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### Harmless Constitutional Error and the Institutional Significance of the Jury

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# HARMLESS CONSTITUTIONAL ERROR AND THE INSTITUTIONAL SIGNIFICANCE OF THE JURY

Roger A. Fairfax, Jr. \*

*Appellate harmless error review, an early twentieth-century innovation prompted by concerns of efficiency and finality, had been confined to nonconstitutional trial errors until forty years ago, when the U.S. Supreme Court extended the harmless error rule to trial errors of constitutional proportion. Even as criminal procedural protections were expanded in the latter half of the twentieth century, the harmless error rule operated to dilute the effect of many of these constitutional guarantees—the Sixth Amendment right to jury trial being no exception. However, while a trade-off between important process values and the Constitution's protection of individual rights is inherent in the harmless error rule, recent applications of appellate harmless error review to certain Sixth Amendment errors have exceeded the scope of the initial compromise. Highlighting the current trend of application of appellate harmless error review to jury verdicts based on fewer than all of the required elements of a charged offense, this Article warns that we are approaching the “point of no return” in the evolution of the jury in our constitutional democracy. The Article maintains that the Supreme Court's willingness to sacrifice individual criminal defendants' Sixth Amendment jury trial rights at the altar of efficiency and finality has subverted the constitutional function of the jury itself, and has undermined the jury's institutional role. The Article proposes a new theoretical grounding for the constitutional recognition of the jury's core institutional interests—as distinct from the individual Sixth Amendment jury trial rights currently deemed expendable by the Court—and advances a concrete proposal for the Supreme Court's inclusion of certain jury-related constitutional errors in the category of those structural errors not susceptible to appellate harmless error review.*

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## INTRODUCTION

Conventional wisdom teaches that the last decade of U.S. Supreme Court criminal procedure jurisprudence has fortified the jury's prestige considerably. The line of cases beginning with *Apprendi v. New Jersey*,<sup>1</sup> for many, represents the renaissance of the Sixth Amendment guarantee of trial by jury. However, even as the Supreme Court seemingly has affirmed

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1. 530 U.S. 466 (2000) (holding that any fact that increases a sentence beyond a statutory maximum must be decided by a jury beyond a reasonable doubt); *see also* United States v. Booker, 543 U.S. 220 (2005) (extending *Blakely* reasoning to federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296 (2004) (requiring juries, rather than judges, to find facts necessary to enhance a sentence within statutory guidelines).

the significance of the jury with its one hand, it has torn at the jury's very foundation with its other, undermining both the constitutional role and institutional interests of the jury in profound ways. Perhaps the most telling signal of the jury's institutional erosion is the Court's misguided application of the appellate harmless error rule to certain constitutional trial errors implicating the jury's core fact-finding function.

The U.S. Constitution does not guarantee a criminal defendant a trial free from error.<sup>2</sup> The doctrine of harmless error, which saves a flawed criminal conviction from reversal, generally permits a conviction to stand where the reviewing court believes the defect in the proceeding was harmless beyond a reasonable doubt. A twentieth-century innovation prompted primarily by concerns of efficiency and finality, the harmless error rule applies to all trial errors, save for a narrow class of constitutional errors deemed to be structural. A criminal conviction infected by structural error is immune to harmless error review and, therefore, is subject to automatic reversal. Conversely, if the constitutional error of which the criminal defendant complains is not deemed structural, the appellate court may both acknowledge the conviction was tainted with constitutional error and, at the same time, affirm the conviction.

The Supreme Court has been sparing in its designation of errors as structural, thus far admitting only a handful of constitutional defects into the category of errors requiring automatic reversal.<sup>3</sup> What remains in the vast number of errors that can be deemed harmless would surprise most casual observers; everything from Fourth Amendment violations to the erroneous admission of a coerced confession may be deemed harmless for purposes of appellate review of criminal convictions.<sup>4</sup> One particularly troubling omission from the list of "unforgivable" structural errors is the trial court's failure to instruct the jury as to all the elements of the charged offense.

Imagine a scenario in which the government charges an individual with violation of a particular criminal statute containing three elements. However, the trial court instructs the jury on only two of those three

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2. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."); see also Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. Chi. L. Rev. 511, 575 (2004) ("While the right to a fair trial is a fundamental constitutional right, the ideal, error-free trial proves to be rather elusive in practice.").

3. The U.S. Supreme Court thus far has recognized only bias of the trial judge, racial discrimination in the selection of the grand jury, denial of the right to pro se representation, denial of the right to counsel and counsel of one's choosing, denial of the right to a public trial, and defective reasonable doubt instructions as errors that cannot be harmless and necessarily must result in the reversal of a conviction. See, e.g., *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563–65 (2006); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); see also *infra* Part I.C.

4. Persuasive arguments have been made for and against inclusion of such constitutional defects in the category of structural error. See generally, e.g., Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 Harv. L. Rev. 152 (1991).

elements. The jury, which never was told that it had to find the third element in order to convict, returns a verdict of guilty. The appeals court acknowledges that the trial court erred in instructing the jury on only two elements of the three-element offense, and that the flawed instruction and omitted elements verdict violated the defendant's Sixth Amendment right to a jury trial. Nevertheless, the appeals court believes the evidence presented by the government at trial was such that the jury would have found the missing element beyond a reasonable doubt had it been so instructed. Therefore, the appeals court declares the constitutional error "harmless" and, although no fact-finder has determined that the particular element of the crime had been proven, affirms the conviction.

The failure to instruct the jury on a basic element of the crime for which the defendant is standing trial, as depicted in the hypothetical above, would seem to compromise the Sixth Amendment right to jury trial to such an extent that the conviction would be reversed *per se*. This is particularly so in this era of "renewed respect" for the jury's fact-finding role in criminal adjudication. However, the Supreme Court quietly has made the aforementioned hypothetical a reality of our criminal procedure jurisprudence. Rather than reversing a conviction that is based on a jury's finding of fewer elements than are required by a statute, an appellate court may acknowledge the Sixth Amendment violation, yet, under harmless error review, opine on what the jury would have found with respect to the missing element or elements. By engaging in what this Article terms "first-guessing" of the jury's verdict, an appellate court may allow a conviction to stand despite the fact that the jury—the fact-finder to which the defendant is entitled under the Sixth Amendment—has not found each element of the crime beyond a reasonable doubt.

While the Supreme Court acknowledges that elemental omission errors violate the Sixth Amendment right to jury trial, it deems the violation no more important than the myriad other constitutional errors that can be deemed nonprejudicial and overlooked on appellate harmless error review. Thus, the Supreme Court has shown its willingness to sacrifice important jury right principles at the altar of the efficiency and finality interests that the harmless error rule advances. As a result, contrary arguments based upon respect for the individual Sixth Amendment rights of the criminal defendant have been doomed from the start.

However, the Supreme Court's application of harmless error review in such a scenario rests upon the premise that the only injury caused when a defendant is convicted by means of a verdict based upon fewer than all the elements of a crime is a violation of the defendant's Sixth Amendment right to a jury trial. To the contrary, as this Article argues, the application of harmless error review to these flawed verdicts works a different and more profound constitutional injury—to the jury and the very structure of the Constitution itself. The Supreme Court has viewed this particular constitutional error through much too narrow a theoretical lens. A broader examination reveals that appellate court first-guessing of juries not only

violates the Sixth Amendment jury trial right and fundamental notions of due process, but also offends constitutional structure by undermining the institutional interests of the jury.

The jury, which has a constitutional function independent of its service as a vehicle for an individual's Sixth Amendment rights, is frustrated in its structural and institutional role when a court assumes what it would have done had it been correctly instructed. The willingness of the Supreme Court to permit such first-guessing of a jury's verdict through harmless error review of elemental omissions is evidence of a profound lack of regard for the jury's institutional existence, an existence that will be eroded beyond recognition unless the Court corrects course. This Article proposes a shift from a rights-focused approach to an institution-focused approach to harmless constitutional error in the jury context. Such a shift would necessitate that even if a court were inclined to lump the Sixth Amendment violation occasioned by elemental omissions in with the other "nonstructural" errors not subject to automatic reversal, it still would be obligated to remedy the institutional violence done to the jury itself. This recognition of the institutional interests of the jury, therefore, requires the inclusion of elemental omissions in the category of those structural errors not subject to harmless error review. In sum, if the jury is to retain any semblance of its intended constitutional function, appellate courts must respect the institutional interests of the jury, which cannot be further subordinated to the pragmatic values the harmless error rule advances.

Part I of this Article briefly traces the development of the harmless error doctrine and the structural error carve-out. Part II of the Article analyzes the recent jurisprudential trend in which harmless error review is being applied to elemental omissions and explains the Court's flawed understanding of the nature and scope of the constitutional injury involved when an appellate court first-guesses the fact-finder on harmless error review. Part III argues for the acknowledgement of the structural and institutional roles of the jury in the criminal process, illuminates the manner in which those roles are frustrated by appellate first-guessing of omitted elements in jury verdicts, and proposes a theoretical grounding for subjecting elemental omissions—and, for that matter, any error that wholly subverts the institutional role of the jury—to automatic reversal. Part IV considers the consequences of expanding structural error to include elemental omissions, including normative implications for efficiency, fairness, finality, and public confidence in the administration of criminal justice.

## I. THE HARMLESS ERROR DOCTRINE AND STRUCTURAL ERROR

*A. Development of the Harmless Error Rule in the United States*

A twentieth-century innovation in the United States,<sup>5</sup> “[h]armless error is one of the most frequently discussed issues in criminal appeals.”<sup>6</sup> Most accounts trace the history of the development of harmless error doctrine to the 1835 English case of *Crease v. Barrett*.<sup>7</sup> In *Crease*, a civil case, the Court of the Exchequer “evinced its resolve not to invade the province of the jury,”<sup>8</sup> and declined to find harmless the erroneous exclusion of evidence that was unlikely to change the result.<sup>9</sup> Whatever the true intent of the *Crease* court,<sup>10</sup> its 1835 ruling became the touchstone for the rule of automatic reversal that would reign in England for the next several decades.<sup>11</sup>

In 1873, Parliament responded to the perceived hypertechnicality of an automatic reversal rule, and adopted the Judicature Act, which, in civil cases, decreed, “A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial . . . .”<sup>12</sup> English judges, however, were not, as a general matter, inclined to assess the evidence and affirm verdicts infected with error.<sup>13</sup> Parliament, in 1907, persisted and passed the Criminal Appeal Act, which, inter alia, set out a harmless error rule: “Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they considered that no substantial miscarriage of justice has actually occurred.”<sup>14</sup>

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5. See Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309, 314 (2002) (“Harmless error doctrine is largely a creature of the twentieth century.”).

6. Simon, *supra* note 2, at 575. Much of the attention given to the harmless error rule seems to have come from the past quarter century. See Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. Crim. L. & Criminology 421, 421 (1980) (noting, in 1980, that the harmless error rule “has received comparatively little critical attention”).

7. 149 Eng. Rep. 1353.

8. See Roger J. Traynor, *The Riddle of Harmless Error* 6 (1970).

9. *Crease*, 149 Eng. Rep. at 1359.

10. See Traynor, *supra* note 8, at 6–8 (arguing that *Crease* was misinterpreted by later judicial opinions and did not stand for the fidelity to the rule of automatic reversal commonly attributed to it).

11. See Lester Bernhardt Orfield, *Criminal Appeals in America* 190 (1939); see also John M.M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819, 822 & n.12 (1994).

12. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, sched. 48 (Eng.).

13. See Traynor, *supra* note 8, at 9–10.

14. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, § 4 (Eng.); see also Traynor, *supra* note 8, at 10–11; Charles S. Chapel, *The Irony of Harmless Error*, 51 Okla. L. Rev. 501, 519 (1998). However, even despite the English double jeopardy bar, which well into the 1960s

Influenced by the same formalistic English judicial philosophy which compelled Parliament's legislative response, the judicial climate in the United States in the nineteenth century was one in which "[a]ppellate courts in this country were wont to hold that an error raised a presumption of prejudice or called for automatic reversal, and they reversed judgments for the most trivial errors."<sup>15</sup> By the beginning of the twentieth century, American appellate judges "[i]n numerous decisions . . . had reversed hard-won convictions because of only minor errors of procedure or form."<sup>16</sup> Popular outcry gave way to reform efforts surrounding the automatic reversal rule.<sup>17</sup>

Some of the most prominent members of the bar and legal academy were outspoken critics of the automatic reversal regime, and aided in efforts to prompt legislatures to alter the rule.<sup>18</sup> One example of these efforts was the "Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation," which boasted the membership of the likes of Felix Frankfurter, Roscoe Pound, and William H. Taft.<sup>19</sup>

In 1919, Congress responded by amending the Judicial Code with section 269,<sup>20</sup> which was designed "to insure that trial verdicts were not lightly disturbed on appeal, especially under circumstances where the grounds for appeal were mere technical errors."<sup>21</sup> This legislation, now codified at 28 U.S.C. § 2111, provides, "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record

prohibited the ordering of a new trial, appellate judges were loathe to dismiss appeals where error had infected the trial. See Traynor, *supra* note 8, at 11.

15. Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. Chi. L. Rev. 1, 20 (1994) (quoting Traynor, *supra* note 8, at 13–14).

16. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1174 (1995).

17. Chapel, *supra* note 14, at 522 ("Citizens became increasingly frustrated with appellate court reversals of criminal convictions."); see also Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 1005–06 & n.56 (1973) (describing public reaction—and, sometimes, overreaction—to certain high-profile reversals of criminal convictions).

18. See Goldberg, *supra* note 6, at 422–23 & n.15; see also David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 Utah L. Rev. 483, 486 & n.18. Partly as the result of concern in some quarters for the integrity of constitutional criminal protections, there was some resistance to the notion of applying the harmless error rule to criminal cases. See Dow & Rytting, *supra*, at 486–87. There was "a strong effort in the Congress to confine [the 1919 law] . . . to civil litigation, because of fear that the historic securities thrown around the citizen charged with crime might be too easily relaxed." *Id.* at 486 (citing 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 852 (West 1982)).

19. Goldberg, *supra* note 6, at 422 n.15; see also *Kotteakos v. United States*, 328 U.S. 750, 759–60 & n.14 (1946).

20. See Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 892, 992; see also Orfield, *supra* note 11, at 195 ("Congress finally passed a [harmless error] statute . . . after considerable agitation.").

21. Saltzburg, *supra* note 17, at 1006. Professor Stephen A. Saltzburg has pointed out that some states responded to the dissatisfaction with automatic reversal rules before Congress did. See *id.* at 1006 n.58 (citing Cal. Const. art. 6, § 4.5).



without regard to errors or defects which do not affect the substantial rights of the parties.”<sup>22</sup>

The federal harmless error legislation did not receive the attention or have the immediate impact reformers might have expected. However, in the interwar period, appellate judges faced continued criticism regarding reversals for technical errors at trial,<sup>23</sup> and the reformers continued to push for change.<sup>24</sup> Just after World War II, their efforts were met with a measure of success. As part of the reform-minded promulgation of the 1946 Federal Rules of Criminal Procedure, a harmless error rule was adopted. Rule 52(a), which implemented the 1919 harmless error statute, mandated that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights must be disregarded.”<sup>25</sup> Still, the text of the harmless error rule did not illuminate the manner in which the rule was to operate in practice.<sup>26</sup>

A partial answer to that question came that same year in the 1946 case of *Kotteakos v. United States*,<sup>27</sup> the first time the Supreme Court fully considered the harmless error statute and its import.<sup>28</sup> The Court, after recounting the development of the harmless error doctrine in the federal system and in the states, made clear that the harmless error rule was operative<sup>29</sup>: “If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and

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22. 28 U.S.C. § 2111 (2000).

23. See Orfield, *supra* note 11, at 182 (noting that in the period just before World War II, “[a] very common criticism of criminal appeals has been that appellate courts too often reverse a conviction on purely technical considerations”); Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925) (“The American Courts of Review reflecting as they must the temper of the great body of the American Bar, tower above the trials of criminal cases as impregnable citadels of technicality.”).

24. For example, the American Law Institute, as part of its 1930 Model Code of Criminal Procedure, offered a harmless error provision which mandated,

No judgment shall be reversed or modified unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Code of Criminal Procedure § 461 (1930); see also William Brunyate, *The American Draft Code of Criminal Procedure*, 1930, 49 L.Q. Rev. 192, 205 (1933).

25. Fed. R. Crim. P. 52(a). Rule 52(b) is directed to plain error. Although this Article deals only with harmless error in the criminal context, the harmless error rule in federal civil cases is promulgated at Federal Rule of Civil Procedure 61. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 14 & n.46 (1997) (noting the sharp distinction between civil and criminal harmless error rules).

26. See, e.g., Simon, *supra* note 2, at 576 (noting that “the terse language of the Federal Rules of Criminal Procedure offers little guidance” on the question of how the harmless error analysis is to proceed).

27. 328 U.S. 750 (1946).

28. See Saltzburg, *supra* note 17, at 1007.

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

the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.”<sup>30</sup>

B. *Application of the Harmless Error Rule to Constitutional Error*

One thing was certain both before and after *Kotteakos*—the harmless error rule did not apply to constitutional errors at trial. Prior to the Supreme Court’s 1967 decision in *Chapman v. California*,<sup>31</sup> constitutional errors prompted the automatic reversal of a conviction.<sup>32</sup> Indeed, the notion that an error implicating a federal constitutional right could be harmless was not even taken seriously until the 1960s, when a significant expansion in the rights of criminal defendants was underway.<sup>33</sup> A five-justice majority in the 1963 case of *Fahy v. Connecticut*<sup>34</sup> avoided the question of whether a constitutional error could ever be harmless, a question the four dissenters answered in the affirmative.<sup>35</sup> Four years later, in *Chapman*, the Court made clear that automatic reversal is not required to remedy federal constitutional error.<sup>36</sup>

Petitioner Ruth Elizabeth Chapman had been convicted at a state trial infected with a clear federal constitutional violation and the state supreme court upheld the conviction pursuant to the harmless error rule contained in California’s constitution.<sup>37</sup> After determining that review of federal constitutional errors is governed by federal law,<sup>38</sup> the Court turned to the

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30. *Id.* at 764–65. As Justice Felix Frankfurter explained two decades after the 1919 harmless error legislation,

Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict. Of a very different order of importance is the right of an accused to insist on a privilege which Congress has given him.

*Bruno v. United States*, 308 U.S. 287, 294 (1939).

31. 386 U.S. 18 (1967).

32. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 10 (2002) (“[U]ntil 1967 it was generally accepted that the finding of any error of constitutional dimension was sufficient to merit the reversal of a defendant’s conviction; until that time, only errors falling short of constitutional import were susceptible to the harmless error rule.”).

33. See David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. Kan. L. Rev. 1401, 1404 (1997); see also Goldberg, *supra* note 6, at 423 (“Until *Fahy v. Connecticut*, no court had suggested that a federal constitutional error might be harmless. The Court had never given any serious consideration to the question, and no constitutional error had gone unremedied by reversal.”).

34. 375 U.S. 85 (1963).

35. See *id.* at 94 (Harlan, J., dissenting) (“Was it constitutionally permissible for Connecticut to apply its harmless-error rule to save this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence? I see no reason why not.”).

36. *Chapman*, 386 U.S. at 22.

37. *Id.* at 19–20.

38. *Id.* at 21 (“Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.”).

question of whether a federal constitutional error can ever be harmless. The Court noted that a harmless error rule operates in each of the fifty states and the federal system, and that none of those rules distinguished between errors of statute or rules on the one hand and constitutional error on the other.<sup>39</sup> Emphasizing the core purpose of harmless error review—avoiding the “setting aside [of] convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial”<sup>40</sup>—the Court expanded the harmless error doctrine to federal constitutional error<sup>41</sup>:

We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.<sup>42</sup>

*Chapman* then advanced a standard for judging the harmlessness of a constitutional error, declaring that, “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”<sup>43</sup>

After *Chapman*, even where the defendant raises a timely objection to a constitutional error below,<sup>44</sup> the appellate court may affirm the conviction in cases where it is clear beyond a reasonable doubt that such error did not affect the outcome of the proceedings or “did not contribute to the verdict

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39. *Id.* at 22.

40. *Id.*

41. Although this Article does not seek to challenge the application of harmless error review to constitutional error per se, others have criticized the harmless constitutional error rule as a general matter. *See, e.g.*, Goldberg, *supra* note 6, at 421 (condemning the harmless constitutional error rule as “among the most insidious of legal doctrines”).

42. *Chapman*, 386 U.S. at 22. Commentators have argued that the Supreme Court in *Chapman* failed to explain adequately the basis for its decision; it is unclear whether the harmless error rule rests “squarely on the Constitution” or is a “subconstitutional rule[] of procedure.” Meltzer, *supra* note 15, at 2, 5. Professor Daniel Meltzer argues the Supreme Court in *Chapman* may have relied upon what some have called “constitutional common law” in fashioning its doctrine. *See id.* at 26–27. Unlike *Kotteakos*, which closely examined the federal harmless error statute, 28 U.S.C. § 2111, the *Chapman* Court seemed to ignore the existing statutory basis for the imposition of the harmless error rule. *See id.* at 20–21, 26–27; *see also* Traynor, *supra* note 8, at 42.

43. *Chapman*, 386 U.S. at 24.

44. In cases where the defendant failed to make a timely objection below, the defendant has the burden of showing that the error was “plain,” and that it “affect[s] substantial rights,” and “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” in order to trigger the reviewing court’s remedial discretion to correct the error under Rule 52(b) of the Federal Rules of Criminal Procedure. *See* United States v. Olano, 507 U.S. 725, 735–36 (1993); *see also, e.g.*, United States v. Cotton, 535 U.S. 625, 631–34 (2002); Johnson v. United States, 520 U.S. 461, 466–67 (1997). In addition, appellate courts apply a different harmless error standard on habeas review. *See* Brecht v. Abrahamson, 507 U.S. 619, 623, 637–38 (1993) (holding that the standard applied to errors on habeas review is whether error had a “substantial and injurious effect or influence in determining the jury’s verdict,” rather than whether the error was harmless beyond a reasonable doubt (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))); John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas Corpus After Brecht v. Abrahamson*, 35 Wm. & Mary L. Rev. 163 (1993).

obtained.”<sup>45</sup> Two years later, the Supreme Court muddied the waters by allowing a conviction to stand despite constitutional error because of the “overwhelming” evidence of the defendant’s guilt.<sup>46</sup> Since then, the Court has shifted between the two standards—harmlessness based upon whether the error contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming—in applying the harmless error rule to federal constitutional error.<sup>47</sup>

Although the Court would be occupied with the tension between the two formulations of the harmless constitutional error standard in the years following *Chapman*, another issue would present a different challenge. In the course of expanding harmless error review to constitutional error, the Court did note that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.”<sup>48</sup> The difficulty of determining which errors can never be harmless—and, thus, are reversible per se—continues to present obstacles to achieving a coherent conception of harmless error doctrine.

### C. The Structural Exception to Harmless Constitutional Error

Although the Supreme Court has made plain that “most constitutional errors can be harmless,”<sup>49</sup> the *Chapman* Court noted its “prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,”<sup>50</sup> citing cases involving a biased trial judge,<sup>51</sup> the evidentiary admission of a coerced confession,<sup>52</sup> and the denial of the right to counsel at trial.<sup>53</sup> Beyond setting out these three precedents, the *Chapman* Court provided no guidance for the future ascertainment of those rights “so basic to a fair trial that their

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45. *Chapman*, 386 U.S. at 24. Although there has been considerable disagreement on the point, see, e.g., Brent M. Craig, “What Were They Thinking?”—*A Proposed Approach to Harmless Error Analysis*, 8 Fla. Coastal L. Rev. 1, 6–12 & n.62 (2006), the Supreme Court has instructed appellate courts to assess “not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Obviously, there are significant challenges to determining the effect on the jury under either approach. A number of proposals have been advanced to facilitate such determinations. See, e.g., Craig, *supra*, at 15–23 (proposing a hybrid between a jury poll and a special verdict form).

46. *Harrington v. California*, 395 U.S. 250, 254 (1969).

47. See, e.g., Traynor, *supra* note 8, at 43–46; Gregory Mitchell, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 Cal. L. Rev. 1335, 1342–47 (1994) (tracing the development of disparate standards).

48. *Chapman*, 386 U.S. at 23.

49. See *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

50. *Chapman*, 386 U.S. at 23.

51. See *id.* at 23 n.8 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

52. See *id.* (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)). Interestingly, the Court would, almost twenty-five years later, apply harmless error review to the admission of a coerced confession. See *Fulminante*, 499 U.S. 279.

53. See *Chapman*, 386 U.S. at 23 n.8 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

infraction can never be treated as harmless error.”<sup>54</sup> The Court subsequently “adopted an ad hoc approach which resulted in the vast majority of constitutional errors being held subject to harmless error analysis.”<sup>55</sup> Thus, in the wake of *Chapman*, we knew that harmless error review could be applied to many, but not all types of constitutional error; however, there was no principled way of determining into which category a specific constitutional error would fall.

Finally, nearly twenty-five years after *Chapman*, the Court offered a framework for determining which constitutional errors were subject to automatic reversal and which were subject to harmless error review. The Court, in *Arizona v. Fulminante*,<sup>56</sup> attempted to draw a principled distinction between the numerous constitutional errors it had made subject to harmless error review and those constitutional errors the Court had deemed to be reversible per se. This attempt yielded the trial error/structural error dichotomy to which the Court adheres today.<sup>57</sup>

The Court, in *Fulminante*, distinguished those errors susceptible to harmless error review by making a distinction between “trial” errors, “which may . . . be quantitatively assessed in the context of the other evidence,”<sup>58</sup> and “structural” errors, which “affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.”<sup>59</sup> To be sure, the term “structural error” does not refer to constitutional structure; instead, it corresponds to the “infrastructure” within which a criminal case is tried. Only those constitutional errors that “transcend[] the criminal process,”<sup>60</sup> and implicate that trial infrastructure or framework, according to *Fulminante*, were reversible per se.<sup>61</sup>

Grafting this explanation onto the Court’s precedents that had designated certain constitutional errors as not subject to harmless error review, the *Fulminante* majority carved out a category of rights giving rise to such structural errors, a category including the right to a public trial, the right to pro se representation, the right not to have members of one’s race excluded from a grand jury, the right to an unbiased judge, and the right to counsel.<sup>62</sup>

This list of structural errors pales in comparison to the remainder of constitutional errors, most of which presumably are deemed to be trial error

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54. *Id.* at 23.

55. McCord, *supra* note 33, at 1406.

56. 499 U.S. 279.

57. *See id.* at 307–11; *id.* at 291 (White, J., dissenting); *see also* Kamin, *supra* note 32, at 24; McCord, *supra* note 33, at 1406.

58. *Fulminante*, 499 U.S. at 307–08.

59. *Id.* at 310; *see also* Kamin, *supra* note 32, at 24.

60. *Fulminante*, 499 U.S. at 311 (internal quotation marks omitted).

61. Dow & Rytting, *supra* note 18, at 484 (“[T]he Supreme Court has concluded that constitutional violations that occur during the course of a criminal proceeding fall into one of two categories. They are either structural defects or trial errors. If an error constitutes a structural defect, then it requires automatic reversal. If it is simply a trial error, however, it must be subjected to harmless error analysis.” (citations omitted)).

62. *Fulminante*, 499 U.S. at 310.

and, therefore, subject to harmless error review.<sup>63</sup> Indeed, the Court has been miserly in its own designation of constitutional errors subject to automatic reversal.<sup>64</sup> A full decade-and-a-half after *Fulminante*'s inventory of those structural constitutional errors subject to automatic reversal, only two additions—a defective reasonable doubt instruction and deprivation of counsel of one's choice—have been made.<sup>65</sup>

Not surprisingly, the dichotomy between trial error and structural error has been the subject of much criticism. Some commentators take issue with the manner in which the Court distinguishes between trial and structural errors, arguing that the Court is far too simplistic,<sup>66</sup> and ultimately unpersuasive, in its approach to the complex task of determining which errors are or are not reversible per se.<sup>67</sup> Others attack the dichotomy itself, arguing that "[t]he Constitution does not create a hierarchy of rights or values,"<sup>68</sup> while others try to discern the Court's rationale for choosing certain rights over others in the designation of structural error.<sup>69</sup> Some go as far as to condemn the application of harmless error review to any constitutional error, arguing that all constitutional error should be subject to automatic reversal because harmless error doctrine allows appellate courts to undermine constitutional decisions they are otherwise bound to apply.<sup>70</sup>

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63. See, e.g., *id.* at 306–07 (listing sixteen constitutional errors to which the Court has applied harmless error review).

64. See, e.g., *United States v. Hasting*, 461 U.S. 499, 509 (1983) ("[I]t is the duty of a reviewing court . . . to ignore errors that are harmless, including most constitutional violations." (citations omitted)); *Edwards*, *supra* note 16, at 1176 ("Since *Chapman*, however, the Court has dramatically expanded the list of constitutional violations that are subject to harmless-error analysis, while adding few to (and, indeed, subtracting one from) the list of violations that are per se reversible."); see also Martha S. Davis, *Harmless Error in Federal Criminal and Habeas Jurisprudence: The Beast That Swallowed the Constitution*, 25 T. Marshall L. Rev. 45, 69 (1999) ("[E]rrors previously considered harmful per se have been falling by the wayside as the [harmless error] rule is applied more and more broadly.").

65. See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563–65 (2006); *Neder v. United States*, 527 U.S. 1, 8–9 (1999).

66. See, e.g., McCord, *supra* note 33, 1460–61.

67. Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 Sup. Ct. Rev. 195, 204; Ogletree, *supra* note 4, at 161–66 (criticizing the *Fulminante* Court for "fail[ing] to craft a persuasive rationale for distinguishing between trial and structural errors").

68. See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 90 (1988) ("There is no historical or structural reason to suppose that the framers intended rights having truth-furthering purposes to carry more weight than rights having other purposes.").

69. Professor Charles Campbell has concluded that the Court militates in favor of designating a constitutional error as structural error when (1) the "fundamental" nature of the right is explicitly stated in the Constitution, (2) where congressional intent in protecting the right is clear, and (3) where the right has particular historical significance. Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 Baylor L. Rev. 499, 516–19 (1990). Another factor cited by Professor Campbell in determining when the Supreme Court will designate the violation of a constitutional right as structural error is when automatic reversal would be necessary to deter violations of such right. See *id.* at 519.

70. See, e.g., Goldberg, *supra* note 6, at 436.

Premitting any quarrel with the wisdom of the Court's approach to articulating the contours of structural error,<sup>71</sup> as this Article argues below, the lack of a jury finding on every element of the charged offense implicates very important institutional interests of the jury, and is anything but harmless error.

## II. ELEMENTAL OMISSIONS AND APPELLATE FIRST-GUESSING OF THE JURY

The basic function of the jury in a criminal trial is to determine whether the government has carried its burden of proving each and every element of the charged offense beyond a reasonable doubt.<sup>72</sup> It is beyond peradventure

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71. While considering the basic legitimacy of *Fulminante* trial error/structural error dichotomy is beyond the scope of this Article, some of the difficulty with the Court's structural error carve-out stems from its grounding in both consequentialist and deontological concerns. To be sure, the impact on the verdict of, for example, the exclusion of members of one's race from the grand jury or the denial of public trial is inefficient and difficult (if not impossible) to quantify. At the same time, such errors implicate interests beyond those associated with the determination of a particular defendant's guilt or innocence. See Ogletree, *supra* note 4, at 161–72. Among these broader interests are the intrinsic importance of these rights in our criminal justice system, reliability of the trial as an accurate fact-finding mechanism, and public confidence in the outcome of criminal proceedings. As the *Fulminante* framework would seem to have this dual theoretical grounding, the dichotomy may seem unsatisfying to those seeking a unitary and simple formula for determining whether harmless review might apply to a particular error.

72. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (“Taken together, [the Fifth Amendment due process and the Sixth Amendment jury trial] rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))). Conceptually related to an element is an “affirmative defense,” which can be defined as “an issue that either lessens or relieves the defendant of criminal responsibility even if the formal elements of the crime have been proven.” Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *Hastings L.J.* 457, 464 n.32 (1989); see also Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 *Colum. L. Rev.* 199, 200 (1982) (providing a “comprehensive conceptual analysis” of defenses). The burden of proof on affirmative defenses—as distinct from elements—can be shifted to the defendant consistent with the Due Process Clause. See generally *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977). But see *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Although beyond the scope of this Article, affirmative defenses present many interesting questions, including those related to a trial court's failure properly to instruct a jury on an affirmative defense, the requirement that a defendant make a threshold showing before a trial court will instruct a jury on an affirmative defense, see, e.g., *United States v. Bailey*, 444 U.S. 394, 416 (1980); *Leach v. Kolb*, 911 F.2d 1249, 1256–57 (7th Cir. 1990), and trial court review of a guilty verdict rejecting an affirmative defense. See, e.g., *United States v. Mora*, 994 F.2d 1129, 1136 (5th Cir. 1993) (applying a sufficiency of the evidence analysis to jury rejection of affirmative defense). For insightful scholarly treatment of the relationship between due process, the jury right, and affirmative defenses, see, for example, Jonathan F. Mitchell, *Apprendi's Domain*, 2006 *Sup. Ct. Rev.* 297, 304–09 (describing the Supreme Court's reluctance to extend a constitutional jury guarantee to affirmative defenses); Colleen P. Murphy, Essay, *Context and the Allocation of Decisionmaking: Reflections on United States v. Gaudin*, 82 *Va. L. Rev.* 961, 977–81 (1996) (discussing the jury's Sixth Amendment responsibility to determine affirmative defenses). See also Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 *Cal. L. Rev.* 1665 (1987) (arguing that due process and legality principles require government proof beyond a reasonable doubt of affirmative defenses).

that the jury must know what elements it is charged with finding before it can complete this fundamental task.<sup>73</sup> When a court's instruction to a jury omits an element of an offense, misdescribes an element of the offense, or erroneously mandates that the jury presume that such element of the offense has been established, the criminal defendant's individual Sixth Amendment right to a jury trial is violated.<sup>74</sup> However, as this part discusses, appellate courts may, under current Supreme Court doctrine, first-guess the jury, declaring an error harmless based on its assessment of what a jury would have done had it been properly instructed.

#### A. *Elemental Omissions and the Sixth Amendment*

Many trial errors—both nonconstitutional and constitutional—can work to impact a jury's finding on the required elements of a crime.<sup>75</sup> For instance, an erroneous hearsay ruling may alter the array of evidence from which the jury draws its conclusion regarding the establishment of an element of the offense. The erroneous admission of evidence seized in violation of the Fourth Amendment may prompt the jury to find an element it might not otherwise have found. However, in those situations, the jury has been instructed as to the finding it needs to make on the required elements and actually makes the finding, albeit based upon a record affected by the erroneous inclusion or exclusion of certain evidence.

This can be distinguished from a scenario where the jury is prevented from making the finding on a required element at all. The complete frustration of the jury's consideration of required elements of an offense can derive from (1) omission of an element from the jury instructions, (2) misdescription of an element in the jury instructions, or (3) erroneous jury instruction requiring the jury to presume the—either conclusive or rebuttable—establishment of an element of the offense.

An element may be omitted from the jury instructions in a variety of ways. For example, the trial court, due to plain oversight, may fail to instruct the jury on an element of the crime explicitly set out in the statute. Additionally, a judge may fail to instruct the jury on an element of the crime required not by statute, but through the amplification of prior case law interpretation of that statute or common law meanings codified in a

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73. See, e.g., Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 St. Louis U. Pub. L. Rev. 25, 25–26 (2002).

74. See, e.g., *Gaudin*, 515 U.S. at 510 (holding that an elemental omission violates the Sixth Amendment); *Yates v. Evatt*, 500 U.S. 391, 405–06 (1991) (holding that a mandatory rebuttable presumption violates the Sixth Amendment); *Carella v. California*, 491 U.S. 263, 265–66 (1989) (per curiam) (holding that a mandatory conclusive presumption violates the Sixth Amendment); *Pope v. Illinois*, 481 U.S. 497, 509–11 (1987) (Stevens, J., dissenting) (arguing that an elemental misdescription violates the Sixth Amendment).

75. In addition, it should be noted that juries can be misled or confused by instructions that are technically correct as a matter of law. See, e.g., Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. Cal. L. Rev. 1105 (2000); Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000).



statute. Omission of an element might even occur through little or no fault of the instructing judge, as when he or she follows circuit precedent that is good law at the time of trial, but that is later overturned.<sup>76</sup> The Supreme Court has acknowledged that omitted elements errors violate the defendant's Sixth Amendment right to jury trial.<sup>77</sup>

While the reason for the omission of an element can vary, there is little doubt in most instances that an omission, in fact, did occur; a cursory review of the transcript will confirm that fact. However, another, less obvious type of elemental error occurs where the trial court attempts to instruct the jury on an element, but fails to describe the element correctly. Where a court simply gets it wrong with regard to an element of the crime, the error prevents the jury from making the specific finding required by the statute. For instance, in *Pope v. Illinois*, the trial court had misdescribed the meaning of an element under a state obscenity statute and the Supreme Court determined that this elemental misdescription violated the defendant's due process rights.<sup>78</sup>

Another context that gives rise to an elemental error is where the court erroneously instructs the jury to presume that an element has been established. For example, in *Rose v. Clark*,<sup>79</sup> the Supreme Court acknowledged that a state court instruction to a jury to presume malice in a murder trial was unconstitutional under the Court's precedent.<sup>80</sup> Likewise, in *Carella v. California*,<sup>81</sup> mandatory presumptions as to core elements of the crime were deemed to be unconstitutional.<sup>82</sup>

All of the aforementioned errors lead to verdicts of guilty based upon a jury's finding of fewer than all the required elements—what this Article terms “elemental omission.” Indeed, the Supreme Court has analogized the three aforementioned types of jury instruction errors to one another, concluding that they all “preclude[] the jury from making a finding on the actual element of the offense.”<sup>83</sup> Therefore, elemental omissions often

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76. See, e.g., *United States v. Neder*, 136 F.3d 1459 (11th Cir. 1998), *aff'd in part, rev'd in part*, 527 U.S. 1 (1999).

77. See *United States v. Gaudin*, 515 U.S. 506, 509–10, 522–23 (1995).

78. *Pope v. Illinois*, 481 U.S. 497 (1987); see also *Sandstrom v. Montana*, 442 U.S. 510 (1979).

79. 478 U.S. 570 (1986).

80. See *id.* at 579–80 (citing *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Sandstrom*, 442 U.S. at 520, 523).

81. 491 U.S. 263 (1989) (per curiam).

82. See *id.* at 265–66; see also *id.* at 268 (Scalia, J., concurring in the judgment).

83. *Neder v. United States*, 527 U.S. 1, 10 (1999) (“In both cases—misdescriptions and omissions—the erroneous instruction precludes the jury from making a finding on the actual element of the offense. The same, we think, can be said of conclusive presumptions, which direct the jury to presume an ultimate element of the offense based on proof of certain predicate facts.”). Although beyond the scope of this Article, a conceptually related issue is the ability of an appellate court to take judicial notice of an adjudicative fact required to establish an element of the crime, and how a jury must be instructed with regard to that judicial notice. See Fed. R. Evid. 201(g) (“In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.” (emphasis added)); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §

work a violation of both due process and the Sixth Amendment right to jury trial. However, as has been discussed, the presence of a constitutional violation does not necessarily give rise to a reversal of the conviction.

*B. Application of Harmless Error Review to Elemental Omissions*

In the late 1980s, the Supreme Court determined, in a series of decisions, that elemental misdescriptions as well as mandatory rebuttable and conclusive presumptions were subject to harmless error review.<sup>84</sup> Nevertheless, a decade later, there remained a question as to whether the complete omission (rather than a misdescription or erroneous presumption) of an element from a jury instruction also could ever be deemed to be harmless. In the years prior to the Supreme Court's settling of the issue, lower appellate courts had been anything but uniform in their resolution of the question whether harmless error could be applied to situations where an element had been omitted altogether.<sup>85</sup> Some treated the failure to instruct the jury on all elements of the offense as per se reversible error,<sup>86</sup> while others applied harmless error review to such errors.<sup>87</sup> However, all of these courts couched the issue in terms of the Sixth Amendment right to a jury trial and due process.

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2:1, at 334–38, § 2.10, at 377–82 (3d ed. 2007) (noting that Federal Rule of Evidence 201(g) “is consistent with the well-established principle that a court cannot direct a verdict of guilty”); 1 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, *Federal Rules of Evidence Manual* § 201.02[7], at 201–10 (9th ed. 2006) (noting that a trial judge taking judicial notice of facts in a criminal case should “assure the jury that factfinding is its function”).

84. See *Carella*, 491 U.S. at 265–66 (finding that harmless error applies to erroneous mandatory conclusive presumptions); *Pope v. Illinois*, 481 U.S. 497, 501–02 (1987) (finding that harmless error review applies to misdescribed elements); *Rose v. Clark*, 478 U.S. 570, 579–82 (1986) (finding that harmless error review applies to erroneous mandatory rebuttable presumptions). The reasoning employed by the Court in reaching those conclusions has been subjected to legitimate criticism. See generally, e.g., Greabe, *supra* note 11. Justice John Paul Stevens made a particularly persuasive case for equating elemental misdescriptions with elemental omissions in the course of arguing against the application of harmless error review to the former. See *Pope*, 481 U.S. at 507–11 (Stevens, J., dissenting). The Court eventually would come around to embrace Stevens's view that a misdescribed element had the same impact as an omitted element. See *Neder*, 527 U.S. at 10. However, omitted elements would suffer the same fate as elemental misdescriptions. See *id.* at 12–13 (subjecting elemental omission to harmless error review).

85. See, e.g., *Hoover v. Garfield Heights Mun. Ct.*, 802 F.2d 168, 175 (6th Cir. 1986) (noting “some disagreement between the federal courts of appeal as to whether a trial court's failure to instruct on an essential element of an offense may be considered harmless error”).

86. See, e.g., *United States v. Gaither*, 440 F.2d 262, 264 (D.C. Cir. 1971); cf. *Glenn v. Dallman*, 686 F.2d 418, 423 (6th Cir. 1982) (applying the rule of automatic reversal to omission of “nontechnical” elements).

87. See, e.g., *United States v. Brown*, 616 F.2d 844, 846 (5th Cir. 1980); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). Courts of appeals even had conflicting panel decisions on the issue. Compare *United States v. Howard*, 506 F.2d 1131, 1133–34 (2d Cir. 1974) (applying the rule of automatic reversal), with *United States v. Singleton*, 532 F.2d 199, 205–06 (2d Cir. 1976) (finding no per se automatic reversal); and *Redding v. Benson*, 739 F.2d 1360, 1364 (8th Cir. 1984) (finding no per se automatic reversal), with *United States v. Voss*, 787 F.2d 393, 398 (8th Cir. 1986) (applying the rule of automatic reversal).

For example, in *Byrd v. United States*,<sup>88</sup> Judge J. Skelly Wright wrote for the U.S. Court of Appeals for the D.C. Circuit that a “trial judge’s omission to instruct the jury on every essential element of the crime” necessitated automatic reversal as such an error prejudiced the defendant’s “substantial right to have the jury pass on every essential element of the crime.”<sup>89</sup> The burden of these errors, in the view of courts, falls squarely upon the defendant’s jury trial and due process rights. As the U.S. Court of Appeals for the Eighth Circuit explained,

Nevertheless, it is not for us [courts] to find the facts. The Constitution forbids conviction absent proof beyond a reasonable doubt of every fact necessary to constitute the crime. If the sixth amendment right to have a jury decide guilt and innocence means anything, it means that the facts essential to conviction must be proven beyond the jury’s reasonable doubt, not beyond ours. A jury verdict, if based on an instruction that allows it to convict without properly finding the facts supporting each element of the crime, is error. Such error is not corrected merely because an appellate court, upon review, is satisfied that the jury would have found the essential facts had it been properly instructed. The error cannot be treated as harmless.<sup>90</sup>

The characterization of the injury caused by elemental omissions was similarly limited to an emphasis on due process and jury rights by those courts applying harmless error.<sup>91</sup>

In *Johnson v. United States*, the Court considered the question of whether a trial court’s failure to submit to the jury an element of the crime—materiality in a perjury prosecution—was structural error.<sup>92</sup> The Court, two years prior in *United States v. Gaudin*,<sup>93</sup> had decided that failure to submit the element of materiality to the jury violated the defendant’s rights under the Fifth Amendment and Sixth Amendment “to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with

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88. 342 F.2d 939 (D.C. Cir. 1965).

89. *Id.* at 942; *see also* Glenn v. Dallman, 686 F.2d 418, 421 (6th Cir. 1982) (“The failure to instruct a jury on an essential element of a crime is error because it deprives the defendant of the right ‘to have the jury told what crimes he is actually being tried for and what the essential elements of these crimes are.’ This error is not rectified solely because a reviewing court is satisfied after the fact of a conviction that sufficient evidence existed that the jury would or could have found that the state proved the missing element had the jury been properly instructed.” (citations omitted)); *Howard*, 506 F.2d at 1134 (“When [the defendant] exercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crimes charged to a jury’s satisfaction, not to ours or to the district judge’s. Thus, even if we believe that there was overwhelming proof of the elements not charged, we must still reverse.”).

90. *Voss*, 787 F.2d at 398 (citations omitted).

91. *See, e.g., Benson*, 739 F.2d at 1363 n.3 (describing the court’s error in *In re Winship*, 397 U.S. 358 (1970)).

92. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997).

93. 515 U.S. 506 (1995).

which he is charged.”<sup>94</sup> The *Johnson* Court, under the plain error analysis,<sup>95</sup> considered whether such a constitutional error constituted structural error and, therefore, “affect[ed] substantial rights,”<sup>96</sup> satisfying one of the prongs of plain error analysis. Although ultimately sidestepping the issue,<sup>97</sup> the Court opined that the erroneous and unconstitutional failure to submit the materiality element could be analogized to elemental misdescriptions and erroneous conclusive mandatory presumptions—both subject to harmless error analysis—as easily as it can be analogized to the erroneous reasonable doubt instruction, which had been deemed in *Sullivan v. Louisiana*<sup>98</sup> to be structural error.<sup>99</sup>

The *Sullivan* case did, indeed, provide a strong argument for the treatment of elemental omission as structural error. The Court, in *Sullivan*, first clarified that harmless error review is concerned

not [with] whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.<sup>100</sup>

Working from this premise, the Court explained why harmless error review could not apply to an erroneous reasonable doubt instruction:

There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury’s action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.<sup>101</sup>

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94. *Id.* at 522–23; see also Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 932–33 (2006) (discussing the Court’s reasoning in *Gaudin*).

95. See *supra* note 44.

96. *United States v. Olano*, 507 U.S. 725, 736 (1993).

97. The Court determined that it was not necessary to decide the structural error question because it did not believe the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,’” which is a prerequisite for correcting an error on plain error review. *Johnson*, 520 U.S. at 469 (quoting *Olano*, 507 U.S. at 736).

98. 508 U.S. 275 (1993).

99. See *Johnson*, 520 U.S. at 469 (citing *Sullivan*, 508 U.S. at 280).

100. *Sullivan*, 508 U.S. at 279 (citations omitted).

101. *Id.* at 280 (citations omitted). The Court went on to add that the erroneous reasonable doubt instruction is clearly on the structural side of the *Fulminante* trial error/structural error dichotomy: “The right to trial by jury reflects, we have said, ‘a

The Court attempted to distinguish erroneous conclusive mandatory presumptions on the basis that such errors could be harmless because other jury findings could be considered “functionally equivalent to finding the element required to be presumed.”<sup>102</sup> The *Sullivan* Court, however, did not explicitly advance a basis for distinguishing an omitted or misdescribed element from an erroneous reasonable doubt instruction. In both scenarios, “[t]here is no *object* . . . upon which harmless error scrutiny can operate,” as there has not been a jury finding beyond a reasonable doubt on each and every required element of the charged offense.<sup>103</sup> Indeed, in the years subsequent to the *Sullivan* decision, some lower courts and commentators argued persuasively that the case dictated that omitted and misdescribed elements be exempted from harmless error review.<sup>104</sup>

Despite the logical force of the argument that the violation of the Fifth and Sixth Amendments represented by elemental omissions and misdescriptions should be deemed structural error under the reasoning of *Sullivan*, the Supreme Court had made no definitive statement until the 1999 case of *Neder v. United States*.<sup>105</sup> In *Neder*, the defendant was convicted by a jury of certain tax offenses; however, the district court had instructed the jury that it “need not consider”<sup>106</sup> whether the alleged false statements were material as that was deemed, under then-circuit precedent, to be a question for the court to decide.<sup>107</sup> Although the U.S. Court of Appeals for the Eleventh Circuit found that instruction erroneous—and violative of the Fifth and Sixth Amendments—it applied harmless error review and ultimately held the error to be harmless.<sup>108</sup>

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profound judgment about the way in which law should be enforced and justice administered.’ The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” *Id.* at 281–82 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).

102. *Id.* at 281 (citing *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in the judgment); *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring)). This reasoning has been criticized on the grounds that “the idea of ‘functional equivalence’ is sufficiently elastic as to permit results that are contrary to *Sullivan*’s spirit.” Benjamin E. Rosenberg, *The Effect of Sullivan v. Louisiana on Harmless Error Analysis of Jury Instructions That Omit an Element of the Offense*, 29 Rutgers L.J. 315, 323 (1998).

103. *Sullivan*, 508 U.S. at 280.

104. See, e.g., Greabe, *supra* note 11, at 850; Rosenberg, *supra* note 102, at 321 & n.38 (collecting cases).

105. 527 U.S. 1 (1999). The Court was confronted with the issue during the previous term in *Rogers v. United States*, 522 U.S. 252 (1998). Although the Court recognized that whether harmless error review could apply to elemental omissions was “an important constitutional question,” the Court was able to avoid the issue. See *id.* at 256 (determining that the jury instruction in question did not, in fact, omit an element).

106. *Neder*, 527 U.S. at 6.

107. *Id.* at 6–7.

108. See *United States v. Neder*, 136 F.3d 1459, 1465 (11th Cir. 1998). Subsequent to the trial and prior to disposition of the U.S. Court of Appeals for the Eleventh Circuit appeal, the Supreme Court had decided *United States v. Gaudin*, 515 U.S. 506 (1995), which established that materiality was an element to be submitted to the jury. See *Neder*, 527 U.S. at 6–7.

The Supreme Court affirmed.<sup>109</sup> Rather than extending the reasoning of *Sullivan* to designate an elemental omission as structural error, the Court reasoned that “[t]he conclusion that the omission of an element is subject to harmless-error analysis is consistent with the holding (if not the entire reasoning) of *Sullivan v. Louisiana*.”<sup>110</sup> Although the Court acknowledged that *Sullivan*’s reasoning “does provide support for Neder’s position,”<sup>111</sup> it endorsed the Government’s view “that the absence of a ‘complete verdict’ on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment’s jury trial guarantee.”<sup>112</sup> The Court then analogized this “omitted elements” constitutional error to its precedents by applying harmless error review to elemental misdescription and mandatory conclusive presumption errors, both of which are circumstances in which “the jury did not render a ‘complete verdict’ on every element of the offense.”<sup>113</sup>

Justice Antonin Scalia, who has been the leading voice on the Court in favor of the jury trial right,<sup>114</sup> issued a blistering partial dissent in which he, at the outset, declared his belief “that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged—which necessarily means his commission of *every element* of the crime charged—can never be harmless.”<sup>115</sup> Scalia criticized the seeming illogic of the majority’s reaffirmation “that it would be structural error (not susceptible of ‘harmless-error’ analysis) to ‘vitiat[e] *all* the jury’s findings,’”<sup>116</sup> while it applies harmless error to a jury’s finding of fewer than all the elements required for a valid guilty verdict.<sup>117</sup>

Scalia’s dissent also condemned the manner in which the majority authorized the appellate court to speculate as to what the jury’s conclusion

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109. *Neder*, 527 U.S. 1.

110. *Id.* at 10.

111. *Id.* at 11. Ellis Neder argued that because the jury was prevented by the error from rendering a complete verdict, there was, as in *Sullivan*, “no *object* . . . upon which the harmless-error scrutiny can operate.” *Id.* (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993)).

112. *Id.* at 12.

113. *Id.* at 13. The majority did concede that “[i]t would not be illogical to extend the reasoning of *Sullivan* from a defective ‘reasonable doubt’ instruction to a failure to instruct on an element of the crime.” *Id.* at 15. However, invoking Oliver Wendell Holmes’s insight that “the life of the law has not been logic but experience,” the majority noted that such an extension is not warranted in a case such as *Neder*, in which materiality was not a central issue, was not contested by the defendant, and the evidence of which was stark. *Id.*

114. See, e.g., Rachel E. Barkow, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. Ann. Surv. Am. L. 15, 16 (2006) (“Since joining the Court, the Justice has been a staunch advocate of the jury guarantee. He has eloquently explained in numerous opinions that a failure to instruct a jury on all material elements of the crime charged or to give a proper definition of reasonable doubt can never be harmless error.”).

115. *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part).

116. *Id.* at 32–33 (alteration in original) (citation omitted).

117. *Id.* at 33 (“The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking *all* of them away—since failure to prove one, no less than failure to prove all, utterly prevents conviction.”).

would have been had it been properly instructed, which he argued, “puts appellate courts in the business of reviewing the defendant’s *guilt*.”<sup>118</sup> Justice Scalia concluded by characterizing the majority’s reasoning as having derived from undue confidence in judges which leads to an undermining of the right to jury trial, unwarranted concern that a significant number of convictions will be overturned if elemental omissions are treated as structural error, and the unjustifiable concern for expediency at the expense of the defendant’s right to have a jury find guilt on all elements of the crime.<sup>119</sup>

Thus, after *Neder*, elemental omissions, elemental misdescriptions, and erroneous mandatory presumptions—all deprivations of the defendant’s right to have a jury find every element of the charged offense and, therefore, violative of the Sixth Amendment—are subject to harmless error review. If an appellate court first-guesses a jury—i.e., determines that the jury would have found the missing element if properly instructed—the conviction may stand.

### C. *First-Guessing the Jury*

Harmless constitutional error review generally raises the concern that the jury function is being compromised by some constitutional error that interferes with its review. For instance, the admission of evidence that was obtained in violation of the Constitution or a prosecutor’s improper comment on the defendant’s failure to testify would seem to alter the evidence before the jury and, therefore, impact its ultimate deliberation and decision. Application of the traditional “overwhelming evidence” test on harmless error review—a test that queries whether the untainted evidence is sufficient to support the conviction—places the appellate court into the jury’s fact-finding role, a role it is neither intended nor competent to perform.<sup>120</sup>

This concern about the integrity of the jury’s fact-finding function is heightened in the case of elemental omissions. The distinction between general harmless error review, which “always involves some second-guessing of the initial factfinder’s conclusions,”<sup>121</sup> and harmless error

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118. *Id.* at 39. Justice Antonin Scalia characterized the majority opinion as “the only instance . . . in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).” *Id.* at 32.

119. *See id.* at 39–40 (“The recipe that has produced today’s ruling consists of one part self-esteem, one part panic, and one part pragmatism.”). Justice Stevens agreed, in his own concurrence, with Justice Scalia’s core views about application of harmless error review, but criticized Justice Scalia on his methodology, in particular the fact that Scalia would not take the argument to its logical conclusion—that the error should be reversible per se even if a defendant fails to object below. *See id.* at 27–28 (Stevens, J., concurring in part and concurring in the judgment).

120. *See Mitchell, supra* note 47, at 1340 (criticizing the “overwhelming evidence” test).

121. *Id.*

review of elemental omissions is a stark one. In the latter context, the appellate court is determining not whether what the jury did—finding all the required elements of the offense—was impacted by the constitutional error, or whether the jury would have done what it did but for the constitutional error, but what the jury would have done had it been properly instructed. The appellate substitution of the jury’s judgment—through engaging in an inquiry of what a properly instructed jury would have done—is what this Article terms “first-guessing” the jury. Justice John Paul Stevens, in his dissent in *Pope v. Illinois*, captured the essence of the first-guessing phenomenon:

An application of the harmless-error doctrine under these circumstances would not only violate petitioners’ constitutional right to trial by jury, but would also pervert the notion of harmless error. When a court is asked to hold that an error that occurred did not interfere with the jury’s ability to legitimately reach the verdict that it reached, harmless-error analysis may often be appropriate. But this principle cannot apply unless the jury found all of the elements required to support a conviction. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury’s findings, but it cannot constitutionally *supplement* those findings. It is fundamental that an appellate court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not find.<sup>122</sup>

Stevens was supported in his views by four decades of his colleagues’ own statements on the topic. In *Bollenbach v. United States*,<sup>123</sup> a case decided in 1946, the same year that *Kotteakos* applied the harmless error rule to nonconstitutional errors, the Court remarked,

From presuming too often all errors to be “prejudicial,” the judicial pendulum need not swing to presuming all errors to be “harmless” if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.<sup>124</sup>

This missive cautioning appellate restraint on harmless error review of errors that implicate the province of the jury would be followed by other statements directed specifically to the importance of appellate courts respecting jury review of each element of the charged crime:

It should hardly need saying that a judgment of conviction cannot be entered against a defendant no matter how strong the evidence is against him, unless that evidence has been presented to a jury (or a judge, if a jury

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122. *Pope v. Illinois*, 481 U.S. 497, 509–10 (1987) (Stevens, J., dissenting) (citation omitted).

123. 326 U.S. 607 (1946).

124. *Id.* at 615.



is waived) and unless the jury (or judge) finds from that evidence that the defendant's guilt has been proved beyond a reasonable doubt. It cannot be "harmless error" wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged.<sup>125</sup>

First-guessing, as discussed above, improperly substitutes the appellate court's judgment for that of the jury.<sup>126</sup> As the Court in *Duncan v. Louisiana* emphasized about the function of the jury, "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>127</sup> With first-guessing, the defendant is protected from neither.

The Court's tolerance of first-guessing in the harmless error review of elemental omission is likely prompted by concerns of efficiency, order maintenance, and finality.<sup>128</sup> Whatever its motivation, however, it is based on flawed reasoning and an emaciated view of the jury trial right.<sup>129</sup> Critics of the Court's reasoning have articulated persuasive arguments regarding the Sixth Amendment and what it requires of appellate review of elemental omission error.<sup>130</sup> However, those arguments based upon the Sixth

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125. *Henderson v. Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring); cf. *United Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 409 (1947) ("A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.").

126. See, e.g., *Marks v. United States*, 430 U.S. 188, 196 n.12 (1977) ("[E]ven if we accept the court's conclusion, under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense . . .").

127. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

128. For example, the *Neder* majority also pointed to the difficulties that would be associated with federal habeas review of state convictions under *Neder*'s desired approach, which would require federal courts "to ascertain the elements of the offense as defined in the laws of 50 different States." *Neder v. United States*, 527 U.S. 1, 15 (1999); see also *id.* at 39–40 (Scalia, J., concurring in part and dissenting in part) (pointing out efficiency concerns underlying the majority opinion).

129. See Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States*, 28 Am. J. Crim. L. 229, 239 (2001) ("The cases involving a failure to instruct on an element of the crime have elevated the 'no harm, no foul' policy over reasoned analysis. Although there is no verdict on an element of the crime in violation of the defendant's constitutional rights, the Court applies a harmless error analysis. The *Neder* case is the Court's most troubling moment. A serious, fundamental foul is called, but there is no penalty.").

130. See, e.g., Greabe, *supra* note 11, at 851–52, 857; Stacy & Dayton, *supra* note 68, at 133 ("[A] court should not uphold a conviction or conclude that a defendant has not shown the requisite level of outcome-influencing prejudice when the court's judgment is based on its own probabilistic impressions of what a jury actually did or what a hypothetical reasonable jury is likely to do. Such actions would be inconsistent with a defendant's constitutional right to a jury trial."). But see Rosenberg, *supra* note 102, at 336 ("[A] jury instruction that omits or misstates in a material fashion an element of the charged crime injures the defendant and the jury itself."). The party and amicus briefs in *Neder* demonstrate the focus on the Sixth Amendment jury trial right rather than the institutional interests of the jury. See, e.g., Brief for the Petitioner at 27–28, *Neder v. United States*, 527 U.S. 1 (1999) (No. 97-1985); Reply Brief for the Petitioner at 11, *Neder*, 527 U.S. 1 (No. 97-

Amendment right to jury trial simply have failed to carry the day. This Article does not seek to fight that battle again, but instead offers an alternative justification for disputing the application of harmless error review to elemental omissions. This Article advances an institutional justification for the inclusion of elemental omission in the category of those structural errors subject to automatic reversal—a justification that cannot easily be set aside because of courts' willingness to subordinate the jury trial right to the pragmatic values advanced by the harmless error rule.

### III. INSTITUTIONAL JUSTIFICATION FOR TREATING ELEMENTAL OMISSIONS AS STRUCTURAL ERROR

As has been discussed, the Supreme Court has been sparing at best with regard to designating structural error subject to automatic reversal. The violation of the Sixth Amendment jury trial right caused by omission or misdescription of an element of a crime has been consistently categorized by the Supreme Court as an error subject to harmless error review.<sup>131</sup> Short of the Court's wholesale repudiation of the reasoning applying harmless error review to such constitutional violations, what might support their inclusion in the category of structural error? Institutional considerations dictate automatic reversal of convictions infected with elemental omission and misdescription errors even where the Sixth Amendment does not.<sup>132</sup> Appellate first-guessing of the jury's probable verdict wholly undermines the jury's constitutional function from its own institutional perspective.

Although this Article does not dispute the traditional case for the automatic reversal of verdicts infected with these Sixth Amendment violations, it advances an alternative theory for inclusion of elemental omissions in the category of reversible error. While the entitlement to demand (or waive) a jury trial rests with the criminal defendant, the jury has separate and distinct institutional interests. Among these are the maintenance of the jury's structural role in government and its function as the voice of the community. Injuries to these institutional interests remain, regardless of whether the individual criminal defendant is deemed to have been prejudiced. Once we acknowledge the damage appellate harmless error first-guessing of juries levies upon the institutional interests of the jury, the rationale for mandating automatic reversal of elemental omission errors becomes apparent.

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1985); Brief for Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 20–23, *Neder*, 527 U.S. 1 (No. 97-1985).

131. See *Neder*, 527 U.S. 1; *supra* Part II.B.

132. See, e.g., Goldberg, *supra* note 6, at 432 (“The harmless constitutional error doctrine works only a petty theft on individual defendants’ rights in specific cases but its consistent application exerts a more profound effect upon society. The harmless constitutional error rule, regardless of the test, militates against basic freedoms and controls upon governmental institutions that operate against individuals.”).

### A. *The Structural and Institutional Significance of the Jury*

The guarantee of “trial by jury . . . is fundamental to the American scheme of justice,”<sup>133</sup> so much so that it has been described as “the spinal column of American democracy.”<sup>134</sup> A review of Article III’s mandate that “[t]he Trial of all Crimes . . . shall be by Jury”<sup>135</sup> immediately highlights the structural significance of the jury. The framers saw the jury as an indispensable organ of government.<sup>136</sup> Although the Sixth Amendment guarantees to individuals the right to jury trial, the Article III Jury Clause cements the permanent role of the jury in the framework of government itself.<sup>137</sup> As Professor Akhil Amar persuasively has argued, “[I]t is anachronistic to see jury trial as an issue of individual right rather than (also, and more fundamentally) a question of government structure.”<sup>138</sup> Likewise, under state constitutions, the jury has had a celebrated role; all the early state constitutions, many of which were drafted by those involved with the framing of the Federal Constitution, held the right to jury trial in high esteem.<sup>139</sup> Indeed, on both the federal and state levels, the jury was thought to be a key protection of individual freedom against the excesses of the branches of tripartite government.<sup>140</sup>

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133. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

134. *Neder*, 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part) (“When this Court deals with the content of [the Sixth Amendment] guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.”).

135. U.S. Const. art. III, § 2. Although modern criminal procedure, of course, permits a defendant to waive a jury trial, this procedural fact does not necessarily diminish the institutional significance of the jury. *See infra* note 162.

136. *See, e.g.*, Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 Geo. Wash. L. Rev. 1043, 1048 (2006) (“In the Nation’s early history, the criminal jury held a place of prominence in the constitutional order.”); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. Colo. L. Rev. 767, 779–82 (2005) (discussing the Constitution’s “division of power between the judiciary and the jury”).

137. *See Blakely v. Washington*, 542 U.S. 296, 308 (2004) (“[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.”).

138. Akhil Reed Amar, *The Bill of Rights* 104 (1998); *see also* *Carella v. California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (referring to the right to jury trial as a “structural guarantee”).

139. *See Duncan v. Louisiana*, 391 U.S. 145, 153 (1968) (“The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.”); *see also id.* at 154 (“Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so.”). *But see* Nancy Jean King, *The American Criminal Jury*, 62 Law & Contemp. Probs. 41, 43 (1999) (noting that, “[e]ven though every state guaranteed the right to a jury trial for at least some criminal charges, state law differed as to what that right entailed”).

140. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 63–64 (2003); Mitchell, *supra* note 47, at 1356 (“Although trial by jury serves many purposes for the jurors and the justice system, the primary rationale for jury trial has consistently been that it serves as a bulwark against official tyranny.”).

Although the importance of the jury's role in the American criminal justice system requires no extended discussion, it bears emphasizing the community voice function the jury performs.<sup>141</sup> As the Supreme Court in *Duncan* noted, in affirming the applicability of the Sixth Amendment to the States, "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."<sup>142</sup> This structural role of the jury is meant to ensure the input of the citizenry in the operation of the courts and government more generally. Even recently, the Supreme Court has noted that Sixth Amendment right to jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure . . . meant to ensure [the people's] control in the judiciary."<sup>143</sup> The moral values of the community are expressed through jury service, deliberation, and verdict, and that expression is a function and prerogative of the jury that is independent of the right of the criminal defendant to demand it.<sup>144</sup>

The framers saw the jury as the means for the citizenry to hold ultimate sway over the judicial function of government, in the same way power was given, by means of the ballot, over the legislative and executive functions.<sup>145</sup> Indeed, Thomas Jefferson even expressed a preference for citizen oversight of the affairs of the judiciary through jury service over analogous oversight of the legislative branch through the cherished model of representative government.<sup>146</sup>

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141. Alexis de Tocqueville famously described the jury as "the voice of the community." 1 Alexis de Tocqueville, *Democracy in America* 316–18 (Arthur Goldhammer trans., Library of America 2004) (1862); see also Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. Cin. L. Rev. 1377, 1392–97 (1994) (discussing the jury's "community voice" function).

142. *Duncan*, 391 U.S. at 156.

143. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

144. Mitchell, *supra* note 47, at 1355 ("A criminal jury trial is a vehicle both for determining guilt and for expressing community values."); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right* (Jan. 17, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1084960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084960) (arguing for a broader, community-based notion of the jury trial right).

145. See *Blakely*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." (citing, inter alia, Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (Herbert J. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"))); John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 *Works of John Adams* 252, 253 (Charles Francis Adams ed., Little & Brown 1950) (1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature.); see also *New York v. Allen*, 653 N.E.2d 1173, 1177 (N.Y. 1995) ("Jury service—a privilege and duty of citizenship—is . . . a fundamental means of participating in government." (citation omitted)); Barkow, *supra* note 140, at 63–64. It should be noted, however, that the framers' narrow view of the "citizenry" eligible to serve on a jury excluded most members of the "community." See, e.g., Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L.J. 945, 960–61 (1998).

146. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 *The Papers of Thomas Jefferson* 282, 283 (Julian P. Boyd ed., 1958) ("Were I called upon to

Another institutional prerogative of the jury derives from the Double Jeopardy Clause and its mandate that jury verdicts of acquittal remain inviolate.<sup>147</sup> Juries can, of course, engage in nullification, introducing mercy into the criminal justice system or communicating their messages to the legislature regarding the wisdom of its laws, the judiciary regarding its sentencing and process oversight, and the executive regarding its enforcement and prosecution priorities.<sup>148</sup> Regardless of the normative merits of whether juries should engage in nullification, this ancient power of the petit jury is plenary and unreviewable.<sup>149</sup> Furthermore, although this “voice of the community role” includes the power of citizens to nullify, its function extends beyond that.<sup>150</sup> Lay jurors bring a perspective to the criminal fact-finding process the framers thought valuable enough to enshrine in the body of the Constitution.<sup>151</sup> Juries also serve the institutional function of training the citizen-jurors in the processes of democratic governance. Through jury service, citizens participate in the machinery of government, learning about it while influencing and shaping it at the same time.<sup>152</sup> As Alexis de Tocqueville remarked when commenting

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decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”).

147. See U.S. Const. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.”).

148. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 498 (1966); Lysander Spooner, *An Essay on the Trial by Jury* (Lawbook Exchange, Ltd. 2002) (1852); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1015 (2006) (“The jury’s unreviewable power to acquit gives it the ability to check both the legislative and executive branches.”); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677, 701 (1995) (“The jurors, in judging the law, function as an important and necessary check on government power.”); Goldberg, *supra* note 6, at 431 n.98 (“Jury nullification is not a particularly common event, and may not often be affected by an evidence error. However, there may be circumstances in which a jury failed to exercise its power to nullify the law because the error admitted evidence that dissuaded it from nullification, or excluded evidence which, if heard, would have persuaded the jury to nullify.”); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 *Vand. L. Rev.* 1467, 1505–09 (2001); Mitchell, *supra* note 47, at 1356–57 (“Substantive criminal laws may be misguided, sentencing laws may be overly harsh, prosecutions may be selectively imposed, and judges may be biased. Citizens therefore rely on the common sense and mercy of a jury, through its nullification power, to keep both laws and government officials from working an injustice.”); Stacy & Dayton, *supra* note 68, at 138–42.

149. See, e.g., Barkow, *supra* note 140, at 58–59; King, *supra* note 139, at 50–53; Mitchell, *supra* note 47, at 1356–57; cf. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 *Cornell L. Rev.* (forthcoming May 2008) (discussing the power of grand juries to “nullify” consistent with constitutional design).

150. Of course, even a jury not instructed on all the elements of the crime could choose to engage in nullification. However, jury deliberation undoubtedly is impacted when the jury is not fully instructed as to the elements it is required to find in order to convict.

151. See *Apodaca v. Oregon*, 406 U.S. 404, 410–11 (1972) (defining a properly functioning jury as “a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant’s guilt”); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”).

152. See, e.g., 1 J. Kendall Few, *Trial by Jury* 60 (1993) (citing “education of the citizenry in the administration of law” as a positive consequence of jury trial); Jason

upon the manner in which the American jury serves as a vehicle for the education of the citizenry, “[T]he jury, which is the most energetic form of popular rule, is also the most effective means of teaching people how to rule.”<sup>153</sup>

These constitutional and traditional institutional functions of the jury, many of which are separate and distinct from the role of securing the individual rights of criminal defendants, have begun to receive the greater recognition they deserve. The late twentieth-century renaissance of the jury trial right,<sup>154</sup> marked by *Apprendi* and its progeny, may have been prompted more by respect for the institutional legitimacy of the jury and its constitutional role and prerogatives than for the jury rights of criminal defendants. As Dean Louis D. Bilonis has explained, the recent trend in the Supreme Court criminal procedure jurisprudence has been to emphasize the institutional interests of the jury:

The recent cases, furthermore, tend to focus on justice as perceived from the perspective of our institutions and the public that has some moral stake in their operation, rather than from the perspective of the criminally accused individual. The *Apprendi* line of opinions, for instance, stresses the jury’s historical importance as a structural antidote to judicial power rather than the value of lay decision making as a bulwark of liberty for individuals. The emphasis is on the system’s explicit and implicit protestations and the perceptions of legitimacy that follow.<sup>155</sup>

Recent precedents outside of the harmless error context would seem to confirm that the Court has recognized that the jury has its own institutional interest apart from serving as the vehicle for the defendant’s Sixth Amendment rights.<sup>156</sup> Indeed, the Court even may be said to have

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Mazzone, *The Justice and the Jury*, 72 Brook. L. Rev. 35, 47 (2006) (discussing Justice Harry Blackmun’s view of juries as “an aspect of a functioning democracy”).

153. De Tocqueville, *supra* note 141, at 318. De Tocqueville went on to note that “[t]he jury is incredibly useful in shaping the people’s judgment and augmenting their natural enlightenment. . . . It should be seen as a free school . . . .” *Id.* at 316; see also Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 Wm. & Mary L. Rev. 195, 198–99 (2000) (discussing De Tocqueville’s view that the judge, lawyers, and litigants all contributed to the democratic education of jurors).

154. See, e.g., Barkow, *supra* note 136, at 1048–64 (2006) (discussing the revitalization of the jury trial guarantee during the final years of the Rehnquist Court era).

155. Louis D. Bilonis, *Criminal Justice After the Conservative Reformation*, 94 Geo. L. J. 1347, 1354 (2006). But see Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 Iowa L. Rev. 465, 466–68 (2002) (recognizing the diminished role of juries in the modern criminal justice system).

156. See, e.g., *United States v. Booker*, 543 U.S. 220, 236 (2005) (“The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge’s power and diminish that of the jury.”); *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (“There is not one shred of doubt, however, about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”); *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) (“The New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.”).

subordinated its focus on the individual's entitlement to a jury trial to the structural and institutional value of the jury.

*B. Damage Done by Appellate First-Guessing to the  
Institutional Interests of the Jury*

There is ample support for the view that the jury has institutional interests separate and distinct from that of the criminal defendant upon whose fate it deliberates. By its very nature, harmless error review would seem to allow the appellate court, in varying degrees, to encroach on these interests by making factual assessments about the impact of a constitutional error upon the jury's fact-finding process. Indeed, some have argued that "[t]he greatest cost of the harmless constitutional error rule is its usurpation of the jury function."<sup>157</sup> This "trampl[ing] over the jury's function"<sup>158</sup> is particularly acute in the case of first-guessing on harmless error review of elemental omissions. In addition to the injury it visits upon the due process and jury trial rights of the individual defendant, first-guessing levies a tremendous toll upon the institutional interests and structural integrity of the jury itself. Although the Court, in permitting appellate first-guessing has determined that elemental omissions do not warrant a remedy of automatic reversal, it has ignored the various ways first-guessing undermines the institutional interests of the jury.

First-guessing substitutes the appellate court's judgment for that of the jury and, therefore, obviates the jury's function. In most harmless error review contexts, the appellate court is merely confirming what the jury has, in fact, done. (The jury has found all of the elements, but we need to determine whether the constitutional violation caused that to happen.) Although some may have a degree of discomfort with the appellate court performing that role, at least there is a complete jury verdict upon which to conduct the inquiry. However, in the case of first-guessing, the appellate court is stepping into the jury's shoes and finding one (or more) of the elements for the jury. The appellate court is reaching a conclusion the jury has not reached and, in so doing, it is performing the role of surrogate for the jury, the entity to which the Constitution entrusts—and assigns—the fact-finding function. This substitution of the appellate court fact-finding for the jury's fact-finding relegates the jury to a position of partial filter rather than the exclusive fact-finder role it has been assigned by the Constitution and tradition. As a result, the institutional standing of the jury is diminished.

Permitting the removal of a required factual finding from the jury is an invitation to further compromise the jury's institutional role. Once we

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157. Goldberg, *supra* note 6, at 430; *see also* Mitchell, *supra* note 47, at 1354 ("[W]hen an appellate court assumes the role of fact-finder in a criminal case, it usurps the role of the jury . . .").

158. *Neder v. United States*, 527 U.S. 1, 36 (1999) (Scalia, J., concurring in part and dissenting in part) (noting that applying harmless error to an elemental omission "throws open the gate for appellate courts to trample over the jury's function").

permit appellate judges to make one of the findings that the Constitution requires the jury to make, what principle operates to prevent the appellate judges from making multiple findings reserved to the jury?<sup>159</sup> The Court has indicated that harmless error review does not apply to an error that “vitiates *all* the jury’s findings,”<sup>160</sup> but what about one-third of those findings? Half?<sup>161</sup> The appellate court’s first-guessing of the jury with regard to multiple elements works no more significant a constitutional injury (to the defendant and the jury itself) than does the first-guessing on one of those elements. Undermining the jury’s core institutional prerogative as fact-finder in seemingly limited ways may open the floodgates for future transgressions against the jury’s role in the name of the pragmatic values the harmless error rule represents.

Furthermore, the ability of appellate courts to first-guess a jury on harmless error review fosters diminished respect for the jury as an institution. For trial courts, respect for the jury may begin to wane due to the gradual realization that the jury is not truly the exclusive finder of fact in cases where a defendant elects to assert the right to jury trial.<sup>162</sup> Such a recognition could impact trial judges’ thought processes regarding issues related to the jury and its prerogative. For appellate courts, stepping into the shoes of the jury as fact-finder inevitably leads to a diminished appreciation of the special nature of concentrated deliberation of a jury.<sup>163</sup> This attitude can easily spill over into appellate decision making related to

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159. See *Neder*, 527 U.S. at 33 (Scalia, J., concurring in part and dissenting in part).

160. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

161. See Transcript of Oral Argument at 29–32, *Neder*, 527 U.S. 1 (No. 97-1985). At the argument, the assistant solicitor general conceded that harmless error review could apply to multiple omitted elements.

162. Of course, a defendant may impact the jury’s institutional interests by waiving the right to jury trial in part, such as with the stipulation of a fact establishing an element, see *United States v. Jones*, 108 F.3d 668, 671 (6th Cir. 1997), but see *id.* at 673–76 (Ryan, J., concurring separately), or in total, such as with a guilty plea. See, e.g., Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 Ann. Rev. L. & Soc. Sci. 131 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 87–100 (2005). But see Appleman, *supra* note 144 (querying whether the community-based notion of the jury trial right conflicts with the defendant’s ability to waive trial); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 433 n.156 (2006) (citing Amar, *supra* note 138, at 104–08 (questioning the constitutional analysis underlying the waivability of the jury trial right)). Furthermore, a defendant simply might decline to appeal an elemental omission error. As such, it might be said that the jury right is both a societal right and individual right, see generally Appleman, *supra* note 144 (arguing for a broader, community-based notion of the jury trial right), and society depends on the individual to vindicate that right. Although the defendant may decline the jury’s protection, where the jury *is* called upon, its institutional role should be respected. In other words, although the petit jury’s institutional role does depend, in certain ways, upon the willingness of the defendant to resist the government’s case, this reality should not serve to diminish the institutional significance of the jury in those cases in which the accused does put the government to its proof. See Mitchell, *supra* note 72, at 299–303. In sum, modern criminal procedure’s erosion of the important institutional interests of the jury need not be further exacerbated by harmless error review of elemental omission errors.

163. See, e.g., Chris Guthrie, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 827 (2001); Mazzone, *supra* note 152, at 38–39 & n.17.



the jury. If the public (from which the jury is drawn) is informed about the appellate court's intrusion on the jury's fact-finding role, it could lead to the loss of the jury's prestige among the populace, and could even have the effect of diminishing the conscientiousness of future juries, with jurors assuming that appellate courts will come behind them and fill in the gaps.

First-guessing also may contribute to a loosening of attention paid by trial courts to the accuracy of jury instructions. While judges would not deliberately seek to misinstruct juries, some may take comfort in knowing that the verdict can be saved by appellate first-guessing on harmless error review if the jury instruction omits or misdescribes an element of the offense. Consequently, there may be less of an incentive to be vigilant with regard to the trial court's solemn responsibility to guide the jury in its deliberations.

Further, although a finding is being made by an appellate judge on the omitted elements, those elements are not being considered through the lens of lay people, a key feature of the jury institution. The common sense conclusions of a jury may differ from the learned eye of an appellate judge, even when viewing the same evidence. Appellate judges obviously are in no better a position than a jury to judge the evidence and the demeanor of the witnesses at trial. Even if we ignore the disadvantages faced by an appellate court in its cold record review of the proceedings below, and assume that appellate judges are on par with juries in their ability to judge facts, "[a]n appellate court defies common sense when it steps out of its traditional role as a reviewing court and attempts to operate as a primary factfinder."<sup>164</sup> Indeed, even if we believed that appellate judges would be more competent as fact-finders than are juries,<sup>165</sup> many have argued that it is simply not the role of the appellate court to serve as the arbiter of facts.<sup>166</sup> Permitting appellate judges to first-guess juries rather than demanding that convictions be automatically reversed betrays a preference for judges over juries, a preference the Constitution rejects.

In addition, the jury's role as an overseer of the judiciary is compromised when the trial court can prevent the jury from making a finding assigned to it under the Constitution and the appellate court can first-guess what that jury would have done. Juries were assigned their institutional role by

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164. Goldberg, *supra* note 6, at 429.

165. *Id.* at 430 ("We are probably better off with juries making 'wrong' decisions than with judges making 'right' ones."); see also *id.* at n.95 ("[T]he value in citizen participation may outweigh the value of a decisionmaking system which makes more correct decisions. In the law generally, and in criminal law particularly, the societal acceptability of the decision may be more important than its correctness. Juries represent an institutional insurance policy for the continued acceptability of the decisionmaking system.").

166. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."); Mitchell, *supra* note 47, at 1357 ("When appellate courts engage in review of the trial record to arrive at their own, independent judgments of guilt and innocence, they intrude upon the central function of the jury.").

design.<sup>167</sup> As discussed above, they represent the popular control of the judiciary, in the same way the ballot and franchise represent popular control of the executive and legislative branches.<sup>168</sup> First-guessing the jury on harmless error review of omitted element errors is tantamount to canceling an election and installing the candidate who had been leading in the opinion polls.

Taking away even one element from the jury's consideration unacceptably mutes its community voice and undermines its structural role.<sup>169</sup> The enforcement of the criminal law is undergirded by the moral preferences of the community. As discussed above, the jury plays an indispensable role in expressing the moral judgment of those subject to the criminal laws. Diluting the fact-finding function of the jury through first-guessing diminishes that voice of the community. Also, when jurors are misinstructed regarding the elements of the crimes charged, they are not fully participating in the democratic and civic education envisioned by the framers as part of the jury's function.

When an element of fact-finding is removed from the jury's consideration, the jury's capacity to engage in its mercy or nullification function also may be affected. Deliberation over a factual finding the jury has been instructed to make could prompt consideration of leniency under the circumstances. For example, if an intent element is omitted from a jury instruction, the jury may convict without the same level of consideration of the defendant's motive and its impact on the determination of whether mercy should be shown. Furthermore, criminal laws are defined by their elements, and a central function of jury nullification is to register the jury's disapproval of the wisdom of a criminal law. Jurors are hampered in this function if such laws are not fully defined for them. Although nullification, understandably, is not universally considered a legitimate exercise of jury discretion,<sup>170</sup> it is, as discussed above, an ancient aspect of the jury's

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167. See, e.g., Thomas, *supra* note 136, at 794–97.

168. See *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

169. The Article III rationale for the structural cast of the federal jury does not, of course, apply to state juries, although the incorporation of the Sixth Amendment Jury Trial Clause, which amplified the Article III Jury Trial Clause, may lend support for the identical treatment of missing elements errors on the state and federal level. Certainly, the jury's role as voice of the community carries the same importance in both the state and federal system. Further, as Justice Stevens reminded in *Neder*, the jury plays an additional protective role in states where judges are elected, or otherwise lack life tenure. “[T]his Court has not been properly sensitive to the importance of protecting the right to have a jury resolve critical issues of fact when there is a special danger that elected judges may listen to the voices of voters rather than witnesses.” *Neder v. United States*, 527 U.S. 1, 28 (1999) (Stevens, J., concurring in part and concurring in the judgment). Thus, an automatic reversal rule premised upon the institutional legitimacy of the jury may apply with equal force to missing element verdicts rendered by state juries.

170. Compare, e.g., Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1 (1997), and Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va. L. Rev. 253 (1996), with Butler, *supra* note 148, and Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993); see also Teresa L. Conaway et al., *Jury Nullification: A Selective*,

prerogative. The jury's discretion to engage in this mercy function may be negatively impacted by first-guessing.

Juries implement constitutional structure and serve as an important conduit for citizen influence on the criminal justice process and government generally. The rationale for applying harmless error review to elemental omissions has focused exclusively on the interests of the individual criminal defendant. Those interests, the Court has concluded, are overridden by concerns of efficiency, finality, and truth promotion.<sup>171</sup> As a result, elemental omission, like so many other constitutional errors, can be harmless. However, when we shift focus from the jury trial right of the individual criminal defendant to the institutional interests of the jury itself, the rationale for excluding elemental omissions from the category of structural error is substantially weakened. Even an elemental omission error deemed harmless to the defendant is anything but harmless to the jury itself.

The core jury function and prerogative of determining whether an accused is criminally liable under the terms of a statute is undermined when that jury is frustrated in that task. When an uninformed or misinformed jury returns a verdict of guilty, it is not only the criminal defendant who suffers harm (whether or not the appellate court believes such defendant has been prejudiced), but the jury itself. The only way to remedy and deter such injury to the jury is to treat such errors as structural error and automatically reverse convictions based upon fewer than all the elements of the charged crime.

#### IV. CONSEQUENCES AND LIMITATIONS OF TREATING ELEMENTAL OMISSIONS AS STRUCTURAL ERROR

While the institutional interests of the jury, as this Article argues, mandate automatic reversal for omitted elements verdicts, significant consequences may flow from this course of action. Chief among the concerns with automatic reversal, both generally and in this specific context, are efficiency, fairness, finality, and public confidence in the administration of criminal justice. In addition, critics may question how far-reaching such a rule would be. Would it apply on plain error review, the standard of review which governs when the defendant fails to object at trial? What is the danger that the rationale underlying such a rule eventually would lead to automatic reversal of all jury-related errors? Is there any rational limiting principle available to rein in the effect of the application of an automatic reversal rule to missing elements verdicts? This part provides some insight on the consequences of the position that a missing elements error can never be harmless and addresses normative concerns.

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*Annotated Bibliography*, 39 Val. U. L. Rev. 393 (2004) (listing scores of articles and other commentary debating the merits of petit jury nullification).

171. See *supra* Part II.B; see also *infra* Part IV.A.

A. *Pragmatic Objections to Automatic Reversal  
of Elemental Omission Errors*

The early twentieth-century criminal procedure reform movement sought the adoption of a harmless error rule in order to

substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.<sup>172</sup>

Although “[t]he power of appellate courts to set aside lower court verdicts is of crucial importance to the administration of justice,”<sup>173</sup> underpinning the critique of a strict automatic reversal scheme is a desire for efficiency, fairness, finality, and public confidence in the administration of criminal justice. While these pragmatic objections warrant a cautious approach to implementing what might appear to be a formalistic rule, none of them militates against exempting missing elements errors from harmless error review.

1. Efficiency

Efficiency was a central complaint of those early twentieth-century reformers sponsoring the adoption of the harmless error rule in America, and the preservation of strained adjudication resources remains a key rationale for the halting expansion of the category of structural error. To be sure, there are tremendous costs attendant to the reversal of a conviction. Premitting the emotional costs of, and challenges to, obtaining a conviction, the time and expense of a new trial exacts a significant cost on the system. The marshaling and corralling of witnesses, the utilization of the finite time and focus of prosecutors and investigators, and the occupation of crowded trial court dockets all result from the reversal of a conviction.

On the other hand, the institutional principles at stake overshadow concerns of efficiency. As the Court recently stated in *Blakely v. Washington*,

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection,

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172. *Kotteakos v. United States*, 328 U.S. 750, 760 (1946).

173. Simon, *supra* note 2, at 575.

but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.<sup>174</sup>

Furthermore, it is not clear that the application of harmless error is the more efficient of the approaches to reviewing elemental omission errors.<sup>175</sup> A strict rule of automatic reversal obviously will reduce the amount of time a case will occupy appellate dockets. Where an appellate court determines that a jury was not properly instructed on all the elements of the crime,<sup>176</sup> it simply would reverse the conviction without proceeding to the question of prejudice to the defendant and without stepping into the shoes of the jury to attempt to determine what it would have done had it been properly instructed. Thus, a rule of automatic reversal would obviate the need for the time-intensive analysis of the trial court record that is necessary to the appellate court's application of harmless error review. Furthermore, under a regime of automatic reversal, both trial courts and prosecutors would be especially vigilant in ensuring that juries are properly instructed with regard to the elements of the charged offenses. Because the appellate remedy of reversal would be swift and sure, special attention would be paid to this crucial jury instruction. Granted, no amount of care will avoid the error where the trial court is following binding circuit precedent in delivering jury instructions and such precedent is modified or overruled prior to appeal. However, where jury instruction error can be avoided, the incentive to the government and the court to correct it will be significant.

## 2. Fairness

Fairness is another central concern implicated by an automatic reversal rule for missing element verdicts. The cluster of due process protections for the defendant is a prominent, but not the exclusive, locus for expectations of fairness in the criminal justice system. The government, which carries the burden of proving the defendant's guilt, is entitled, of course, to

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174. *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

175. *See, e.g.,* Goldberg, *supra* note 6, at 440–41 (arguing that the harmless constitutional error rule adds to court congestion and is not clearly supportive of efficiency at the appellate level).

176. The majority in *Neder* asserted that the exemption of omitted elements errors from harmless error review would require federal courts not only to expend great effort to analyze the elements of myriad federal statutes, but also would require federal courts on habeas review “to ascertain the elements of the offense as defined in the laws of 50 different States.” *Neder v. United States*, 527 U.S. 1, 15 (1999) (“Difficult as such issues would be when dealing with the ample volume defining federal crimes, they would be measurably compounded by the necessity for federal courts, reviewing state convictions under 28 U.S.C. § 2254, to ascertain the elements of the offense as defined in the laws of 50 different States.”). While this may be true, determining that a missing elements state verdict violates the Sixth Amendment under a harmless error regime also requires a consideration of elements of state statutes. In any event, it should be of no moment that courts may experience a slightly increased workload in order to safeguard the institutional interest of the jury, the purpose of which is “to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977).

evenhanded treatment by the courts. In cases where the government presents evidence that it believes would have convinced a properly instructed jury on every element of the crime, the reversal of a conviction on account of a missing element seems a harsh result. As described above, missing elements verdicts can arise from a number of scenarios. Where the trial court simply overlooks or misdescribes a required jury instruction and the government fails to catch the error or declines to notice the omission, reversal seems to run with the equities. However, where the jury instruction was in compliance with binding precedent when given, and only later deemed erroneous, fairness might seem to militate against reversal where no prejudice to the defendant can be shown. Likewise, the public may view reversals of missing element convictions where no prejudice to the defendant has resulted as undermining fairness in the system.

However, automatic reversal is a deterrent to future individual rights and structural constitutional violations in the trial court.<sup>177</sup> Despite perceptions of fairness (or lack thereof) which might be held by prosecutors and the public related to the proposed remedy, the purpose of treating missing elements errors as reversible per se is that the preservation of the institutional integrity of the jury should not rest on the government's views of the strength of its own evidence. In the same vein, popular sentiment about the equities in a given case cannot distract courts from fidelity to important structural and instructional requirements.<sup>178</sup> In the end, fairness in the criminal justice system is most effectively safeguarded by a jury permitted to perform its constitutionally assigned function of finding guilt beyond a reasonable doubt on all the elements of the crime.

### 3. Finality

There is, of course, inherent value in finality in the criminal process.<sup>179</sup> Finality is crucial because it undergirds the effective functioning of the criminal process. From a crime control perspective, finality in criminal litigation gives law enforcement officers and prosecutors the credibility with witnesses necessary to keep the system functional. Certainty in the disposition of criminal cases is important not only to the repeat players in the system, but also to the victims of criminal conduct. Unending criminal proceedings can delay the healing process and frustrate efforts at restorative justice. Furthermore, criminal defendants have an interest in finality in criminal proceedings. Indeed, the Constitution's assurance that the serious

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177. See, e.g., Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 Conn. L. Rev. 243, 299–300 (2000); Simon, *supra* note 2, at 580 (“[A]ppellate reversals serve important constitutional functions by condemning the infringement of the defendant's rights; educating police investigators, prosecutors, and trial judges; and deterring them from future violations.”).

178. Cf. *Blakely*, 542 U.S. at 313 (“Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.”).

179. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452–53 (1963).

collateral consequences of criminal jeopardy cannot be revisited upon a criminal defendant after an acquittal—no matter how ill-founded the fact-finder's decision—is grounded in notions of finality.<sup>180</sup> Many undoubtedly share the expectation that the jury, for better or worse, will have the final word on guilt or innocence. Although appellate proceedings related to constitutional and nonconstitutional errors in the adjudicative process are commonplace, arguably the determination of whether the government has met its burden of proof on all elements of the crime should end with the fact-finder.

However, the system tolerates (and even requires) the review of the factual basis for jury convictions by the trial court under postverdict motions for judgment of acquittal on evidentiary sufficiency grounds,<sup>181</sup> and by the appellate court in the course of sufficiency of the evidence challenges. In those situations, the jury presumably has been properly instructed and has reached the conclusion that the government has met its burden of proof on all required elements. Nevertheless, the reviewing trial or appellate court can determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>182</sup> Juries, for better or worse, sometimes do not have the final word on a defendant's guilt or innocence.<sup>183</sup> With appellate first-guessing of omitted elements verdicts, juries do not have the first word either.

#### 4. Public Confidence in the Criminal Justice System

The inclusion of missing element errors in the category of structural error also may lead to apprehension that automatic reversals in such cases will undermine public confidence in the criminal justice system. Indeed, the restoration of public confidence in the criminal process in the wake of well-publicized reversals was the rallying cry for the reform efforts leading to the adoption of the harmless error rule.<sup>184</sup> However, it is important to remember that treating missing elements as structural error only affords the defendant a new trial, not outright acquittal. Therefore, the “guilty” are not

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180. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 87 (1978) (“The underlying idea [of the Double Jeopardy Clause] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.” (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957))).

181. *See* Fed. R. Crim. P. 29 (motion for judgment of acquittal); *see also* Fed. R. Crim. P. 33 (motion for new trial, which may be granted on grounds that the verdict is contrary to the weight of the evidence if the court believes that it is in the interest of justice).

182. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citation omitted).

183. To be sure, judicial interference with a jury's guilty verdict pursuant to Rule 29 undoubtedly infringes upon jury discretion, but it does so in the service of due process protections for the defendant. The application of harmless error review to the first-guessing described in this Article undermines both jury discretion and due process protections.

184. *See supra* Part I.A.

going free; all the automatic reversal rule requires is that the accused receive a trial before a jury properly instructed that it needs to find every element of the crime in order to convict. In most cases, the government will have a second opportunity to try the defendant and seek a conviction. Rather than undermining public confidence in the system, the care the system takes to ensure that individuals are not deprived of life or liberty without the requisite safeguards would seem to have the opposite effect. So too would the outward show of the courts' commitment to the institution of the jury, a cornerstone of the criminal justice system and conduit for public participation in that system.

That the jury's institutional interests are sometimes at odds with other important values in the criminal justice process comes as no surprise. Recognized for the manner in which it serves important pragmatic interests as well as the promotion of truth in the criminal justice process, the harmless error rule has survived criticism that it intrudes upon the province of the jury.<sup>185</sup> Nevertheless, where the intrusion undermines the structural and institutional legitimacy of the jury, automatic reversal is warranted and worth its concomitant efficiency costs.

#### B. Migration to Other Jury-Related Errors?

There is a legitimate concern that designating missing elements verdicts as structural error based on the institutional injury to the jury will lead to a rapid expansion of the number of jury-related errors subject to automatic reversal. This slippery slope argument has some merit, but only with regard to errors that undermine the institutional role of the jury.<sup>186</sup> The type of errors implicating the structural role of the jury—like the erroneous reasonable doubt instruction deemed to be structural error in *Sullivan v. Louisiana*<sup>187</sup>—might include, for instance, verdicts rendered by a jury smaller than deemed consistent with the constitutional guarantee, or an error allowing a biased or interested jury to render a verdict in a case.<sup>188</sup>

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185. See generally, e.g., Goldberg, *supra* note 6.

186. Therefore, for example, an error that involved a verdict from a jury of five members might compromise the jury's institutional interest in engaging in deliberation and serving as the voice of the community in a way that improper prosecutorial comment to the jury might not.

187. 508 U.S. 275 (1993).

188. In *Batson v. Kentucky*, the Supreme Court held that the Equal Protection Clause is violated when a prosecutor challenges a potential juror on the basis of race or on race-based assumptions regarding the ability of a potential juror to judge a member of her own race. See 476 U.S. 79, 89–96 (1986). Although the issue has not been decided by the Supreme Court, lower courts have overwhelmingly treated *Batson* errors as structural error. See *United States v. McFerron*, 163 F.3d 952, 955–56 (6th Cir. 1998) (“[The] suggestion [that *Batson* errors are amenable to harmless error review] has been resoundingly rejected by every circuit court that has considered the issue.”) (collecting cases); see also *United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999); *Turner v. Marshall*, 121 F.3d 1248, 1254 n.3 (9th Cir. 1997). But see *Carter v. Kemna*, 255 F.3d 589, 592 (8th Cir. 2001) (noting lower court disagreement on the application of the harmless error rule when a *Batson* error improperly excluded an alternate juror but no alternate was ultimately deliberated). Although the injury in a



Because such errors go to the very essence of the jury's identity and function, they conceivably could be candidates for automatic reversal if harmless error review would undermine those institutional interests.

Regardless of these slippery slope concerns, the Court's jurisprudence is trending away from any expansion of the structural error exception to harmless error review, toward the continued subordination of the institutional interests of the jury. One prominent example can be found in the recent application of harmless error review to *Blakely* error in *Washington v. Recuenco*.<sup>189</sup> The Court has drastically expanded (some would argue restored) the Sixth Amendment jury trial right by requiring that all facts required for sentence enhancement be proven to a jury (rather than a judge) beyond a reasonable doubt rather than by a preponderance of the evidence.<sup>190</sup> The line of cases, beginning with *Apprendi v. New Jersey*,<sup>191</sup> was greeted with much fanfare and academic commentary. The consensus was that, no matter the everyday practical effect of the decisions, the Supreme Court had made a significant nod to the Sixth Amendment right to jury trial and the institution of the jury itself.<sup>192</sup> Nevertheless, the *Recuenco* Court recently decided that the sentencing court's failure to adhere to *Blakely*'s strictures was subject to harmless error review.<sup>193</sup> Thus, even where the sentencing court explicitly invades the province of the jury in setting a sentence, the Court uses prejudice to the individual defendant as the sole touchstone for determining whether such invasion deserves a remedy. *Recuenco* is but another example of the application of the harmless error rule to errors implicating the institutional interests of the jury.

*Neder* and *Recuenco* are both harbingers of the migration of the subordination of the jury's institutional interests to the context of the grand jury as well. In the October 2006 Term, in *United States v. Resendiz-Ponce*,<sup>194</sup> the Court took up the question whether harmless error should apply where an indictment fails to charge all the elements of a crime. In *Resendiz-Ponce*, the defendant had been charged with attempted illegal reentry after deportation.<sup>195</sup> Although he was convicted at trial by a jury

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violation of *Batson* is to the defendant's right to equal protection, one might also conceive of it as relevant to the makeup of the jury in its role as voice of the community, and thus injurious to the institutional interest of the jury. See, e.g., Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 Yale L.J. 93, 137-38 (1996).

189. 126 S. Ct. 2546 (2006).

190. See *id.* at 2549.

191. 530 U.S. 466 (2000).

192. See, e.g., Douglas A. Berman, *Assessing Apprendi's Aftermath*, 15 Fed. Sent'g Rep. 75 (2002); Bilionis, *supra* note 155, at 1354; Saltzburg, *supra* note 17. But see Bibas, *supra* note 155, at 465-66 ("The real tug of war [in the 'institutional allocation of power in the criminal justice system' related to *Apprendi*] is not between juries and judges, as there are few juries left, but among prosecutors, legislatures, and judges.").

193. See *Recuenco*, 126 S. Ct. at 2552-53.

194. 127 S. Ct. 782 (2007).

195. *Id.* at 786-87.

properly instructed on each element of the crime, the grand jury arguably had been instructed on fewer than all the elements of the crime.<sup>196</sup> The solicitor general argued that, like in *Neder*, the failure to instruct the fact-finder on all elements of the offense is not a structural error requiring automatic reversal.<sup>197</sup> Because the right to grand jury has not been incorporated, elemental omission in the grand jury context presented an even weaker case than elemental omission in the jury trial context, which had been determined, in *Neder*, not to be structural error.<sup>198</sup> Instead, the United States argued, the error should be subject to harmless error review, with the inquiry on appeal being “whether it is clear beyond a reasonable doubt that, but for the error, the grand jury would still have returned an indictment” considering the evidence presented at trial.<sup>199</sup> The government contended that where a properly instructed petit jury subsequently renders a verdict of guilty on all elements of the crime beyond a reasonable doubt—a higher standard of proof than the grand jury’s probable cause inquiry<sup>200</sup>—the error does not prejudice the defendant.<sup>201</sup>

The government’s position in *Resendiz-Ponce* ignored the grand jury’s structural and institutional legitimacy; the grand jury plays a structural role which implements constitutional design.<sup>202</sup> A preconstitutional entity, the grand jury, like the petit jury, works as both a conduit to express community values and as a structural check on the three branches of government.<sup>203</sup> The grand jury is in a unique position to offer feedback on the wisdom of the substance, application, and adjudication of the criminal

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196. See *id.* at 787. Juan Resendiz-Ponce argued, and the U.S. Court of Appeals for the Ninth Circuit agreed, that attempted illegal reentry required an overt act, an allegation not included in the indictment. See *United States v. Resendiz-Ponce*, 425 F.3d 729, 731–32 (9th Cir. 2005). The Supreme Court ultimately would disagree that an overt act was required to be explicitly included in the indictment. See *Resendiz-Ponce*, 127 S. Ct. at 789–80.

197. Brief for the United States at 9–23, *Resendiz-Ponce*, 127 S. Ct. 782 (No. 05-998).

198. *Id.* at 15. It is unclear why the fact that the Supreme Court, in *Hurtado v. California*, 110 U.S. 516 (1884), did not incorporate the Grand Jury Clause through the Due Process Clause of the Fourteenth Amendment to apply to the states would have any bearing on whether, in a federal prosecution, a grand jury indictment on all elements of the charged offense is required.

199. See Brief for the United States, *supra* note 197, at 9.

200. *Id.* It is ironic that the United States relied upon the subsequent jury verdict as cleansing the elemental omission error in the grand jury, particularly when the government would have harmless error apply to elemental omissions in the petit jury context as well under *Neder*.

201. *Id.* Of course, the prejudice to the defendant is an inquiry under harmless error review, not a rationale for applying it. The position of the United States does find some support in *United States v. Mechanik*, where the Court concluded that the subsequent conviction by a petit jury renders harmless procedural errors in the grand jury. 475 U.S. 66, 67 (1986). See generally, e.g., Christopher M. Arfaa, Note, *Mechanikal Applications of the Harmless Error Rule in Cases of Prosecutorial Grand Jury Misconduct*, 1988 Duke L.J. 1242. Nevertheless, the error at issue in *Resendiz-Ponce* is not merely procedural, but goes to the heart of the grand jury’s institutional and structural role.

202. See Fairfax, *supra* note 149 (manuscript at 122, on file with author).

203. See *id.* (manuscript at 121–23, on file with author).

law.<sup>204</sup> Thought for most of our constitutional history to be so important as to serve as a prerequisite to the exercise of federal jurisdiction in a criminal case,<sup>205</sup> the grand jury has a rich heritage with its own constitutional purpose and with institutional interests independent from those of the criminal defendant.<sup>206</sup> All this is ignored in the suggestion that harmless error review should apply to elemental omission errors in grand jury indictment.

In the end, the Court in *Resendiz-Ponce* avoided the question whether elemental omissions in the grand jury context were structural errors,<sup>207</sup> but the issue is sure to present itself to the Court in the very near future.<sup>208</sup> Some have suggested that the solicitor general is correct in the argument that *Neder* dictates the answer to the question.<sup>209</sup> However, the same institutional interests involved with elemental omissions in the petit jury context are at stake in the grand jury context. The grand jury's existence and purpose are not completely tethered to the role of vehicle for the individual rights of a criminal defendant. When an appellate court determines what the grand jury would have done had it been asked to do so,<sup>210</sup> it substitutes its judgment for that of the grand jury, the entity to which the Constitution assigns the indictment function. If the grand jury is to continue to have constitutional or practical import, its institutional

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204. See *id.* (manuscript at 144, on file with author). Indeed, during oral argument in *Resendiz-Ponce*, Chief Justice John Roberts seemed to pay fealty to the grand jury's institutional and structural interests when he stated that "historically a significant role for the grand jury has been not to indict people even though the government had the evidence to indict them." Transcript of Oral Argument at 16, *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007) (No. 05-998).

205. See Fairfax, *supra* note 162, at 399–400. The Court, in *United States v. Cotton*, questioned the jurisdictional import of grand jury indictment. 535 U.S. 625, 629–31 (2002); see also Joshua A.T. Fairfield, *To Err Is Human: The Judicial Conundrum of Curing Apprendi Error*, 55 Baylor L. Rev. 889, 951–53 (2003) (discussing *Cotton*).

206. See generally Fairfax, *supra* note 162.

207. See *supra* note 200.

208. In oral argument in *Resendiz-Ponce*, the Government argued that the sheer volume of federal criminal cases, the opportunity for both prosecutors and judges to make mistakes, and the prospect of case law developments subsequent to the securing of indictments mean that the issue of elemental omissions will arise frequently. See Transcript of Oral Argument, *supra* note 204, at 15–16.

209. One commentator has reasoned that *Neder* would also necessitate the application of harmless error to instances where the grand jury has indicted on fewer than all the elements of a crime. See Fairfield, *supra* note 205, at 951–53 (arguing that *Neder*'s logic should extend to failure to present an element of a crime to a grand jury). As for the thinking of Justice Scalia, the vigorous dissenter in *Neder*, we have a strong "clue" from his dissent in *Resendiz-Ponce*: "Since the full Court will undoubtedly have to speak to the point on another day (it dodged the bullet today by inviting and deciding a *different* constitutional issue—albeit, to be fair, a narrower one) there is little use in my setting forth my views in detail. It should come as no surprise, given my opinions in [*United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (holding that the right to choice of counsel is structural error), and *Neder*] that I would find the error to be structural." *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 793 (2007) (Scalia, J., dissenting).

210. See, e.g., *Cotton*, 535 U.S. at 633 ("Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.").

legitimacy must not be undermined in the very serious way that harmless error review of elemental omission or first-guessing threatens to undermine it. As in the petit jury context, elemental omission in the grand jury context should be treated as structural error.

### C. *Limiting Principles?*

Although the structural and institutional interests of the jury necessitate the treatment of missing elements verdicts as structural error, query whether there are limiting principles to cabin the cost and disruption the automatic reversal rule would cause while remaining true to the underlying rationale. Two such limiting principles are considered below and ultimately rejected because they are inconsistent with the institutional interests of the jury.

One possible limit on the rule might confine it to those missing elements verdicts where substantive, factual elements are missing from the jury instruction. For example, where a jury instruction—through omission, misdescription, or erroneous mandatory presumption—is missing the intent element, the rule of automatic reversal would apply, whereas, for example, in a federal bank robbery case, a missing element that a robbed bank had been federally insured could be subject to harmless error review. Some courts have drawn distinctions between “substantive” elements and merely “procedural” or “technical” elements.<sup>211</sup> The problem with this approach is that it is not clear which elements are technical and which are not. Is the element that requires a finding that a firearm traveled in interstate commerce a technical element? Does it matter that the element is related to Congress’s power to proscribe the conduct in the first place? Whenever the legislature sees fit to require an elemental finding in its definition of the crime, it is unclear the extent to which it can be determined whether the element is substantive or procedural. Furthermore, the Jury Clauses, due process, and common law tradition require that the jury find evidence beyond a reasonable doubt on all elements of the crime charged, not just nontechnical elements.<sup>212</sup> The jury’s institutional interest would seem to be undermined when any required factual finding is taken from it and given to the court.

Related to the technical/substantive approach is one that would limit the rule of automatic reversal to elements where the evidence was controverted. Some courts have equated such elements with technical elements,<sup>213</sup> and others have suggested that the fact that the element had been disputed by

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211. See *Glenn v. Dallman*, 686 F.2d 418, 421 n.2 (6th Cir. 1982); see also *United States v. Bryant*, 461 F.2d 912, 921 (6th Cir. 1972) (“We are not here concerned with an omission that constitutes a mere technical defect or with one that concerns the existence of an element that has been conceded by the defense or is otherwise not in issue. Instead, the omission in this case concerned the element that constitutes the very basis of the offense and the only element in issue.”); *United States v. Rybicki*, 403 F.2d 599, 604 (6th Cir. 1968) (finding that reversal was warranted where “omission was not merely a technical procedural fault but could have visited substantial prejudice on [the defendant]”).

212. See, e.g., *Greabe*, *supra* note 11, at 847.

213. See, e.g., *Bryant*, 461 F.2d at 920–21.

the defendant would be a factor in determining whether automatic reversal would apply. Indeed, as some have argued, *Neder* could be interpreted to allow for automatic reversal where the misdescribed element was contested and the evidence was, in the view of the appellate court, more equivocal.<sup>214</sup> Although this is a reasonable reading of *Neder*,<sup>215</sup> the Court's opinion states, in the broadest possible terms, that "omission of an element is an error that is subject to harmless-error analysis."<sup>216</sup>

Even if there were room in the Court's holding for a "partial" automatic reversal rule, applying when an element had been contested at trial, the appellate determination of whether evidence was controverted would require an intensive record review that would resemble the prejudice inquiry under harmless error review. Furthermore, it would seem odd to condition the application of the automatic reversal rule on an appellate review of the record to determine the extent to which the appellate court believes the defendant disputed the government's evidence on an element, particularly given that the defendant has no burden of proof and is not required to put on a defense.<sup>217</sup>

As the Court underscored in *Neder*, "Under our cases, a constitutional error is either structural or it is not."<sup>218</sup> If the jury's structural and institutional interests are to be safeguarded through the characterization of missing elements verdicts as structural error, then the protective remedy of automatic reversal ought to apply across the board.

Mandating automatic reversal in cases where the defendant did not object below, however, presents more difficult issues. Where there was no defense objection at the jury instruction stage, the defendant could have been sandbagging the prosecution by failing to note the error in hopes of an acquittal. It goes without saying that such gamesmanship is abusive of the

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214. See Carter, *supra* note 129, at 240 ("The Court's carefully limited holding . . . leaves open room for an argument that an erroneously omitted element of a crime would only be harmless if the element were uncontested and supported by overwhelming evidence. The opinion further allows for the position that contesting the element at trial or on appeal would be sufficient to establish the harm.").

215. See *Neder v. United States*, 527 U.S. 1, 15 (1999) (noting that the defendant had not contested the materiality element at trial and did not suggest that the element would be contested on retrial); see also *id.* at 19 ("In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee."); *United States v. King*, 587 F.2d 956, 966 (9th Cir. 1978) ("The failure to instruct on every element of an offense is harmless error only if the omitted element is undisputed, and, therefore, its omission could not possibly have been prejudicial.").

216. *Neder*, 527 U.S. at 15.

217. See *id.* at 19 ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.").

218. *Id.* at 14.

criminal process and should be discouraged.<sup>219</sup> However, the institutional interests of the jury apply with equal force whether or not defendant's counsel noticed the error below; because it is the jury (as well as the defendant) that is injured by missing elements verdicts, automatic reversal should be applied.<sup>220</sup>

Federal plain error review, a much more onerous standard of review than that of harmless error, focuses its inquiry on four key factors. The defendant has the burden of showing that there was an error, that the error was "plain," that it "affect[s] substantial rights,"<sup>221</sup> and that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."<sup>222</sup> Although demonstration of prejudice typically is required to satisfy the "affect[s] substantial rights" prong of the plain error rule, the Supreme Court has not foreclosed the notion that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome."<sup>223</sup> The Court's subsequent statements on this issue are not the model of clarity, but a fair reading of the Court's approach is that the fact that an error was a structural error for purposes of harmless error review meant that it likely would satisfy the third, "affect[s] substantial

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219. Of course, such strategic behavior is only effective where both the judge and the prosecutor fail to notice the error in the jury instruction about which defense counsel stood silent. An automatic reversal approach would incentivize trial courts and prosecutors, thus diminishing the incidence of erroneous jury instructions. *See supra* Part IV.A.1.

220. *Cf. Neder*, 527 U.S. at 28 (Stevens, J., concurring in part and concurring in the judgment) ("If [elemental omissions] were, as Justice Scalia's dissent suggests, as serious as malpractice on 'the spinal column of American democracy,' surely the error would require reversal of the conviction regardless of whether defense counsel made a timely objection." (citations omitted)). A colorable argument can be made that, just as we tolerate the defendant's waiver of rights affecting the jury's institutional interests (such as in the guilty plea context), *see supra* note 162, we should be willing to countenance the application of harmless error review where the defendant has forfeited the issue below. *Cf. Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 892–901 (1991) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 894 n.2 (highlighting the distinction between "waiver" and "forfeiture" and noting that "[a] right that cannot be waived cannot be forfeited by other means (at least in the same proceeding), but the converse is not true"). This may be particularly so in a situation where the defendant has not merely failed to object to an elemental omission error in the trial court's jury instructions, but has contributed to the error by submitting proposed jury instructions which omit a required element of an offense. Under a regime of automatic reversal for elemental omission error, as this Article submits, prosecutors and judges will have a strong incentive to ensure defendants do not game the system in this way. However, to the extent a line *must* be drawn for the purpose of constraining appellate remedies in the forfeiture context, perhaps a defendant's affirmative manufacturing of elemental omission error would be an appropriate place to draw it.

221. *United States v. Olano*, 507 U.S. 725, 734–35 (1993). Rule 52(b) generally is permissive; these four prongs must be satisfied simply to trigger the reviewing court's remedial discretion to correct the error under Rule 52(b) of the Federal Rules of Criminal Procedure. *See Johnson v. United States*, 520 U.S. 461, 469–70 (1997); *see also* Fed. R. Crim. P. 30(d) (naming plain error review under Rule 52(b) as the exclusive means of access to appellate review of forfeited jury instruction error).

222. *Olano*, 507 U.S. at 736–37 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

223. *Id.* at 735.

rights,” prong of the plain error test.<sup>224</sup> However, what is clear is that the Court has been unwilling to treat elemental omission as the type of error that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings” (the fourth prong of the plain error test), such that a court may exercise discretion to correct it.<sup>225</sup> The Court, in rejecting the notion that failure to submit an element of the crime to a jury was an error so serious as to cast doubt on judicial proceedings sufficient to trigger correction of a plain error, will assess the amount of uncontroverted evidence presented by the government—the same analysis employed under harmless error review of elemental omissions.<sup>226</sup>

The application of this brand of plain error review to missing elements verdicts undoubtedly avoids the necessity of costly retrials under the automatic reversal rule. Nonetheless, this approach, though in service of the pragmatic interests discussed above, ignores the institutional significance of the jury. Only the categorization of missing elements verdicts as structural error fully safeguards the institutional role of the jury and shores up the constitutional guarantee of trial by jury.

#### CONCLUSION

By usurping the jury’s core fact-finding function through harmless error review of elemental omissions, appellate courts undermine the jury’s structural and institutional role of injecting popular input into the judicial function. Notwithstanding the pragmatic benefits that might flow from allowing appellate judges to substitute their judgment of the facts for that of the jury, “first-guessing” works a fundamental intrusion into the province of the jury. Once the prerogative of the jury has been breached in this way, there is no principled way to prevent further infringements.

In its refusal to treat elemental omission error as structural and, therefore, reversible per se, the Court has operated under far too cramped a conception of the constitutional injury involved. The Court has demonstrated its willingness to sacrifice vindication of Sixth Amendment jury trial rights at the altar of the pragmatic values the harmless error rule advances. The Court’s approach, while merely misguided with regard to the constitutional injury to individual criminal defendants caused by harmless error review of elemental omission errors, is laid bare as wholly untenable once the focus is shifted to the institutional injury suffered by the jury itself. Fidelity to the constitutional and democratic ideals undergirding the institution of the jury requires that the category of structural errors not susceptible to harmless error review be expanded to include elemental omission error.

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224. See, e.g., *United States v. Cotton*, 535 U.S. 625, 632 (2002) (seeming to assume that a structural error would satisfy the third prong of the plain error analysis); *Johnson*, 520 U.S. at 468–69 (discussing, but not deciding, whether a structural error satisfied the third prong of the plain error test).

225. See *Johnson*, 520 U.S. at 469–70 (citation omitted).

226. See *id.* at 470 & n.2.

The harmless error rule, a twentieth century innovation of statute and constitutional common law, was designed to eschew formalism in favor of adherence to pragmatism. Nevertheless, the reach of the harmless error rule was meant to extend only as far as the boundaries of basic constitutional values would permit. No constitutional value is more fundamental than the framework of government that shelters the political and civil rights we hold so dearly. The jury's institutional role in that structure must be jealously guarded, lest our desire for efficiency overshadow our need for liberty.



## *Notes & Observations*