *Presbyterian Hospital, Inc.*, supra, 652 P.2d 267–68; *Moore* v. *Jenkins*, supra, 304 S.C. 547; *Randle* v. *Allen*, supra, 862 P.2d 1334; see also *Moran* v. *Jones*, 75 Ariz. 175, 180–81, 253 P.2d 891 (1953).

Moreover, we have applied a structural error analysis in our prior decisions in situations in which peremptory challenges have been denied to one party. In *Krause* v. *Almor Homes, Inc.*, 147 Conn. 333, 334, 160 A.2d 753 (1960), an injured child and his mother brought an action against two defendants allegedly responsible for the child's injuries. The child sued on a negligence theory whereas the mother sued to recover expenses incurred in treating her son's injuries. Id. Instead of permitting the child and his mother each to exercise four peremptory challenges, however, the trial court restricted them to a total of four peremptory challenges; id., 334–35; while permitting the defendants to exercise four peremptory challenges each, for a total of eight. On appeal, this court determined that the trial court improperly had limited the plaintiffs' peremptory challenges. Id., 336. We did not, however, examine the trial court's error for harmfulness. Id.

The majority places great weight on *Kalams* v. *Giacchetto*, 268 Conn. 244, 842 A.2d 1100 (2004), and its predecessor, *State* v. *Hancich*, supra, 200 Conn. 615. Those decisions, however, present an imprecise analogy to the present case because, in both *Kalams* and *Hancich*, the trial court awarded supernumerary peremptory challenges in *equal quantity* to *both sides*. In *Hancich*, the trial court awarded each party eight peremptory challenges, rather than the four to which each party was entitled. Id., 624. When the trial court discovered its mistake, it reduced both parties' number of peremptory challenges to four, notwithstanding the fact that defense counsel already had exercised four, thereby leaving him with no remaining peremptory challenges.[9] Id. Likewise, in *Kalams*, the trial court awarded each party nine peremptory challenges, rather than the four to which each party was entitled, on the basis of the court's misinterpretation of the statute.[10] *Kalams* v. *Giacchetto*, supra, 257–58. In each case, we observed that the trial court's award, although improper, did not harm either party. Id., 261–62; *State* v. *Hancich*, supra,

626. I believe that *Hancich* and *Kalams* stand for the proposition that a trial court's granting of an equal quantity of supernumerary peremptory challenges to *both sides* is not itself harmful.[11] This proposition is wholly inapposite to the facts of the present case.

Krause remains the only decision of this court in which a trial court disrupted only one side's right to challenge venirepersons peremptorily. This court's failure to consider harmfulness in *Krause* is instructive.[12] I would decide the present appeal in accordance with *Krause* and hold that a trial court's award of a reasonable and proportionate number of supernumerary peremptory challenges to both sides is not harmful but that an abridgment of *one side's* right to peremptory challenges constitutes an abuse of discretion that is not subject to harmless error review. To hold otherwise disregards the constitutional delegation of the authority of the legislature to determine by statute the ratio of peremptory challenges and "countenance[s] the trivialization of article first, § 19, of our constitution [as amended by article four of the amendments] which . . . follow[s] from [a] failure to take appropriate action in this case."[13] *State* v. *Hancich*, supra, 200 Conn. 626.

II

My other disagreement with the majority involves its failure to determine whether the award of additional peremptory challenges was improper. See footnote 15 of the majority opinion. In failing to make this determination, the majority does not address whether the trial court's action constituted an exercise of its discretion and whether that discretion had been abused or, alternatively, whether it constituted a disregard of the public policy expressed in the statute. If the award constituted a disregard of the statute, *Hancich* would suggest that the trial court trivialized article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, and that we should not countenance such an act. *State* v. *Hancich*, supra, 200 Conn. 626.

III

Finally, the majority does not explain how the facts of the present case pass its own threshold test, namely, that the defendants must exhaust their peremptory challenges before they are permitted to challenge the award of additional challenges to the plaintiff. In the present case, each of the five defendants had four challenges and, collectively, they exercised seventeen of those twenty challenges. Consequently, at least two, and possibly up to four, of the five defendants exhausted their peremptory challenges, thus meeting the threshold test established by the majority. As the majority correctly notes, the trial court found no unity of interest among any of the defendants or the plaintiff, thus leading to the conclusion that from two to four of the defendants did in fact exhaust their peremptory challenges.

I would affirm the judgment of the trial court and order a new trial. I therefore respectfully dissent.[14]

[1] General Statutes (Rev. to 2001) § 51-243 (a) provides in relevant part: "In any case when the court directs the selection of alternate jurors, each party may peremptorily challenge four jurors. Where the court determines a unity of interest exists, several plaintiffs or several defendants may be considered as a single party for the purpose of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. For the purposes of this subsection, a 'unity of interest' means that the interests of the several plaintiffs or of the several defendants are substantially similar."

[2] Mary Carrano, individually and as administratrix of the estate of Phillip J. Carrano, Jr., and Sarah Carrano were the original plaintiffs in this case. The trial court, *Melville, J.*, granted the defendants' partial motion for summary judgment, concluding that the defendants were entitled to judgment as a matter of law against Sarah Carrano, thereby leaving Mary Carrano as the remaining plaintiff. We refer to Mary Carrano as the plaintiff throughout this opinion.

[3] The plaintiff originally brought this action against five defendants, namely, Yale-New Haven Hospital, Garth Ballantyne, a gastrointestinal surgeon, Andrew Elliot, a physician, Elton Cahow, a physician, and Mary Harris, a registered nurse. After the presentation of evidence, however, the trial court directed a verdict in favor of Elliot and Cahow.

[4] As the majority notes; see footnote 10 of the majority opinion; the trial court, *Mottolese, J.*, determined that the plaintiff was entitled to a minimum of eight peremptory challenges because she represented two distinct interests, namely, her own interest and that of the estate of her deceased husband, and that those interests lacked a unity of interest for purposes of § 51-243 (a).

[5] Although the trial court indicated that it disagreed with the public policy underlying the relevant statute, I do not address that issue because, in my view, harmless error analysis is not appropriate when only one party is awarded extra peremptory challenges.

[6] The majority notes in footnote 20 of its opinion that, once its threshold test—that the "complaining party" exhaust all of its peremptory challenges and request additional challenges—has been satisfied, that party must show that "an objectionable juror actually served on the jury that decided the case, and, that under the facts and circumstances of the case, the service of that juror was harmful."

I would respectfully ask the majority, how is this showing accomplished? The majority provides no guidance other than to cite to *State* v. *Ross*, 269 Conn. 213, 849 A.2d 648 (2004). *Ross*, however, is inapposite. In that case, the trial court denied certain of defense counsel's challenges "for cause." Id., 227, 229. Defense counsel then exercised peremptory challenges to exclude those venirepersons. Id. We concluded that, even if the trial court improperly had denied the challenges for cause, any error would have been harmless inasmuch as defense counsel was not forced to accept any particular venireperson that he deemed unfit. See id., 230.

If, on the other hand, the venireperson had been seated because the defense had no more remaining challenges, this court on appeal would have had a record on which to base a determination of whether the "for cause" challenge improperly was denied and of whether an unfit venireperson had been seated. That record would have consisted of the objecting attorney's articulated reasons for making the "for cause" challenge and the trial court's articulated reasons for denying the challenge. No comparable record is created, however, when a complaining party opts *not* to exercise a peremptory challenge because of a concern about the extraordinary award of peremptory challenges to his or her opponents. Additionally, because of the nature of peremptory challenges, it is difficult to see how, even if an objectionable venireperson was seated, a complaining party could demonstrate that the seating of that venireperson was harmful. The majority's reliance on *Ross* highlights why an award of additional challenges to only one side should be deemed structural error.

[7] The majority characterizes this premise as speculative. Footnote 19 of the majority opinion. I believe that this premise is not speculative but, instead, acknowledges the practical realities of the voir dire process, namely, that it is good trial practice for counsel to factor into his decision whether to accept or to reject a prospective juror on the basis of the number of challenges that his opponent has remaining. This would not be the first time that we have considered such practicalities in determining whether a court's

actions vis-á-vis a party's exercise of peremptory challenges was proper. See, e.g., *State* v. *Hancich*, supra, 200 Conn. 626 ("[t]he defendant in this case . . . *as in any other case*, selected or rejected individual venire[persons] in reliance on the number of peremptory challenges to which the trial court had led her to believe she was entitled" [emphasis added]).

[8] At least one authority has observed that "[t]he numerical weight of authority in civil cases supports the rule that a judgment will not be reversed for error in allowing one or more peremptory challenges in excess of that provided by statute, unless the complaining party shows that he has exhausted his peremptory challenges and has suffered material injury from the action of the court . . . ." Annot., Effect of Allowing Excessive Number of Peremptory Challenges, 95 A.L.R.2d 957, 963 (1964). This observation, however, appears to be outdated. See *Praus* v. *Mack*, 626 N.W.2d 239, 261 n.3 (N.D. 2001) (Maring, J., dissenting) ("the modern trend is reflected [not in the annotation, but] in recent cases, which have more persuasive rationales").

[9] The trial court "offered to allow [defense counsel] to retract [the] last peremptory challenge, and therefore, to accept as a member of the jury the recently excused [venireperson]. The trial court also offered to allow [defense counsel] an additional peremptory challenge. [Defense counsel] refused the offer[s] . . . ." *State* v. *Hancich*, supra, 200 Conn. 624.

[10] The trial court in *Kalams* determined that each party was entitled to eight peremptory challenges as of right, and also granted a ninth challenge to each party because three alternate jurors were to be selected. *Kalams* v. *Giachetto*, supra, 268 Conn. 257–58.

[11] The majority construes *Kalams* to stand for the proposition that "a trial court's award of peremptory challenges not required by law must be reviewed for harm . . . and nothing therein suggests that this conclusion is limited to awards to both sides of the litigation." (Citation omitted.)

This is a glib interpretation of *Kalams*. Certainly, nothing in *Kalams* suggests that its conclusion applies to *all* awards of supernumerary peremptory challenges, or even to *any* awards of supernumerary peremptory challenges not consistent with the facts of *Kalams*. The majority's notion that *Kalams* applies to the situation in which only one side is awarded supernumerary peremptory challenges discovers and gives effect to a purported holding of *Kalams* that, in fact, does not exist.

[12] It also is consistent with numerous, subsequent decisions concluding that harm may be presumed if the circumstances are such that harm would be impossible to prove. See, e.g., *State* v. *Bronson*, 258 Conn. 42, 55, 779 A.2d 95 (2001) ("It would be impossible for the defendant to establish . . . that, had the motion [for a court-appointed expert's examination of M, the minor victim] been granted, the . . . expert would have testified that M could have testified in the defendant's presence. Thus, in this circumstance, where the court abused its discretion in denying the motion, we must presume the requisite prejudice to the defendant to require reversal of the judgment."); *Lamb* v. *Burns*, 202 Conn. 158, 165, 520 A.2d 190 (1987) ("In the circumstances of the . . . case, because the defendant's questions on voir dire were not answered, it is impossible for the defendant to show that he could have discovered information that would have justified a challenge for cause or induced him to exercise a peremptory challenge. Thus, we cannot conclude that the trial court's restrictions placed upon the defendant's voir dire examination were not harmfully prejudicial."); *State* v. *Anthony*, 172 Conn. 172, 177, 374 A.2d 156 (1976) ("[B]ecause of the arbitrary time limitations set [by the trial court] for the voir dire examination, it is impossible for the defendant to show that he could have discovered facts or prejudices on the part of individual [venirepersons] which would have justified challenges for cause. We cannot conclude that the arbitrary time limitations cutting off voir dire examination while counsel still had questions unasked were not harmfully prejudicial.").

[13] In footnote 15 of its opinion, the majority suggests that, by this statement, I am raising a constitutional issue when doing so could be avoided. I disagree. Merely recognizing that the jury selection process is grounded in the state constitution and that such elevated status requires that we not trivialize the protections enshrined therein does not mean that I am raising a constitutional issue. Rather, it is an acknowledgment of the sanctity of a process that delegates to the legislature the authority to establish the number of peremptory challenges.

[14] Because I would order a new trial, I do not address the plaintiff's claim that the Appellate Court improperly concluded that the plaintiff had presented insufficient evidence of economic damages.