

Peremptory Challenges on Appeal: Not Worth the Trouble

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ABSTRACT: This Essay argues that Iowa should eliminate peremptory challenges in jury selection in almost every type of case. While there are several good arguments in favor of elimination, and a few in favor of preservation, this Essay adds a novel argument to the mix: that the difficulty of dealing with errors involving peremptory challenges on appeal is another good reason to eliminate them. This Essay examines three major approaches to the issue, specifically of how to treat, on appeal, a lower court's erroneous failure to remove a veniremember for cause, when the same veniremember was removed by the exercise of one of the appellant's peremptory challenges. It concludes that the drawbacks and inconsistencies of each approach are myriad and are in part a result of the ambivalence American judiciaries seem to feel toward peremptories. This Essay argues that the near impossibility of establishing a coherent system of review for the impairment of the right to peremptory challenges, in light of their negligible value in securing the just resolution of disputes, is yet another reason to eliminate them in most cases.

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INTRODUCTION

The defendant is on trial for murder in the first degree. Before the trial, the parties select a jury from the venire, the pool of potential citizen-jurors.¹ Each party is allowed ten “peremptory” challenges, ten opportunities to dismiss potential jurors without having to provide any reason for doing so. They are each given time to question the potential jurors, to determine whether they would like to remove anyone—a process called “voir dire.”² During voir dire, the defendant’s counsel asks that anyone on the venire concerned about their ability to try the case impartially speak up. One potential juror says, “I think the defendant’s guilty. He’s from the west side. Everyone from the west side is guilty, it’s only a matter of catching them. It’ll take a lot from him to convince me otherwise.” The defendant challenges the veniremember “for cause,” asking the court to remove the person from the venire because they can’t presume the defendant’s innocence. The judge—erroneously—denies the challenge, leaving the biased juror on the venire. At the close of voir dire, the defendant uses a peremptory challenge—no cause needed—to prevent the biased veniremember from serving on his jury. The defendant also uses each of her nine remaining peremptory challenges to remove other potential jurors. She is then convicted and appeals based on the judge’s error in failing to remove the partial veniremember for cause. On review, should her conviction be reversed?

The Iowa Supreme Court holds that it should not. In 2017, that court decided *State v. Jonas*.³ It held that when a trial court errs in overruling a challenge for cause, but the challenged veniremember is eventually removed by peremptory challenge, then it will *presume* the for-cause error was “harmless” and decline to reverse unless the challenging party can prove it was harmed by the error. Only when the challenging party uses all of its peremptory challenges, peremptorily challenges an additional veniremember, and has that challenge denied by the trial court may the for-cause error justify reversal.⁴

This complicated holding⁵ demonstrates the complexity of the problem that the peremptory challenge, and more specifically its curative use, presents

1. *Venire*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A panel of persons selected for jury duty and from among whom the jurors are to be chosen.”).

2. *See Voir Dire*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“Law French ‘to speak the truth’”).

3. *See generally* *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017).

4. *Id.* at 583–84; *see infra* Section II.C for an extended discussion of *Jonas*.

5. Hereinafter, any reference to a “Supreme Court” not obvious in context will include “Iowa,” “United States,” or “U.S.” as a modifier. This sacrifices style but is necessary for clarity, and I apologize in advance for any choppy reading.

on appeal. Under what circumstances is a party deprived of their right to exercise peremptory challenges? Under what circumstances is a reviewing court able and willing to remedy that deprivation? American courts diverge widely on these questions,⁶ and each set of proposed answers comes with an accompanying set of serious drawbacks.

In this Essay, Part I explores the nature of harmless error and where it fits in Iowa's judicial system; it also discusses peremptory challenges and the arguments for and against them. Part II sets out the problem, where appellate review, harmless error, challenges for cause, and peremptory challenges intersect: How should harmless error principles apply to the curative use of peremptory strikes during jury selection? It explains the three ways American courts have tried to address the problem, and it discusses the drawbacks of each approach. Part III argues that the impossibility of establishing a coherent system of review for the impairment of peremptory challenges, in light of their negligible value in securing justice, is yet another reason to abolish peremptory challenges in most cases.

I. APPELLATE REVIEW, HARMLESS ERROR, AND JURY SELECTION

Analyzing the problem of peremptory challenges on appeal requires an understanding of both harmless error as well as the history and development of peremptory challenges. This Part provides background on both topics. Section A covers the nature of appellate review in Iowa, which allows for correction of errors at law. This opens the door to "harmless" error doctrine, which Section B covers. Section C provides background on peremptory challenges and the chorus critiquing them.

A. JUDICIAL REVIEW AND REMEDIES IN IOWA

Understanding harmless error in Iowa requires understanding the judicial power in Iowa, specifically the jurisdiction of the Iowa Supreme Court. The Iowa Constitution delegates "the judicial power" to the Iowa Supreme Court, the district courts, and such other inferior courts as the legislature may establish.⁷ Like the framers of the United States Constitution,⁸ the framers of the Iowa Constitution followed Montesquieu,⁹ splitting the government into three departments: the legislative,¹⁰ the executive,¹¹ and the judicial.¹² In separating the powers, it went further than the United States Constitution by

6. See *infra* Part II.

7. IOWA CONST. art. V., § 1.

8. See PAUL MERRILL SPURLIN & MAURIZIO VALSANIA, *Montesquieu and the American Constitution* 94, in *THE FRENCH ENLIGHTENMENT IN AMERICA: ESSAYS ON THE TIMES OF THE FOUNDING FATHERS* (1984) (explaining that Blackstone's elevation of Parliament drove Americans to Montesquieu).

9. See 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *DE L'ESPRIT DES LOIS* 312–13 (London 1768).

10. IOWA CONST. art. III.

11. IOWA CONST. art. IV.

12. IOWA CONST. art. V.

declaring that no officer of the executive or legislative departments may exercise judicial power, and no officer of the judicial department may exercise legislative or executive powers.¹³ In other words, the judicial power, “the power to decide and pronounce a judgment’ in particular cases,”¹⁴ may not be mixed with the legislative power, “the authority ‘to make, alter, and repeal laws and to formulate legislative policy.’”¹⁵

As for *appellate* judicial power, the United States Constitution’s Due Process Clause¹⁶ does not confer a right to have judicial decisions reviewed by a higher court.¹⁷ The United States Supreme Court made this clear:

An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.¹⁸

The Iowa Constitution also confers no such right.¹⁹

13. IOWA CONST. art. III, § 1. The framers of the Iowa Constitution must have agreed with Montesquieu that

there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge then would be the legislator. . . . There would be an end to every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.

1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 188 (7th ed., Alexander Donaldson trans., 1778). *But cf.* THE FEDERALIST NO. 37, 219–20 (James Madison) (Jim Miller ed., 2022) (“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . .”).

14. *Planned Parenthood of Heartland, Inc. v. Reynolds ex rel. State*, 9 N.W.3d 37, 48 (2024), *reh’g denied* (July 22, 2024), *amended* (Sept. 6, 2024) (quoting *Klouda v. Sixth Jud. Dist. Dep’t of Corr. Servs.*, 642 N.W.2d 255, 261 (Iowa 2002)); *see also* MONTESQUIEU, *supra* note 9, at 313 (defining judicial power as “pouvoir[] . . . juger les crimes ou les différents des particuliers”).

15. *Planned Parenthood*, 9 N.W.3d at 48 (quoting *In Int. of C.S.*, 516 N.W.2d 851, 859 (Iowa 1994)); *see also* MONTESQUIEU, *supra* note 9, at 313 (defining legislative power as “pouvoir[] . . . de faire des lois”).

16. U.S. CONST. amend. XIV, § 1.

17. *McKane v. Durston*, 153 U.S. 684, 687 (1894).

18. *Id.*; *accord* Griffin v. Illinois, 351 U.S. 12, 18 (1956). *But see* David Rossman, *Were There No Appeals: The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 521 n.6 (1990) (arguing the *McKane* proposition was dictum).

19. *Van Der Burg v. Bailey*, 223 N.W. 515, 516 (Iowa 1929); *In re C.M.*, 652 N.W.2d 204, 210 (Iowa 2002).

However, Iowa has elected to confer a right of review.²⁰ The Iowa Constitution specifically delegates jurisdiction to the Iowa Supreme Court²¹ over appeals in equity cases and to correct errors in law cases.²² Appellate jurisdiction over equity cases gives the Iowa Supreme Court power in such cases to review “not only the errors of the inferior court, but also . . . the merits of the case.”²³ It allows the court to reexamine the facts—trying the case *de novo*—whereas in legal proceedings review may only be for legal errors.²⁴ Thus the court reviews actions at law for correction of legal errors,²⁵ accepting the facts generally as the trial court found them.²⁶

But what remedies are there for errors?²⁷ If the Iowa Supreme Court constitutes a court for correction of errors at law, how can the court go about

20. See IOWA R. APP. P. 6.103. This is the general rule, though there are several exceptions. See, e.g., IOWA R. APP. P. 6.104; IOWA R. APP. P. 6.107; IOWA R. APP. P. 6.105 (citing IOWA CODE § 631.16 (2025)).

21. In this Essay, references to the Iowa Supreme Court include the Iowa Court of Appeals, for the Court of Appeals has jurisdiction coextensive with that of the Supreme Court and hears cases delegated to it by the Supreme Court. See IOWA CODE §§ 602.5103, 602.4102(2)–(3).

22. The constitution authorizes the supreme court to exercise “appellate jurisdiction only in cases in chancery, and . . . constitute a court for the correction of errors at law,” IOWA CONST. art. V, § 4, and the general assembly conferred jurisdiction to the full extent of that authority, IOWA CODE § 602.4102(1).

Equitable (a.k.a., chancery, see *Chancery*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A court of equity”)) jurisdiction, poses somewhat of a difficulty for a constitution like Iowa’s, which mandates a strict separation between the law-making and the case-judging powers, see IOWA CONST. art. III, § 1. Equity, being a result-oriented jurisdiction, dispenses with the niceties of rules of law when it determines that they stand in the way of justice. See Henry E. Smith, *Equity As Meta-Law*, 130 YALE L.J. 1050, 1059–71 (2021) (discussing the conceptual and political development of equity); see also *Gee v. Pritchard* [1818], 36 Eng. Rep. 670, 674 (Chan.) (Lord Eldon) (“The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.”). But see Michelle Johnson & James Oldham, *Law versus Equity—as Reflected in Lord Eldon’s Manuscripts*, 58 AM. J. LEGAL HIST. 208, 225 (2018) (critiquing the use of this quote as an expression of Lord Eldon’s views and arguing that his true vision of equity was less strict and more nuanced).

While courts of equity consistently adhere to precedent, equitable jurisdiction confers power to make judgments according to a court’s view of justice in the specific case. *Preston v. Daniels*, 2 Greene 536, 539 (Iowa 1850); *Holi-Rest, Inc. v. Treloar*, 217 N.W.2d 517, 527 (Iowa 1974) (“Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before.” (quoting HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 29, at 76 (2d ed. 1948))). Nevertheless, the Iowa Constitution explicitly confers equitable jurisdiction on the district court, IOWA CONST. art. V, § 6, and appellate jurisdiction in equity suits on the Supreme Court, IOWA CONST. art. V, § 4.

23. *Stockwell v. David*, 1 Greene 115, 117 (Iowa 1848).

24. *Id.*

25. IOWA R. APP. P. 6.907.

26. Unless not supported by substantial evidence, in which case, the factual error amounts to a legal error. See *Connie’s Constr. Co. v. Fireman’s Fund Ins. Co.*, 227 N.W.2d 207, 209 (Iowa 1975).

27. This Essay is not concerned with errors committed in, for example, granting summary judgment or dismissing a complaint for failure to state a claim. This Essay is concerned only with

correcting them? The Iowa Constitution authorizes the Supreme Court to “issue all writs and process necessary to secure justice to parties,”²⁸ and the judicial branch operationalized that authority by enacting Iowa Rule of Appellate Procedure 6.1001(1).²⁹ This provision, in addition to the rules of appellate remedies that developed through the common law, is the source of the court’s remedy power.

The court undoubtedly has authority to order a new trial,³⁰ though such a trial cannot be held before the Iowa Supreme Court (for it has no original jurisdiction).³¹ Instead, the new trial must be before the district court, which has broad original jurisdiction,³² or another court that has original jurisdiction. There is at least one alternative to ordering a new trial: When a reviewing court determines that the trial court erred in overruling a motion that would have concluded the case in the movant’s favor (e.g. a motion for a directed verdict), the reviewing court may order the lower court to enter final judgment for the movant.³³

However, there are circumstances under which a party may prevail on their legal claim of error yet not be entitled to any remedy at all. When a reviewing court, though finding legal error, determines the error was “harmless,” it will provide neither a new trial nor any other remedy. The next Section addresses the concept of harmless error.

B. HARMLESS ERROR IN IOWA

The concept of a harmless legal error has a long, puzzling history in American jurisprudence.³⁴ Early on, it seems that the idea that harm resulted from an error was bound up in the definition of error itself: “There must be some injury to the party, to make the matter generally assignable as error.”³⁵

actions that have been tried, for jury selection occurs only in trials at law. State *ex rel.* Att’y Gen. of Iowa v. Autor, 991 N.W.2d 159, 163 (Iowa 2023).

28. IOWA CONST. art. V, § 4.

29. See Iowa R. App. P. 6.1001(1).

30. See Rasmussen v. Alberts, 246 N.W. 620, 622 (Iowa 1933) (“The only relief, which could be extended under writ of error would be to reverse and remand for a new trial.”). “A new trial is the reexamination in the same court of any issue of fact or part thereof, after a verdict, or master’s report, or a decision of the court.” IOWA R. CIV. P. 1.1002. The district court also has power to grant new trials. See IOWA CODE § 602.6104(2) (2025).

31. See IOWA CONST. art. V, § 4.

32. *Id.* § 6; IOWA CODE § 602.6101. The district court also has some appellate jurisdiction. See IOWA CODE § 602.6102; see also *id.* § 602.6104(1) (setting out which officials can exercise the jurisdiction of the district court).

33. Iowa R. App. P. 6.1206.

34. See ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13–17 (1970); see also *id.* at 3–12 (discussing origin of harmless error doctrine in the common law courts of England and the influence on American courts).

35. Greenleaf’s Lessee v. Birth, 30 U.S. 132, 135 (1831); see also Brobst v. Brock, 77 U.S. 519, 528 (1870) (“It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action.”); Wilson County v. Third Nat. Bank, 103 U.S. 770, 777 (1880) (noting that because there was no injury to the party, “[w]hether the court was right or wrong in its judgment on the demurrers . . . [was] entirely immaterial”); Bryan

In other words, no injury meant no error and no remedy on review. This resembles modern “standing” doctrine.³⁶ And though the concept of legal error was quickly separated from the concept of harm or injury, early American reviewing courts still linked remedy to injury.³⁷

An important question, then, became whether the courts did or did not *presume* harm. Mid-nineteenth century U.S. Supreme Court opinions presumed harmlessness, placing the burden of proving injury on the party assigning error.³⁸ However, opinions in the later nineteenth century began to shift the burden, presuming harm and requiring disproof from the respondent.³⁹ The first case to provide a standard of proof for the inquiry is *Deery v. Cray*:

We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained [sic] of works no injury to the party against whom the ruling was made[.] But whenever the application of this rule is sought, it must appear *so clear as to be beyond doubt* that the error did not and could not have prejudiced the party’s rights.⁴⁰

The U.S. Supreme Court actually used the modern adjective “harmless” in this context for the first time in 1873.⁴¹

Early Iowa Supreme Court opinions reviewing for legal error generally track their early federal counterparts in presuming harmlessness and placing the burden on the applicant to prove harm.⁴² However, harmless error appears to have been even more firmly ingrained in Iowa’s legal system than it was in the federal system. The cases discussed below, decided shortly after Iowa became a state in 1846, are illustrative of this point.

Early opinions of the Iowa Supreme Court indicate that harm is required if a legal error is to require reversal and a new trial, and that such a rule is derived from the common law. In *Speers v. Fortner*, for example, the defendant assigned as error the admittance of testimony from a witness he argued was

v. Abert, 3 App. D.C. 180, 185 (1894) (“Matters which became immaterial in the course of a trial, and worked no injury to the party, cannot be assigned as error.”).

36. Modern standing doctrine holds that a plaintiff must have suffered a cognizable injury for the federal courts to exercise jurisdiction and provide a remedy, regardless of whether they have pled a legal cause of action. *See generally* *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021).

37. *See supra* note 35.

38. *See, e.g.,* *Landes v. Brant*, 51 U.S. 348, 375 (1850) (quoting 3 Bac. Abr., *Error*, K., 105) (“[A] man cannot reverse a judgment for error, unless he can show that the error was to his disadvantage.”).

39. *See, e.g.,* *Deery v. Cray*, 72 U.S. 795, 807–08 (1866); *see also* *Gregg v. Moss*, 81 U.S. 564, 569 (1871) (describing proof that the plaintiff did not suffer harm); *Lancaster v. Collins*, 115 U.S. 222, 227 (1885) (noting that it was “clear that that the error” did not cause the plaintiff harm); *Ogdensburg & L.C.R. Co. v. Pratt*, 89 U.S. 123, 135 (1874) (noting that the error “clearly appear[ed] to produce[] no injury”); *Runkle v. Burnham*, 153 U.S. 216, 224 (1894) (noting that the error “could not have affected the question [at issue]”).

40. *Deery*, 72 U.S. at 807–08 (emphasis added).

41. *Lucas v. Brooks*, 85 U.S. 436, 454 (1873).

42. *See, e.g.,* *Speers v. Fortner*, 6 Iowa 553, 554–55 (1858).

interested.⁴³ The Iowa Supreme Court found no error and therefore did not reverse the district court's judgment.⁴⁴ However, the reasoning behind its no-error finding suggests the court would find some errors harmless. The rule can be stated in two ways. First, if the appellant suffered no injury by the error, then they are not entitled to reversal. In other words, if the jury (or judge) would have resolved the case in the same way had the error not been made, then the reviewing court will not order a new trial. In the court's words:

We there refer to the case of *Samuel v. Withers*, 9 Miss., 166, in which it is expressly held, that even if an incompetent witness is admitted, it must appear that he gave evidence material to the case, or the judgment will not be reversed. And this, we believe to be the correct rule. We think the record should disclose, either the substance of the testimony given, or that it was material. *A case should not be reversed, unless this court can see that a new trial is necessary in order to correct some injury resulting from the judgment appealed from. If it does not appear with reasonable certainty, that the party complaining could be placed in a better condition by giving him another trial, it should not be granted.*⁴⁵

The court then applied that rule to the case:

And hence, in this case, *suppose for this alleged error*, the cause should be remanded, and this witness excluded. Now, for aught that appears, he was virtually excluded before; for it is not shown that he testified to anything, and least of all, anything that influenced the finding of the jury. If he did not, then *his exclusion would affect nothing, and a second trial would result as did the first.*⁴⁶

The court affirmed the judgment on the ground that it could find no error since the witness's testimony was not recorded, and it would not presume error.⁴⁷ But dicta in this opinion indicates the court's willingness to affirm even when the trial court erred, so long as the error did not affect the outcome.⁴⁸ It also indicates that the court would place the burden on the petitioner to prove an injury resulting from the error, rather than on the respondent to prove the error caused none (i.e., was harmless).⁴⁹ The court provides neither constitutional nor statutory basis for these propositions, but only a case from a different jurisdiction, indicating that harmless error doctrine derives from common law.⁵⁰

43. *Id.* at 553.

44. *Id.* at 555.

45. *Id.* at 554–55 (emphasis added).

46. *Id.* at 555 (emphasis added).

47. *Id.* at 554.

48. *See id.* at 555 (“[A] second trial would result as did the first.”).

49. *See also* *Jenks v. Knotts Mexican Silver Mining Co.*, 12 N.W. 588, 589–90 (Iowa 1882) (holding the same); *cf.* *Jacobs v. City of Cedar Rapids*, 164 N.W. 891, 892 (Iowa 1917) (holding any error in prohibiting testimony harmless when it could not be shown that the answer, if permitted, would have helped appellant).

50. *Speers*, 6 Iowa at 554.

The Iowa Supreme Court stated a harmless error rule clearly in *Granger v. Buzick*, another early case.⁵¹ In a breach of contract action, the defendant-petitioner assigned as error that an additional defendant was joined who was not party to the contract.⁵² Not deciding whether it was an error, the court held that defendant-petitioner waived the error by not objecting earlier; however, it also said:

We think the objection comes too late, particularly as he is not injured by the judgment, and a reversal would in no wise benefit him. . . . It has been repeatedly decided by this court, that the court will not reverse in consequence of errors that do not operate injuriously upon the party seeking a reversal.⁵³

Though the court says there are—but does not cite—others, and though not decisive in this case, this is the first opinion in which the Iowa Supreme Court declares this rule.

Pelamourges v. Clark, a will contest, is the first case for which the requirement to show prejudice was decisive, and the court there clarified that its guiding principle is whether the verdict would have been different had the error not been made.⁵⁴ The petitioner assigned as error the district court's prohibiting its witnesses from answering certain questions pertaining to the soundness of the testator's mind.⁵⁵ The Supreme Court agreed that the district court had erred: the questions were "proper to be asked" and "not . . . objectionable in any material sense."⁵⁶ However, the court said, "the difficulty with us, is, to see that the court has excluded . . . testimony that, if suffered to be introduced, would have caused the verdict of the jury to be given the other way."⁵⁷ And because it could not see that the testimony would have caused the jury to deliver a verdict for the plaintiff, it declined to reverse: "A new trial will not be granted, nor the judgment of the District Court reversed, for the improper rejection of testimony, when the court is satisfied that justice has been done, and when there is little reason to believe that a different result would ensue upon a new trial."⁵⁸ Several opinions cite

51. *Granger v. Buzick*, 3 Greene 570, 571 (Iowa 1852).

52. *Id.*

53. *Id.*

54. *Pelamourges v. Clark*, 9 Iowa 1, 25 (1859). There is an earlier case for which the rule was decisive, but it was decided before Iowa became a state, so it was not decided under the Iowa Constitution. See *Harrell v. Stringfield*, Morris 18, 19 (1839) ("While we are determined not to disturb proceedings in those courts, for technical errors which can work no possible harm, we shall not hesitate to do so whenever there are plausible grounds for supposing that such errors may create an injury to the party asking a reversal.").

55. *Pelamourges*, 9 Iowa at 25.

56. *Id.*

57. *Id.*

58. *Id.* (citing 2 GRAHAM & WATERMAN ON NEW TRIALS 651 (2d ed. 1855)); see also *Woodward v. Horst*, 10 Iowa 120, 123 (1859) (stating that a new trial would not be granted when the error was "as to a part of the case" that did not affect the holding).

Pelamourges for this rule.⁵⁹ The court's focus is on the result—the verdict—and in assessing whether an error calls for reversal, it asks whether the verdict might have been different in the absence of the error.

Regardless of its exact common law basis, the harmless error doctrine is now well established. It is codified at Iowa Code section 619.16.⁶⁰ However, a perusal of harmless error case law reveals that the precise contours of the modern rule are slippery. Specifically difficult to discern is where the presumption, or burden of proof, lies on the question of prejudice. And “[g]iven the infinite variety of circumstances which may arise, this evaluation must necessarily be made on a case-by-case basis[.]” so the placement of a presumption on one side or the other is quite consequential.⁶¹

For example, in *State v. Buenaventura*, the Iowa Supreme Court cites *State v. Windsor* for the proposition that “[e]ven if an abuse of discretion is found, reversal is not required unless prejudice is shown.”⁶² This suggests that the burden is on the appellant to prove that the error was not harmless—to show prejudice. But *Windsor* does not say that. It says:

[E]ven when the ruling is erroneous, reversal is not required when no prejudice results. One respect in which the *presumption of prejudice* may be overcome is by showing the same evidence came into the record at another time. In addition, prejudice will not be presumed or found when the answer to the question was not obvious and the proponent made no offer of proof.⁶³

The major difference between what *Windsor* says and what *Buenaventura* purports it says is, of course, that, under *Buenaventura*, the burden is on the appellant to *disprove* harmlessness whereas under *Windsor* the burden is on the appellee to *prove* harmlessness. Even so, *Buenaventura*'s proposition has been cited as authority in multiple recent Iowa Supreme Court opinions.⁶⁴ This line of cases is just one example of the slipperiness of the harmless error rule and the importance of the placement of the presumption.

Furthermore, the harmless error rule is applied differently to different categories of errors. Most crucially, the presumption of harm shifts depending on the type of error. For nonconstitutional errors at trial, for example, the rule is relatively clear: A new trial will be awarded based on a nonconstitutional error only when the error affected the appellant's

59. *E.g.*, *Dawson v. Wisner*, 11 Iowa 6, 8 (1860); *Childs v. Shower*, 18 Iowa 261, 276 (1865).

60. IOWA CODE § 619.16 (2025) (“The court, in every stage of an action, must disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.”).

61. Laurie Kratky Doré, *Harmless Error and Substantial Rights*, in 7 IOWA PRAC. SERIES, EVIDENCE § 5.103:14 (2025).

62. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003) (citing *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982)).

63. *Windsor*, 316 N.W.2d at 688 (citing *In re Herm's Est.*, 284 N.W.2d 191, 197 (Iowa 1979)) (emphasis added).

64. *E.g.*, *State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017); *State v. Slaughter*, 3 N.W.3d 540, 546–47 (Iowa 2024), *as amended* (Apr. 25, 2024).

substantial rights.⁶⁵ The court presumes the error was harmful and reverses unless the record affirmatively establishes harmlessness.⁶⁶ The question is whether the error affected the jury's verdict.⁶⁷ Prejudice is also presumed when there is an error in the jury instructions.⁶⁸ But the court does not presume harm when considering discovery errors.⁶⁹

In short, in reviewing for errors at law, it is well established that some errors may be harmless, and therefore not bases for reversal and a new trial. However, the rules by which the harmlessness of an error is to be assessed are not clear and appear to shift considerably across time. And because it is difficult to prove prejudice (harmfulness), it becomes extremely important whether prejudice is presumed or not. Now that we understand the complexities of appellate review and harmless error, we can move on to the substantive area of law that this Essay addresses—the selection of a jury—before we examine how harmless error principles apply.

C. SELECTING A JURY: PEREMPTORY CHALLENGES & CHALLENGES FOR CAUSE

The requirement that jurors be impartial became a rule of the English common law in the fifteenth century.⁷⁰ Litigants in the United States, civil and criminal, enjoy a right to an impartial jury, protected by the U.S. Constitution.⁷¹ The Iowa Constitution also protects the right to an impartial

65. *Eisenhauer ex rel. T.D. v. Henry Cnty. Health Ctr.*, 935 N.W.2d 1, 19 (Iowa 2019).

66. *Id.*; *Mormann v. City of Manchester*, 27 N.W.3d 820, 830 (Iowa 2025) (“The burden to demonstrate that the admission was harmless rests with the proponent of the evidence.”); *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (Iowa 2015) (“The burden [when the jury was erroneously instructed] is on the party claiming harmlessness.”). As described *supra*, with some qualification, this appears to have been the rule for quite some time. *See, e.g., Dunne v. Deery*, 40 Iowa 251, 253 (1875) (“While the presumption of prejudice will arise from a legal error in a cause, yet that presumption may be overcome, and where it is made affirmatively to appear that no prejudice did or could have resulted to the appellant by reason of the error, it is the duty of this court to affirm.”) And yet there are contemporary cases stating precisely the opposite. *E.g., Konchar v. Pins*, 989 N.W.2d 150, 162 (Iowa 2023) (“[T]he burden rests upon the appellant not only to establish error but to further show that prejudice resulted.” (quoting *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013))).

67. *See Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 266–67 (Iowa 2019).

68. *Rivera*, 865 N.W.2d at 903; *Reynolds v. City of Keokuk*, 34 N.W. 167, 168 (Iowa 1887) (“The rule is that, where there is an error, a presumption of prejudice arises which cannot be disregarded, unless the record discloses affirmatively, and the court is satisfied, the error was not prejudicial.”). *But see Crawford v. Yotty*, 828 N.W.2d 295, 298–99 (Iowa 2013), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016) (requiring the plaintiff to “demonstrate that her requested jury instruction contained a correct statement of applicable law not covered by another instruction and that the court’s refusal to give her requested instruction prejudiced her”).

69. *Struve v. Struve*, 930 N.W.2d 368, 378 (Iowa 2019).

70. *William T. Pizzi & Morris B. Hoffman, Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1439 (2001).

71. The United States Constitution clearly secures a criminal defendant the right to be tried by an impartial jury. *See* U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. A right to trial by impartial jury in civil cases is secured by the Seventh and Fourteenth Amendments. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”).

jury in both civil and criminal suits.⁷² It follows that if a party establishes, by voir dire, that a veniremember is partial, and the party challenges the veniremember's service on the jury on that basis, both the U.S. Constitution and the Iowa Constitution require that the court excuse the veniremember from service. This is called a challenge for cause, and such challenges are the means by which a litigant can vindicate her constitutional right to an impartial jury.⁷³

In contrast to challenges for cause, which must be unlimited, are peremptory challenges (or peremptory "strikes"), which require no showing of cause.⁷⁴ The modern right of peremptory challenge, recognized in all states but one,⁷⁵ has its roots in English criminal trials.⁷⁶ Returning to Montesquieu, he writes in *The Spirit of Laws*,

In accusations of a deep or criminal nature, it is proper the person accused should have the privilege of chusing in some measure his judges, in concurrence with the law; or, at least, he should have a right to except against so great a number, that the remaining part may be deemed his own choice.⁷⁷

And after discussing challenges for cause, William Blackstone writes,

[I]n criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge . . . This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudice we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him: the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which,

72. IOWA CONST., art. I, § 10; *id.* § 9; *see also* *Schwickerath v. Maas*, 297 N.W. 248, 251 (Iowa 1941) ("The Constitution of Iowa, Article 1, Section 9, provides that the right of trial by jury shall remain inviolate. Necessarily, this implies a jury, fair, impartial, disinterested and unbiased."); *In Int. of A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994) ("Both the Bill of Rights and the Iowa Constitution provide no person shall be deprived of life, liberty, or property, without due process of law.").

73. *See* IOWA R. CRIM. P. 2.18(5).

74. *See id.* at 2.18(9).

75. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure at 3-6, No. R-21-0020 (Ariz. Aug. 30, 2021).

76. *See* Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812-27 (1997).

77. MONTESQUIEU, *supra* note 13, at 190.

the prisoner is still at liberty, if he pleases, peremptorily to set him aside.⁷⁸

The common law rule was that the criminal defendant was permitted to use thirty-five peremptory strikes, but the provision was later reduced by statute to twenty.⁷⁹ Though the right was denied by statute to the prosecution, the king had the right in effect because the king's counsel was not required to show cause for his challenges unless, by the time the parties had finished going through the panel, there were too few veniremembers remaining to seat a full jury.⁸⁰ In the United States federal courts, peremptory challenges have been provided by statute since 1790.⁸¹

By contrast to challenges for cause, neither the Due Process Clause nor any other provision of the U.S. Constitution requires that states provide litigants a right of peremptory challenge in any type of suit, civil or criminal.⁸² And even if a state decides to provide a right to peremptory strikes, it may deem their erroneous denial harmless on review without running afoul of the Federal Constitution.⁸³

The utility and justice of peremptory challenges have been attacked vociferously, particularly in the final two decades of the twentieth century, in the wake of the U.S. Supreme Court's decision in *Batson v. Kentucky*.⁸⁴ "[C]ommentators have increasingly come to see peremptories themselves as violating, rather than upholding, constitutional values . . ." ⁸⁵ They have called for their eradication on various bases. Judge Bennett calls for their abolition because implicit bias cannot realistically be eliminated from their use.⁸⁶ Similarly, Judge Broderick argues they should be eliminated because they are "anathema to our democracy": they "function[] as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients."⁸⁷ Judge Hoffman calls for their elimination from a historical perspective, on the basis that "the conditions which gave rise to . . . peremptory challenge[s] simply do not exist today," and that they are

78. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 271-72 (1830).

79. *Id.* at 272.

80. *Id.*

81. Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat. 119.

82. *Stilson v. United States*, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.")

83. See *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 212, 218 (2009).

84. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

85. *The Supreme Court 2008 Term—Leading Cases*, *supra* note 83, at 220.

86. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010); cf. Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1729 (2006) ("If the jury is to perform its many and varied roles, then the peremptory needs to be eliminated so that discrimination during jury selection can be avoided.")

87. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 371, 418 (1992).

“[i]nconsistent with [f]undamental [p]recepts of an [i]mpartial [j]ury.”⁸⁸ Justice Stevens came around to the idea of abolition while serving on the United States Supreme Court, in part because he believes peremptories unfairly infringe on the power of ordinary people to govern through service on juries.⁸⁹ Empiricists have determined that peremptories do not improve the objectivity of juries.⁹⁰

Arguments in defense of peremptory challenges mirror Blackstone’s.⁹¹ The first is that peremptories ensure the impartiality of the jury. Peremptories empower parties to remove veniremembers who are actually partial but cannot be proven partial through voir dire, and therefore cannot be removed by a challenge for cause.⁹² A subargument under this heading that squarely implicates the subject of this Essay is that, not only do peremptories empower parties to remove partial veniremembers who cannot be removed by challenges for cause, but they also empower parties to remove partial veniremembers who should have been removed for cause but were left on the venire. In other words, peremptories empower parties to remedy a judge’s for-cause error.⁹³ Thus, in short, peremptories help secure an impartial jury—a crucial right⁹⁴—by removing from the venire those persons who are actually partial but either cannot be proven so or can be proven so but remain on the venire due to judicial error. The U.S. Supreme Court itself holds this to be

88. Hoffman, *supra* note 76, at 812, 848–51, 853–70.

89. John Paul Stevens, *Foreword*, 78 CHI-KENT L. REV. 907, 907 (2003).

90. See, e.g., 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, 515–17 (1978) (concluding attorneys are rarely able to affect a verdict by their use of peremptories). Another more recent study concluded as follows:

These findings cast significant doubt on the argument that peremptory challenges help create juries that are more impartial than randomly selected juries. Using unordered selection procedures and reducing the amount of information available about potential jurors would reduce, but not eliminate, the problem. Accordingly, courts and legislatures should consider limiting or eliminating peremptory challenges.

Roger Allan Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377, 422 (2010).

91. See *supra* text accompanying note 78.

92. See, e.g., *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (noting that peremptories “permit litigants to assist the government in the selection of an impartial trier of fact” by “exclude[ing] a given number of persons who otherwise would satisfy the requirements for service”); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (describing peremptories as a “state-created means to the constitutional end of an impartial jury and a fair trial”); *Frazier v. United States*, 335 U.S. 497, 505 (1948) (“The right of peremptory challenge is given, of course, to be exercised in the party’s sole discretion . . .”).

93. See, e.g., *Martinez-Salazar*, 528 U.S. at 319 (Scalia, J., concurring in the judgment).

94. See *supra* notes 70–72 and accompanying text.

true.⁹⁵ Yet, it holds that peremptory strikes are not protected by any of the articles and amendments that protect the challenge for cause.⁹⁶

The second argument in defense of peremptories is that they bring solace to the defendant, that the people who will decide her fate are fair. No lesser luminaries than Montesquieu and Blackstone thought this important, specifically in criminal cases, and more specifically in cases where the defendant's life was at stake.⁹⁷ A slight variation of this argument is that peremptory challenges give the trial democratic legitimacy: Allowing (non-governmental) parties to select those who will decide their case from a larger-than-necessary pool "help[s] to legitimate the trial to the parties who will be subject to a trial's coercive force."⁹⁸ However, concern for legitimacy can lead to the opposite conclusion, as Justice Stevens's *Foreword* makes clear: Although the exercise of peremptories legitimizes the jury trial process in the minds of private litigants, it *d*legitimizes the process in the minds of the veniremembers who are struck without cause, without a chance to exercise their most direct power of self-government.⁹⁹

In short, the peremptory challenge is subject to a barrage of criticism and has very few defenders. But how are they treated on appeal?

II. THREE APPROACHES TO AN INTRACTABLE PROBLEM

The issue this Essay is concerned with lies where appellate review, harmless error, challenges for cause, and peremptory challenges intersect.¹⁰⁰ Specifically, it focuses on different American courts' approaches to the problem of whether a judge's erroneous denial¹⁰¹ of challenge for cause, and on the difficulties associated with those approaches. According to the law of every jurisdiction with which this writer is familiar, an error in denying a challenge for cause may be held harmless. In other words, a court reviewing for correction of errors may decide not to grant a new trial even when the original court erred.

95. See *Martinez-Salazar*, 528 U.S. at 311 ("We have long recognized the role of the peremptory challenge in reinforcing a defendant's right to trial by an impartial jury.").

96. See *supra* note 82 and accompanying text.

97. See *supra* notes 77–78 and accompanying text.

98. Ela A. Leshem, Note, *Jury Selection as Election: A New Framework for Peremptory Strikes*, 128 YALE L.J. 2356, 2387 (2019).

99. Stevens, *supra* note 89, at 907–08.

100. Thus, this Essay applies only to lawsuits. Or in Iowa parlance, actions tried by "ordinary" instead of "equitable" proceedings, because in Iowa equity cases may not be tried to juries and are reviewed *de novo*, rather than for correction of errors.

101. In at least one state the other veniremembers used to grant or deny challenges for cause, but today that authority rests solely with the judge in the federal system and in every state with which the author is familiar. See C.J. Williams, *On the Origins of Numbers: Where Did the Number of Peremptory Strikes Come from and Why Is Origin Important?*, 39 AM. J. TRIAL ADVOC. 481, 490–91 (2016); see also *Boon v. State*, 1 Ga. 618, 621 (1846) (where veniremembers decided for-cause challenges, not the judge).

This Part explains three different approaches to this problem and discusses their associated difficulties.¹⁰² Each approach starts from the proposition that the peremptory removal of the veniremember who should have been removed for cause makes the for-cause error harmless. Section A explains the separation approach of the federal courts. Section B explains the waiver approach adopted by several states. Section C explains Iowa's approach, which sits somewhere between the separation and waiver approaches.

A. THE SEPARATION APPROACH: MARTINEZ-SALAZAR

The federal approach to the issue is explained in the United States Supreme Court's opinion in *United States v. Martinez-Salazar*.¹⁰³ Litigants in federal court have a right to peremptory challenges in both civil and criminal cases. Civil litigants are entitled to three peremptories each by statute.¹⁰⁴ The number of peremptory challenges criminal litigants are entitled to depends on the type of case, and the right is conferred by the Federal Rules of Criminal Procedure.¹⁰⁵ In capital cases, each side is entitled to twenty peremptory challenges.¹⁰⁶ In any other felony case, the defendant is entitled to six peremptory challenges, and the government is entitled to six peremptory challenges.¹⁰⁷ In misdemeanor cases, each side is entitled to three peremptories.¹⁰⁸ The paneling of alternate jurors triggers the allotment of additional peremptory challenges.¹⁰⁹ Challenges for cause, a right protected by the Federal Constitution, are unlimited.¹¹⁰

The respondent, Martinez-Salazar, was charged jointly with a codefendant with several federal crimes and tried by a jury in the U.S. District Court for the District of Arizona.¹¹¹ He and his codefendant were allotted the full complement of peremptory challenges to which they were entitled under Federal Rule of Criminal Procedure 24.¹¹² During voir dire, a veniremember more than once expressed that he would favor the prosecution,¹¹³ at one time

102. Only one American jurisdiction, Arizona, has eliminated peremptory challenges and need not deal with this problem. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure at 3–6, No. R-21-0020 (Ariz. Aug. 30, 2021).

103. *See generally* *United States v. Martinez-Salazar*, 528 U.S. 304 (2000).

104. 28 U.S.C. § 1870 (2018); *see also* FED. R. CIV. P. 47(b) (“The court must allow the number of peremptory challenges provided by 28 U.S.C. § 1870.”).

105. *See* FED. R. CRIM. P. 24(b).

106. *Id.* at 24(b)(1).

107. *Id.* at 24(b)(2).

108. *Id.* at 24(b)(3).

109. *Id.* at 24(c)(4).

110. *See supra* notes 70–73 and accompanying text.

111. *Martinez-Salazar*, 528 U.S. at 308.

112. *Id.*; *see* FED. R. CRIM. P. 24(b)(2), (c)(4)(A).

113. *Martinez-Salazar*, 528 U.S. at 308.

going so far as to say, “[y]ou assume that people are on trial because they did something wrong.”¹¹⁴

Martinez-Salazar challenged him for cause.¹¹⁵ The district court overruled the challenge and twice more refused to remove the veniremember on Martinez-Salazar’s objections.¹¹⁶ The defendants then removed the veniremember with a peremptory challenge.¹¹⁷ They subsequently exhausted their allotment of peremptories.¹¹⁸ After the jury was selected, the district court asked the parties if they had any objection to any of the jurors.¹¹⁹ Neither defendant objected.¹²⁰ The jury delivered a verdict of guilty on all counts.¹²¹

On review, the Court of Appeals for the Ninth Circuit reversed, holding that although the error did not infringe Martinez-Salazar’s Sixth Amendment right to an impartial jury,¹²² the error did infringe Martinez-Salazar’s Fifth Amendment right to due process of law by “impairing his right to the full complement of peremptory challenges to which federal law entitled him.”¹²³ The Due Process Clause violation, according to the Ninth Circuit, meant the error required automatic reversal—it could not have been harmless.¹²⁴ The Supreme Court granted certiorari.¹²⁵

The Supreme Court reversed, affirming Martinez-Salazar’s conviction.¹²⁶ Re-endorsing the proposition that “peremptory challenges [to prospective jurors] are not of constitutional dimension,”¹²⁷ the Court wrote that Martinez-Salazar’s rule-based right to peremptory strikes was not impaired at all by Martinez-Salazar’s *choice* to use one on the veniremember who should have been excused for cause:

A hard choice is not the same as no choice. Martinez-Salazar, together with his codefendant, received and exercised 11 peremptory challenges (10 for the petit jury, 1 in selecting an alternate juror). That is all he is entitled to under the Rule.

After objecting to the District Court’s denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a

114. *Id.*

115. *Id.* at 309.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 309–10.

124. *Id.* at 310.

125. *United States v. Martinez-Salazar*, 527 U.S. 1021, 1021 (1999).

126. *Martinez-Salazar*, 528 U.S. at 307.

127. *Id.* (quoting *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)).

challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice. The District Court did not demand and Rule 24(b) did not require that Martinez-Salazar use a peremptory challenge curatively.

In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury.¹²⁸

In short, under this holding, no right—technical, procedural, substantial, constitutional, or otherwise—is infringed when a party chooses to use a peremptory to cure a for-cause error. Thus, when a peremptory is used curatively, there is no harm.

Importantly, the Court rejected the Government's contention that a party waives a for-cause error by not peremptorily challenging the veniremember.¹²⁹ Though technically dicta,¹³⁰ this statement of law has not been reexamined by the Court in the quarter century since it pronounced it. The Court reserved the question of whether it would be harmless error were there evidence that the trial court deliberately restricted Martinez-Salazar's right to exercise peremptory strikes.¹³¹

There were two concurrences. First, Justice Souter remarked that the opinion did not address the question of whether the error would have been harmless had Martinez-Salazar requested an additional peremptory strike to remove one of his jurors after exhausting his peremptories—on the basis that he had been forced to use one unfairly—and had such request denied.¹³² Second, Justices Scalia and Kennedy agreed with the majority's opinion that Martinez-Salazar was not forced to use a peremptory but argued that the majority should not have addressed the waiver question, as it was not properly before it.¹³³

Several states have adopted the federal approach.¹³⁴ However, there are two distinct and serious problems with this approach. The first problem with

128. *Id.* at 315–16.

129. *Id.* at 315.

130. *Id.* at 318 (Scalia, J., concurring in the judgment).

131. *Id.* at 316.

132. *Id.* at 317–18 (Souter, J., concurring).

133. *Id.* at 318–19 (Scalia, J., concurring in the judgment).

134. *See, e.g.,* State v. Fire, 34 P.3d 1218, 1220 (Wash. 2001). A more severe variant of this approach is to disregard any effect of the error on the party's peremptory challenges and to look only at whether the error caused a partial jury to be seated, in violation of the Sixth Amendment. *E.g.,* People v. Ramirez, 515 P.3d 1085, 1129 (Cal. 2022); Hammock v. State, 52 P.3d 746, 750 (Alaska Ct. App. 2002). In these jurisdictions, that rule is usually coupled with the requirement that the appellant also used all of his peremptory challenges. *E.g.,* Willis v. State, 977 S.W.2d 890, 894–95 (Ark. 1998). Thus, in these jurisdictions, a party is forced to use his peremptories to cure for-cause errors, and only if he exhausts his peremptories curing the court's errors and is forced to accept a demonstrably biased juror will he be entitled to reversal.

the federal approach is that it puts the challenging party in a catch-22 situation: They can either strike the veniremember and cure the error or save their peremptory and risk losing on appeal after having their case judged by a juror who they do not want on their jury. Thus, only parties who are *certain* they are correct and will get a reversal on appeal will leave the challenged veniremember on their petit jury. Yet it is difficult to be *certain* about any legal issue, much less one which, given that it arises at trial, must be analyzed quickly. All other parties—even those who were correct and would have gotten a reversal on appeal—are effectively forced to use a peremptory, contrary to the Court’s framing.

The second problem with the federal approach is that it encourages sandbagging by those unusual parties who are certain they will get a reversal on appeal. If the challenger believes he is right and really is right, he can ensure a mistrial by *not* striking the veniremember, wasting time and resources.

B. THE WAIVER APPROACH

Under the federal approach, a party forgoes any right to challenge a for-cause error on appeal if he removes the challenged juror with a peremptory. By contrast, the waiver approach is based on exactly the opposite proposition: A party waives his right to assign error to the denial of a challenge for cause of a veniremember when he *declines* to exercise a peremptory challenge on that veniremember. The waiver approach considers the for-cause error harmful only if the challenging party used a peremptory to remove the challenged veniremember and then subsequently exhausted all of their peremptories.¹³⁵ In other words, it is the complete inverse of the federal approach, under which the use of the peremptory would make the error harmless.

This approach is best exemplified by the opinion of the Montana Supreme Court in *State v. Good*.¹³⁶ There, the defendant-appellant, Good, was charged with sexual abuse of children.¹³⁷ During jury selection, while discussing the presumption of innocence, two veniremembers expressed doubt “that the teenage victim would make up a story about sexual abuse.”¹³⁸

135. It is not clear whether Montana still requires the exhaustion of peremptory challenges to reverse; the language of its supreme court suggests it does not. See *State v. Calahan*, 538 P.3d 1129, 1133 (Mont. 2023) (“If a district court denies a legitimate for-cause challenge, the structural error *must* be reversed.” (emphasis added)). However, such a liberal rule would be impossible to justify. It would effectively start with the same proposition the United States Supreme Court started with in *Martinez-Salazar*—that for-cause and peremptory challenges are conceptually separate, and therefore not required to be used to avoid waiver—and then come to exactly the opposite conclusion, i.e., that nothing, including the fact that the biased veniremember did serve on the petit jury, can cure the error. It would combine the sandbagging drawback of *Martinez-Salazar* with the disregard for the impartiality of the resulting jury drawback of *Jonas* and its relatives, discussed *infra* Section III.C.

136. See generally *State v. Good*, 43 P.3d 948 (Mont. 2002).

137. *Id.* at 951–52.

138. *Id.* at 952.

A third veniremember “stated that she would find it hard to understand why a defendant would not want to testify in his own defense and it would bias her opinion.”¹³⁹ The trial court denied Good’s challenges for cause to each of these veniremembers.¹⁴⁰ Good removed the first two veniremembers with peremptory challenges and subsequently exhausted all six of his peremptory challenges.¹⁴¹

On appeal, the Montana Supreme Court ruled that Good had waived any error committed by the trial court in denying his challenge for cause to the third veniremember, as Good could not demonstrate that he had removed her from his petit jury with a peremptory strike—exactly what *Martinez-Salazar* would have required Good to do to preserve the error for review.¹⁴² As to the other two veniremembers, the court ruled that the trial court had committed error as to each of them by denying Good’s challenges for cause.¹⁴³

But were the errors grounds for reversal? Under the federal approach, they would have been made harmless by Good’s peremptories. The court held that they were and reversed. It reasoned that the waiver requirement forced Good to use two of his six peremptory challenges on the two veniremembers who should have been excused for cause.¹⁴⁴

Since Good used all four of his remaining statutory peremptories,¹⁴⁵ the court presumed that there were two additional veniremembers who sat on Good’s jury whom Good would have removed peremptorily but could not.¹⁴⁶ In such cases, the court held, the error is structural and prejudice is conclusively presumed:¹⁴⁷

[S]uch error precedes the presentation of evidence and affects the very framework in which the trial proceeds. Additionally, the impartiality of the jury is at issue when a defendant is effectively denied peremptory challenges. Furthermore, unlike trial error, an error during voir dire does not involve the admission of tainted evidence which can be qualitatively or quantitatively weighed against the admissible evidence introduced at trial.¹⁴⁸

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 956.

143. *Id.* at 958.

144. *See id.* at 956 (“We decline to address whether the District Court abused its discretion with regard to the unknown juror since Good cannot conclusively demonstrate that he exercised one of his peremptory challenges to remove her.”).

145. *Id.* at 952.

146. *Id.* at 956.

147. In so holding, it overruled precedent to the effect that the error may still be harmless if at trial there was “overwhelming evidence” presented against the appellant. *Id.* at 959–60, *overruling* *State v. Williams*, 866 P.2d 1099, 1103 (Mont. 1993). Given that it is now held structural, such an error now requires automatic reversal. *Good*, 43 P.3d at 959–60.

148. *Good*, 43 P.3d at 960. Some states with the same category of rule as Montana do not hold that the peremptory has anything to do with the impartiality of the jury. *See, e.g.*,

There are significant problems with this approach as well. The first problem is that it assumes the challenger's peremptory right was infringed even if, in reality, it wasn't. There are certainly cases in which the appellant would not have exercised an additional peremptory, even if he had been able to. Who knows, other than Good, possibly, whether Good would have used those two peremptories? Who knows whether he would not have declined to use them? Thus, this approach grants new trials even when the appellant's right to peremptory challenges was not actually impaired: it overprotects. The second problem with this approach is that it reverses even when by all objective measures the jury that delivered the verdict was impartial. Therefore, the result in a second trial will likely be the same as the first, wasting time and resources. Finally, this approach effectively *ensures* the result of a new trial any time a for-cause error is made (and subsequently cured), for any astute lawyer will counsel her client to exhaust his peremptory challenges, even when he has no objection to any of the veniremembers not challenged for cause and has no desire to remove any of them peremptorily.

C. JONAS AND IOWA'S TEDIOUS APPROACH

Iowa's approach is explained in *State v. Jonas* and codified for criminal cases at Iowa Rule of Criminal Procedure 2.18(11).¹⁴⁹ It starts from the same premise as the waiver approach: A party waives his right to assign error to the denial of a challenge for cause to a veniremember when he declines to exercise a peremptory challenge on that veniremember.

The issue in *Jonas* was the same: whether an error in denying a challenge to a venireman for cause during jury selection was harmless.¹⁵⁰ The defendant,

Commonwealth v. Ingber, 531 A.2d 1101, 1104–05 (Pa. 1987); *State v. Clark*, 220 So. 3d 583, 663 (La. 2016) (holding the peremptory challenge right is separately guaranteed by Louisiana Constitution). And even among states that do, there is some disagreement about whether the presumption of prejudice can be overcome. Compare *Fuson v. State*, 735 P.2d 1138, 1140 (N.M. 1987), with *Good*, 43 P.3d at 959–60. See also *Clark*, 220 So. 3d at 663 (“Prejudice is presumed when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges.”), *vacated on other grounds*, 585 U.S. 1012 (2018).

149. The text:

2.18(11) *Preserving appellate review of certain denials of challenges for cause.*

a. To preserve for appellate review a claim that a challenge for cause was improperly denied when the party later exercised a strike on the same juror, a party must do the following outside the presence of the jury before the jury is impaneled:

(1) The party must identify a seated juror whom the party would have stricken if an additional strike had been available and state the reasons why the juror would have been stricken.

(2) The party must request an additional strike to be used on that juror.

b. If the court grants the additional strike, then another juror shall be called and examined as needed.

COMMENT: Rule 2.18(11). Rule 2.18(11) is intended to codify the procedure set forth in *State v. Jonas*, 904 N.W.2d 566 (Iowa 2017).

150. See *State v. Jonas*, 904 N.W.2d 566, 571 (Iowa 2017).

Jonas, was convicted by a jury of second-degree murder.¹⁵¹ Jonas, a man, was homosexual and charged with murdering a man with whom he had had intimate relations.¹⁵² Jonas sought to remove a man from the venire for-cause because the man told the trial court that Jonas's homosexuality would influence his ability to be fair and impartial in the case.¹⁵³ The trial court denied the motion.¹⁵⁴ Jonas then exercised one of his peremptory strikes on the venireman.¹⁵⁵ Thus, the venireman in question did not serve on the jury. Jonas subsequently used all of his allotted peremptory strikes.¹⁵⁶ After Jonas was convicted, he appealed, assigning error to the trial court's failure to excuse the venireman for cause.¹⁵⁷ The court of appeals affirmed the jury's conviction because Jonas could not show prejudice.¹⁵⁸

The Iowa Supreme Court granted further review and affirmed.¹⁵⁹ Though it agreed with Jonas that the trial court erred in failing to excuse the venireman for cause,¹⁶⁰ the court found the error harmless since Jonas had been able to remove the venireman from the panel.¹⁶¹ The court had long held that, in contrast to evidentiary errors, prejudice would not be presumed in jury-selection errors where the for-cause error was cured with a peremptory strike,¹⁶² and in this case, the appellant apparently failed to demonstrate any resulting prejudice.¹⁶³ However, it explained that it would have presumed prejudice had Jonas requested to strike an additional juror who decided his case and had his request denied.¹⁶⁴ In such a case, the court reasoned, Jonas would have been harmed by having his case decided by a juror whom he wished to exclude and whom he would have been able to exclude had he not been forced to use the strike on a veniremember who should have been struck for cause.¹⁶⁵ Three justices concurred in the result but argued the court should not have reached the prejudice issue, since, they argued, the trial court had not erred in the first place.¹⁶⁶

This approach dispenses with the first problem inherent in Montana's approach: That is, it does not reverse unless the party proves that she would

151. *Id.* at 568.

152. *Id.* at 567-68.

153. *Id.* at 569-70.

154. *Id.* at 570.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 568.

160. *Id.* at 575.

161. *Id.* at 584 (citing *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993)).

162. *Neuendorf*, 509 N.W.2d at 747.

163. *See Jonas*, 904 N.W.2d at 584 ("As a result, the actual prejudice test of *Neuendorf*, rather than the automatic prejudice test of *Mootz*, controls. As a result, the defendant cannot succeed in this appeal.")

164. *Id.* at 583.

165. *Id.* at 583-84.

166. *Id.* at 584-88 (Waterman, J., concurring).

have used an additional peremptory but was not able to. However, it wastes even more time than Louisiana's approach. A careful lawyer will follow the steps prescribed in *Jonas*, thus ensuring her client's right to a new trial should her client lose, even if her client really had no problem with the juror against whom he declares he would have exercised his additional peremptory. Thus, *Jonas* opens the door to formalist gamesmanship that has nothing to do with the justice or merits of the case. So, it wastes time on the front end (encouraging parties to engage in a tedious process of preservation) and on the back end (granting a new trial anytime the process is performed correctly).

And on the other hand, the procedure is confusing: Parties represented by lawyers who do jury trial work all the time know what they need to do to ensure review of the for-cause error, but what about pro se litigants or litigants represented by lawyers who rarely do jury trials? The potential for differentials in justice resulting from complex, technical procedure is part of the reason for the harmless error rule;¹⁶⁷ yet the impossibility of dealing with peremptory strikes on review has *created* complex, technical procedure.¹⁶⁸

III. YET ANOTHER REASON TO ABOLISH PEREMPTORY CHALLENGES

*[I]f 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.*¹⁶⁹

Iowa should do exactly that: eliminate peremptory challenges. The Iowa Supreme Court's long, tedious opinion in *Jonas* and tedious process by which for-cause errors can be presented and reversed on review demonstrate the intractability of this problem. On one hand, peremptory challenges have been around, at least in the criminal context, for a long time in the Anglo-American legal tradition.¹⁷⁰ On the other hand, courts recognize that peremptory challenges do not supply any benefit important enough to make us particularly worried about their denial.¹⁷¹ None of the fifty states have, for example, an automatic reversal rule. Finally, courts cannot agree about how they interact with their constitutional cousin, challenges for cause.¹⁷² Their conceptual separation—made by some jurisdictions, including the United States, to avoid tricky problems on review—makes no sense: peremptory and

167. See *Kotteakos v. United States*, 328 U.S. 750, 759–60 (1946).

168. See IOWA R. CRIM. P. 2.18(11).

169. *The Supreme Court 2008 Term: Leading Cases*, *supra* note 83, at 220.

170. See BLACKSTONE, *supra* note 78, at 271–72; see Ford, *supra* note 90, at 415 (“[T]he fact that they have been around so long without anyone mounting a convincing argument in their favor suggests there is no persuasive justification.”).

171. See *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993) (declining to presume defendant would have used an additional peremptory); see also *Hammock v. State*, 52 P.3d 746, 750 (Alaska Ct. App. 2002) (declining to reverse even though appellant would have exercised an additional peremptory because appellant did not demonstrate that any of his jurors “were, in fact, not fair”).

172. Compare *supra* Section II.A, with *supra* Sections II.B–C.

for-cause challenges do the same thing (remove a person from the venire). As Blackstone's discussion of them, in tandem with challenges for cause (and with the same verbiage), makes clear, their development is intertwined.¹⁷³

The impossibility of dealing coherently with peremptory challenges on review is but another reason favoring their abolition. Thus, this Essay adds an argument to the chorus¹⁷⁴ calling for as much.

Jonas is a solid approach to an intractable problem. Certainly, it alleviates the worst issue of the basic waiver approach employed by Montana and others (reversal when the appellant would not have exercised an additional peremptory even if he had the chance to).¹⁷⁵ However, it is too complex and still vulnerable to manipulation. *Martinez-Salazar* presents a simpler approach, yet it is unrealistic because the challenge for cause and the peremptory challenge are not separate concepts; they are complements. To not require that a peremptory challenge be used to cure a for-cause error is, first, not realistic in most cases, and second, invites sandbagging in the unusual case in which the challenging party is certain of his success on appeal.

The reasons to preserve the right are few¹⁷⁶ while the reasons to abolish the right are myriad. The difficulty of administering a rule of review in this context simply adds weight to the already weightier side of the balance. Iowa ought to abolish the peremptory strike.

At least in *almost* every case. There is perhaps sufficient weight to the "legitimacy" argument, personal and public, put forward by Blackstone and others since,¹⁷⁷ that peremptories should be eliminated in every type of case *except* criminal ones in which the defendant is in jeopardy of being put to death or imprisoned for life, "*in favorem vitae*."¹⁷⁸ When the stakes are so high, it is important that every person, and especially the defendant, believe the decisionmakers are impartial—and peremptories help ensure that.¹⁷⁹ To achieve that goal, however, only the defendant—not the government—need have power to peremptorily excuse veniremembers.¹⁸⁰

173. BLACKSTONE, *supra* note 78, at 271–72.

174. See *supra* notes 84–90 and accompanying text.

175. See *supra* Section II.B.

176. The writer has discovered no evidence that they actually help impanel an impartial jury (outside of correcting for-cause errors). And the positive psychological effect on the defendant, counteracted by the negative psychological effect on the struck veniremembers, seems to be quite low. See *supra* notes 97–99 and accompanying text.

177. See *supra* notes 97–98 and accompanying text.

178. BLACKSTONE, *supra* note 78, at 271–72.

179. See MONTESQUIEU, *supra* note 13, at 190.

180. A nice complement to this proposal would be a change in the rule governing for-cause challenges based on partiality in criminal cases, specifically, the current rule which essentially requires a showing of fixed bias. See IOWA R. CRIM. P. 2.18(5)(k), (o); see also *State v. Linderman*, 958 N.W.2d 211, 218 (Iowa Ct. App. 2021) (“[T]he test is ‘whether the juror holds such a fixed opinion of the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.’” (quoting *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985))). It should be amended to require excusal (on challenge) if the veniremember manifests *any doubt* about their ability to judge the case impartially. However, there exists neither time nor space in this Essay necessary to fully analyze the problem. Probably, one of the major concerns would be that

Iowa could simplify these problems significantly if it cuts down on the provision of peremptory strikes to something closer to that which existed in Blackstone's England. That is, provide a significant number of peremptories to defendants in capital cases,¹⁸¹ and provide none otherwise. The miniscule benefit that peremptories provide in composing an impartial jury is not worth the amount of confusion and resources that must be spent to administer them. The psychological benefit to the criminal defendant on trial for his life, put forward by Blackstone and Montesquieu,¹⁸² applies to other litigants but to an order-of-magnitude lesser degree. In short, the value of peremptory challenges in cases other than those of the most severe import is outweighed by the difficulty of their administration.

And the Iowa Supreme Court has power to do it. The right to peremptory challenges is provided by the Iowa Court Rules,¹⁸³ promulgated by the Iowa Supreme Court, subject only to legislative acquiescence.¹⁸⁴

The second part of this Essay's proposal is that, in those rare cases where peremptories are still conferred, the denial or impairment of their exercise ought to be held *per se* grounds for a new trial. This does not mean a new trial every time a defendant uses a peremptory on a veniremember erroneously not removed for cause. The baseline rule is and should be that under such circumstances the error is cured. However, if the defendant used all of her peremptories and one excused a veniremember who should have been excused for cause, then she should have a right to a new trial. That she would have used an additional peremptory should be presumed. Were peremptories limited to cases involving crimes subject to life imprisonment, the number of new trials resulting from this rule (as opposed to the more byzantine *Jonas* rule) would be negligible. And the value of peremptories on review would be more apparent, and thus reversal for their denial less questionable. Of course, this rule would apply as well in more egregious cases of impairment, such as when a judge outright denies to the defendant the right to exercise peremptories at all.

veniremembers would attempt to "get out of" jury service by dishonestly manifesting doubt about their ability the judge impartially; but jurors could do the exact same thing under the current rule by dishonestly expressing certainty about their inability to be impartial. Surely, there is room for further discussion on this issue, especially in connection with the changes this Essay has proposed. But making the for-cause challenge standard more liberal would lessen the impact of almost completely eliminating peremptories.

181. BLACKSTONE, *supra* note 78, at 271. In Iowa, where there is no death penalty, only for crimes subject to a penalty of life imprisonment would my rule supply peremptory strikes, and even then, only to the defendant.

182. See MONTESQUIEU, *supra* note 13, at 190; BLACKSTONE, *supra* note 78, at 271-72.

183. See IOWA R. CRIM. P. 2.18(9), (10); IOWA R. CIV. P. 1.915(7).

184. IOWA CODE § 602.4202 (2025) ("A rule or form submitted as required under subsection 1 takes effect sixty days after submission to the legislative council, . . . unless the legislative council, within sixty days after submission and by a majority vote of its members, delays the effective date . . .").

CONCLUSION

Several voices have called for the abolition of peremptory challenges. England, from whose law the common law traditions of peremptory challenge and harmless error derive, abolished them long ago.¹⁸⁵ One state has eliminated them altogether.¹⁸⁶ This Essay adds only one additional reason to follow Arizona's course: that courts do not know what to do with them on appeal. Accordingly, the Iowa Supreme Court, through its power to amend the rules of civil and criminal procedure, should eliminate entirely the right to peremptory challenges in all cases except those criminal cases for which life imprisonment is a possible penalty.

185. See Criminal Justice Act of 1988, ch. 33 § 118(1) (Eng.).

186. See Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure at 3–6, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021).