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A Comprehensive Consideration of the Structural-Error Doctrine

Zachary L. Henderson

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ABSTRACT

Court proceedings are rarely perfect – far from it. Errors happen regularly before and during litigation, and when they do, courts must decide how to handle them. Gone are the days when a typo might demand a new trial: many errors – typos certainly, but also much more serious mistakes – are regularly deemed harmless by the court, meaning those errors had no prejudicial effect on the outcome of the case (and so do not warrant a new trial). Yet even after the development of the harmless-error doctrine in the early part of the twentieth century, errors involving constitutional rights were de facto prejudicial: if a defendant could identify a constitutional error then he was entitled to a new trial. This rule, too, eventually gave way: by the late 1960s the United States Supreme Court had ruled that most constitutional errors were susceptible to harmless-error analysis. But there has remained a narrow set of constitutional errors that, once identified, still automatically entitle a defendant to a new trial. These are called "structural errors," and are the topic of this Article.

The idea that some errors are "structural" was introduced nearly thirty years ago, yet the criteria for what makes an error structural are even less clear now than they were then – indeed, over the past few years the doctrine has arguably gone through a transformation of sorts. This Article describes the origins and development of the structural-error doctrine, lists and analyzes all of the ostensibly "structural" errors identified by the circuit courts (the culmination of a nine-hundred-opinion case survey), discusses and attempts to reconcile the current state of the law, and, finally, offers guidance on several outstanding questions – specifically, how the structural-error doctrine interfaces with the plain-error doctrine, and whether structural errors are waivable. The author hopes that this article will provide an up-to-date, comprehensive, and accurate resource on structural error that will prove helpful to judges, practitioners, and academics alike.

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I. INTRODUCTION

Courts and parties commit errors all the time, and those errors are often the stuff appeals are made of. Perhaps a judge gave a bad evidentiary ruling,[1] or a sentencing judge adopted a probation officer's faulty Sentencing Guidelines recommendation;[2] the list of errors that could occur at various points in a trial are limitless. In fact, litigation today is so complex that a totally error-free case is probably the exception rather than the norm.[3]

For centuries, courts have wrestled with what to do about error. In recent times, the United States Supreme Court identified a special category of constitutional errors called structural errors.[4] As the name suggests, structural errors do not occur in a vacuum.[5] They have broad effects that not only reach forward to the outcome of a case, but backward (to the foundation of the case) and inward (to its structure).[6] In short, structural errors have the effect of somehow "breaking" the proceedings in a fundamental, irreversible way. While most errors are subject to the harmless-error doctrine – meaning a reviewing court asks whether the error on review actually affected a party's substantial rights before reversing the case – structural errors are automatically reversible; no harmlessness analysis is required.[7]

The Supreme Court has tried to be clear that the list of structural errors is short,[8] but that has not stopped litigants from trying to shoehorn the errors in their own cases into the structural-error doctrine, nor has it stopped the circuit courts from identifying more than a dozen new, ostensibly "structural" errors.[9]

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1. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (granting certiorari to review errors in the Mississippi trial court's evidentiary rulings).

2. *See, e.g.*, Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) (reviewing a district court's adoption and application of an incorrect Sentencing Guidelines range).

3. In the forward to his book on harmless error, Justice Traynor once called errors the "insects in the world of law, travelling through it in swarms, often unnoticed in their endless procession." Justice Robert J. Traynor, THE RIDDLE OF HARMLESS ERROR, Ohio State University Press, 3 (1970).

4. *See* Arizona v. Fulminante, 499 U.S. 279, 309–310 (1991).

5. *Id.* at 309–10 ("The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. . . . Each of these constitutional deprivations . . . affect[s] the framework within which the trial proceeds, rather than simply an error in the process itself.").

6. *Id.*

7. *Id.* ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards.").

8. *See* Johnson v. United States, 520 U.S. 461, 468 (1997) ("We have found structural errors only in a very limited class of cases.").

9. *See infra*, Section III-C.

This Article seeks to provide a comprehensive treatment of the structural-error doctrine, as created and maintained by the Supreme Court, and as applied by the circuit courts. Considerable effort went into ensuring the comprehensiveness of the treatment of the issue: this Article is the culmination of the careful review of over nine hundred circuit and Supreme Court opinions, all dealing in some way with the structural-error doctrine.

Part II begins by discussing the structural-error doctrine more generally, including its origins in Subpart A and development in Subpart B, followed by an in-depth discussion of the Supreme Court's significant opinion in *Weaver v. Massachusetts* in Subpart C and that decision's likely future implications in Subpart D.[10] Part III moves down an order of generality by first proposing a prescriptive, functional definition of "structural error" in Subpart A, with the hope that this definition can help shed light on why a given error is or is not structural. The Article then discusses each of the nine structural errors explicitly identified by the Supreme Court in Subpart B as well as the (many) such errors identified by the circuit courts but not yet ratified or rejected by the Supreme Court in Subpart C. (As it turns out, most of them are probably not structural errors after all.) Part IV considers and attempts to resolve several unanswered questions about the doctrine. It begins with a short overview of the waiver and forfeiture doctrines in Subpart A before discussing how the structural-error doctrine interfaces with the plain-error doctrine in Subpart B and whether structural errors are waivable in Subpart C.

II. THE ORIGINS AND DEVELOPMENT OF THE STRUCTURAL-ERROR DOCTRINE

Since announcing the structural-error doctrine in 1991, the Supreme Court and circuit courts have struggled to pin down a definition of structural error that is neither over- nor under-inclusive. At the core of the structural-error doctrine is the idea that some constitutional errors damage the framework of the trial so thoroughly that no aspect of the trial is reliable any longer.[11] In such cases, we cannot look to the rest of the trial to decide whether the error that occurred was harmless; if the error damaged the foundation of the trial, then no part of that trial can be relied on to help determine whether the error in question was harmless.[12] This is all well and good in the abstract, but applying it to specific errors in specific cases can be difficult. After all, it is probably true that most defendants are convinced that the error they fell victim to seriously affected the fairness of their trial.

The history, origins, and development of the doctrine offer the best opportunity to understand the contours of what makes an error structural or not. Accordingly, we begin at the beginning.

10. Weaver v. Massachusetts, 137 S. Ct. 1899 (2017).

11. *See Fulminante*, 499 U.S. at 309–10.

12. *Id.*

A. Origins

The term "structural error" first entered the judicial lexicon in the early 1990s. In *Arizona v. Fulminante*, the Supreme Court introduced the idea of "structural defects,"[13] and just a few months later in *Freytag v. C.I.R.*, Justice Scalia used the phrase "structural errors,"[14] the term that stuck. Yet *Fulminante* – a case this Article discusses at length later – does not represent the absolute beginning of the structural-error doctrine; far from it. To understand the origins of structural error – a kind of error not susceptible to harmless-error review – we first must understand the origins of harmless error itself.

1. Harmless Error

As Justice Traynor once put it, there was a time in American jurisprudence when "no error was lightly forgiven."[15] "[T]he slightest error in a trial could spoil the judgment," and legal proceedings were "entirely surrounded by booby traps."[16] In the mid-to-late 1800s, the federal and state courts of appeals were so paralyzed by their own fear of judicial overreach[17] that they had turned themselves into what one scholar described as "impregnable citadels of technicality."[18] In *The Riddle of Harmless Error*, Justice Traynor pointed to two examples of this.[19] In 1863, the Supreme Court of California reversed a judgment in a robbery case due to an error of omission: the indictment did not specify that the taken property did not belong to the defendant.[20] In another case a decade later, the same court overturned a criminal conviction because the indictment contained a typo: it charged the defendant with "larcey" (rather than "larceny").[21]

By the early 1900s, dissatisfaction with this approach to error was vocal and ubiquitous.[22] In 1906, Roscoe Pound, the renowned scholar and eventual dean of Harvard Law School, declared, without hyperbole, that "the worst

13. *Id.*

14. *See* Freytag v. C.I.R., 501 U.S. 868, 896 (1991) (Scalia, J., concurring).

15. Traynor, *supra* note 3, at 3.

16. *Id.*

17. *Id.* at 13.

18. Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 59 A.B.A. J. 217, 222 (1925).

19. Traynor, *supra* note 3, at 3–4.

20. People v. Vice, 21 Cal. 344, 345 (1863).

21. People v. St. Clair, 56 Cal. 406, 407 (1880).

22. *See, e.g.*, Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178, 185 (1937); Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 436–37 (2009).

feature of American procedure is the lavish granting of new trials."[23] Justice Rutledge would later recount, in his majority opinion in *Kotteakos v. United States*, that "[s]o great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained."[24]

The dam finally broke when, in 1919, Congress amended the law governing grants of new trials in the federal courts. The Act of February 26, 1919 clarified that, before granting a new trial,

> [T]he court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions *which do not affect the substantial rights of the parties*.[25]

This re-centering of federal error analysis around substantial rights begot our modern harmless error doctrine[26] and led to similar adoptions in the state courts.[27] Eventually, all fifty states passed harmless-error statutes or rules.[28]

After *Kotteakos*, harmless-error doctrine took root in American jurisprudence[29] – but at the same time that the *Kotteakos* Court applied this doctrine, it also hinted that there still existed a whole class of errors to which harmless-error analysis might not apply.[30] Where the error in question was a departure from "a constitutional norm or a specific command of Congress," the Court said, even a non-prejudicial error might still need to be reversed.[31]

2. Constitutional Error

For years after *Kotteakos*, courts continued to routinely reverse cases without a finding of prejudice when the error implicated constitutional rights

23. Pound, *supra* note 22, at 185.

24. Kotteakos v. United States, 328 U.S. 750, 759 (1946).

25. Act of Feb. 19, 1919, ch. 48, 40 Stat. L. 1181, *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992, 998 (emphasis added).

26. *Kotteakos*, 328 U.S. at 757.

27. Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 147 (1927).

28. *See* Chapman v. California, 386 U.S. 18, 22 (1967).

29. According to at least one scholar, courts were so zealous in their adoption of the harmless-error doctrine that, after *Kotteakos*, "it sometimes seemed that error was presumed to be harmless and that the burden of proof was on the defendant to prove otherwise." Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1009 (1973).

30. *Kotteakos*, 328 U.S. at 760.

31. *Id.* at 764–765.

and norms.[32] Indeed, the Supreme Court itself began to state more confidently that harmless error was "an impermissible doctrine" to apply to constitutional errors.[33] Yet courts were not consistent in applying this *per se* reversal rule for constitutional cases,[34] and in *Chapman v. California* the Court finally announced that harmless-error analysis could be applied to constitutional errors after all, subject to several notable exceptions.[35]

The *Chapman* Court began by explaining that some constitutional errors remained insusceptible to harmless-error review. (The court gave three examples:[36] coerced confessions,[37] the right to counsel,[38] and the right to an impartial judge.[39]) Nevertheless, it held that constitutional errors *could* be held harmless, so long as the court is "able to declare a belief that it was harmless beyond a reasonable doubt."[40] We will return to this language, for *Chapman*'s focus on the court's *ability* to be certain of harmlessness foreshadows the Court's reasoning in *Fulminante* and its establishment of the structural-error doctrine.[41]

After *Chapman*, the Court applied harmless-error review to a broad array of constitutional errors, including overbroad jury instructions in capital sentencing cases,[42] admissions of evidence at sentencing in capital cases,[43] jury instructions containing erroneous presumptions,[44] jury instructions that misstate elements of the offense,[45] the improper exclusion of a defendant's testimony about the circumstances of his confession,[46] various Confrontation Clause violations,[47] the denial of a defendant's right to be present at his own

32. *See*, *e.g.*, Lynumn v. Illinois, 372 U.S. 528, 537 (1963) (holding that harmless-error review is an "impermissible doctrine" to apply to coerced confessions).

33. *Id.*

34. *See, e.g.*, United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950) (reviewing for harmlessness a Fourth-Amendment search-and-seizure violation), *overruled by* United States v. Burke, 781 F.2d 1234 (7th Cir. 1985).

35. Chapman v. California, 386 U.S. 18, 22 (1967).

36. *Id.* at 23 n.8.

37. *See* Payne v. Arkansas, 356 U.S. 560, 568 (1958).

38. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

39. *See* Tumey v. State of Ohio, 273 U.S. 510, 535 (1927).

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

41. *See infra* text accompanying notes 53–56.

42. Clemons v. Mississippi, 494 U.S. 738, 752–54 (1990).

43. Satterwhite v. Texas, 486 U.S. 249, 258–60 (1988).

44. Carella v. California, 491 U.S. 263, 266 (1989); *see also* Rose v. Clark, 478 U.S. 570, 579–80 (1986).

45. Pope v. Illinois, 481 U.S. 497, 501–04 (1987).

46. Crane v. Kentucky, 476 U.S. 683, 691 (1986).

47. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); *see also* Moore v. Illinois, 434 U.S. 220, 232 (1977); Brown v. United States, 411 U.S. 223, 230–32 (1973).

trial,[48] improper comment on a defendant's Fifth-Amendment right to silence at trial,[49] failing to instruct the jury on the presumption of innocence,[50] various admissions of evidence obtained in violation of the Fourth and Fifth Amendments,[51] and the denial of counsel at a preliminary hearing.[52] Suffice it to say that, after *Chapman*, the Court's harmless-error application to even constitutional errors was robust.

3. Structural Error

With harmless-error analysis suddenly applying to most constitutional errors, it was becoming less and less clear why a small set of constitutional errors were unsusceptible to a finding of prejudice. In *Arizona v. Fulminante*, the Court finally settled on an organizing principle to explain these exceptions.[53] Justice Rehnquist, writing for a five-justice majority, explained that constitutional errors that occur during the course of a trial are susceptible to harmless-error review, because such errors can be "quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[54] As for those constitutional errors that remained *per se* reversible without a finding of harmlessness[55] – such as violations of one's right to counsel, or one's right to be tried before an impartial judge – those errors cannot simply be "assessed in the context of other evidence."[56] Instead, those are "structural defects" that affect "the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."[57]

B. Development

Fulminante was a controversial opinion from day one. Many scholars empathized with the four-justice dissent, led by Justice White, that argued the majority's distinction of trial errors on the one hand and structural errors on the other was based on the fiction that the Court's jurisprudence could be neatly classified.[58] Some scholars went further, pointing out that the majority had provided three inconsistent definitions for what constituted a trial error in

48. Rushen v. Spain, 464 U.S. 114, 117–18 (1983).

49. United States v. Hasting, 461 U.S. 499, 510–12 (1983).

50. Kentucky v. Whorton, 441 U.S. 786, 789–90 (1979) (per curiam).

51. Milton v. Wainwright, 407 U.S. 371, 372, 377–78 (1972); *see also* Chambers v. Maroney, 399 U.S. 42, 52–53 (1970).

52. Coleman v. Alabama, 399 U.S. 1, 10–11 (1970).

53. Fulminante v. Arizona, 499 U.S. 279, 307–12 (1991).

54. *Id.* at 307–08.

55. *Id.* at 309–10.

56. *Id.* at 307–10.

57. *Id.* at 308–09.

58. *Id.* at 291.

the first place: those that could be "quantitatively assessed in the context of other evidence,"[59] those occurring "during the presentation of the case to the jury,"[60] and those that are simply errors "in the trial process itself."[61]

Of course, *Fulminante* was not the Court's last word on the subject. In *Sullivan v. Louisiana*, Justice Scalia wrote for a unanimous Court that the denial of the right to a jury verdict of guilt beyond a reasonable doubt[62] was "unquestionably" a "structural error," because that right reflects "a profound judgment about the way in which law should be enforced and justice administered," and because the consequences of the deprivation of that right "are necessarily unquantifiable and indeterminate."[63]

The structural-error doctrine did not expand for some time, though the Court did tease some developments. For example, in *Johnson v. United States*, the Court asked for the first time – but ultimately did not answer – a question that this Article later addresses: whether "structural error" automatically satisfies the third "affect[s] substantial rights" prong of the four-part plain-error test introduced in *United States v. Olano*.[64] (The court avoided the question, finding instead that the error identified did not satisfy the fourth prong of the *Olano* test: it did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.[65] It would sidestep this question

59. David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1412 (1997) (*quoting Fulminante*, 499 U.S. at 307–08).

60. *Id.* at 1414 (*quoting Fulminante*, 499 U.S. at 307).

61. *Id.* at 1415–16 (*quoting Fulminante*, 499 U.S. at 310).

62. The trial court had issued a jury instruction that included a constitutionally faulty definition of reasonable doubt, which Justice Scalia explained could not be remedied by harmless-error review. As the court explained, "[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our per curiam opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (internal citations omitted).

63. *Id.* at 281–82. Interestingly, Justice Rehnquist—the author of the majority opinion in *Fulminante*—expressed in a concurring opinion concern over Justice Scalia's application of *Fulminante* in *Sullivan*. But "[d]espite these lingering doubts," he joined the majority. *Id.* at 284–85.

64. Johnson v. United States, 520 U.S. 461, 468–69 (1997); United States v. Olano, 507 U.S. 725, 736 (1993).

65. *Johnson*, 520 U.S. at 469–70.

twice more.[66]) Notably, *Johnson* did answer one question: whether structural error can be forfeited. It implicitly concluded that it could.[67]

The next Supreme Court case to contribute to the structural-error doctrine was *Neder v. United States.*[68] *Neder*'s primary contribution was to attempt to streamline the Court's "categorical approach to structural errors."[69] Writing for a unanimous court, Justice Rehnquist clarified that just because an error might appear to be a functional equivalent to a known structural error, that is not enough to justify treating that error as structural; an "error is either structural or it is not."[70] According to the Court, a case-by-case approach is incompatible with the trial-error/structural-error approach the Court had been applying since *Fulminante*.[71]

But Justice Rehnquist said something else in *Neder*, too: he defined structural errors as those that "are so intrinsically harmful as to require automatic reversal, i.e., "affect substantial rights," *without regard to their effect on the outcome*."[72] This was a subtle reframing of structural error: recall that, writing for the majority in *Sullivan*, Justice Scalia explained that a characteristic of structural errors is that their effects on the outcome "are necessarily unquantifiable and indeterminate."[73] (The Court did not then acknowledge the dichotomy it was creating within the doctrine, but it does so later as we will see.[74])

Until *Weaver v. Massachusetts*[75] – discussed in the next Subpart – the structural-error doctrine did not change much after *Neder* (though it is notable which phrases the Supreme Court has ossified since then). The descriptions of structural errors most common to the modern case law are that they "trigger automatic reversal,"[76] and are simply "not subject to harmless-error review."[77] (The first of these raises interesting questions about plain error and waiver that I discuss later.) It will be interesting to see whether those remain the "buzz phrases" after *Weaver*.

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66. *See* Puckett v. United States, 556 U.S. 129, 140–41 (2009); United States v. Cotton, 535 U.S. 625, 632–33 (2002).

67. *Johnson*, 520 U.S. at 469–70. In *Johnson*, the Supreme Court determined that the error in question had been forfeited, despite the lingering (and ultimately unanswered) question whether the error was a structural error. *Id.* at 470. On this basis, we can infer that structural errors can be forfeited; otherwise, the Supreme court would have had to determine whether the error was structural *before* concluding the error was forfeited.

68. *See* Neder v. United States, 527 U.S. 1, 7 (1999).

69. *Id.* at 14.

70. *Id.*

71. *Id.*

72. *Id.* at 7 (emphasis added).

73. Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993).

74. Weaver v. Massachusetts, 137 S. Ct. 1899, 1903 (2017).

75. *Id.* at 1904.

76. United States v. Davila, 569 U.S. 597, 611 (2013).

77. Gonzalez v. United States, 553 U.S. 242, 252–53 (2008).

C. Weaver v. Massachusetts

In 2017, writing for a six-justice majority, Justice Kennedy penned his opinion in *Weaver*.[78] In a lengthy section of dicta, he explained that in fact, there is not one, not two, but "at least three broad rationales for finding an error to be structural."[79] So much for Justice Rehnquist's decade-long attempt to preserve the simple binary of trial errors and structural errors![80]

First, an error "is in some instances" structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest."[81] It is hard to say which phrase is less helpful: "in some instances" or "protects some other interest." Both are vague. Justice Kennedy does give an example – a defendant's right to conduct his own defense – and this is somewhat clarifying.[82] He notes that despite the fact that exercising this right "usually increases the likelihood of a trial outcome unfavorable to the defendant,"[83] it is nonetheless "fundamental" that a defendant be allowed to choose how to protect his own liberty.[84]

Second, an error might be deemed structural if its effects "are simply too hard to measure."[85] Fair enough – this is the basis provided in *Sullivan* and elsewhere.[86] But Justice Kennedy did not stop there; he went on to say that what justified deeming these errors structural was that "the efficiency costs of letting the government try to make the [harmlessness] showing are unjustified."[87] To put it plainly, this suggestion is totally novel to *Weaver*; efficiency costs have never before appeared in the Supreme Court's structural-error jurisprudence. To the contrary, the idea of factoring in efficiency costs when deciding that an error is structural or not appears to fly in the face of Justice Rehnquist's wholesale rejection of a functional-equivalency test – recall that an "error is either structural or it is not."[88] In any event, I do not anticipate that this supposed basis will take root and end up a part of the Supreme Court's future precedents – though whether any of the circuit courts take the bait is an entirely different matter.

Finally, Justice Kennedy explained that an error might be deemed structural "if the error always results in fundamental unfairness."[89] He

78. *Weaver*, 137 S. Ct. at 1905.

79. *Id.* at 1903.

80. *See* Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991); *see also* Neder v. United States, 527 U.S. 1, 14 (1999).

81. *Weaver*, 137 S. Ct. at 1908.

82. *Id.*

83. *Id.* (quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)).

84. *Id.* (citing Faretta v. California, 422 U.S. 806, 834 (1975)).

85. *Id.*

86. *See, e.g.*, Sullivan v. Louisiana, 508 U.S. at 281–82 (1993).

87. *Weaver*, 137 S. Ct. at 1908.

88. Neder v. United States, 527 U.S. 1, 14 (1999).

89. *Weaver*, 137 S. Ct. at 1908.

suggests that in these cases, it would be "futile for the government to try to show harmlessness."[90]

After describing these three bases, Justice Kennedy wraps up noting that "[t]hese categories are not rigid" – he says that, in a given case, it is possible for more than one of these rationales to apply.[91] But it is worth asking, *how?* Let's recap these three bases for structural error: (1) error that is potentially harmless to the outcome of a case but that protects some fundamental right; (2) error for which the harm to the outcome is too difficult (or costly) to prove; and (3) those errors where the harm to the outcome is certain.[92] On their face, these bases are non-overlapping: one begins where the next clearly ends. Indeed, they seem to be devised precisely to cover discrete segments of a spectrum.

Before *Weaver*, the bounds of structural error were relatively easy to identify; the Court's holdings were generally consistent with Justice Rehnquist's declaration in *Neder* that errors are not deemed structural on an ad hoc basis – they are either structural or they are not.[93] Yet *Weaver*'s "at least three broad rationales"[94] seem impossible to reconcile with *Fulminante*'s and *Neder*'s strictly binary "trial error" vs. "structural error" approach[95] – an approach the *Weaver* Court does not so much as nod towards.

Another troubling aspect of *Weaver* is that, where *Fulminante* and its progeny offered some guidance about how to *decide* whether an error is structural, *Weaver* tells us that there are (at least) three bases upon which the Court has, in the past, decided that an error is structural.[96] Yet not only do these bases expansively diverge from the Court's trial-error/structural-error rationale, they also provide no mechanism for deciding whether an error in a future case is structural. Put differently, taken at face value *Weaver* reads almost like a call to return to the post-*Chapman*, pre-*Fulminante* mode of ad hoc decision-making.

But the most problematic aspect of *Weaver* is its holding that it is possible for an error to be structural and yet *not* entitle the defendant to a new trial.[97] Justice Kennedy asserts that a structural error can be "subject to exceptions."[98] Recall that the law, so far, has been clear: structural error "trigger[s] automatic reversal."[99] The *Weaver* Court admits this is true when the structural error was objected to at trial and raised on appeal[100] – but things

90. *Id.*
91. *Id.*
92. *Id.*
93. *Neder*, 527 U.S. at 14.
94. *Weaver*, 137 S. Ct. at 1908.
95. Arizona v. Fulminante, 499 U.S. 279, 280 (1991); *Neder*, 527 U.S. at 14.
96. *Weaver*, 137 S. Ct. at 1908.
97. *Id.* at 1911.
98. *Id.* at 1910.
99. United States v. Davila, 569 U.S. 597, 611 (2013).
100. *Weaver*, 137 S. Ct. at 1910.

get murkier when a structural error is instead raised "in the context of an ineffective-assistance-of-counsel claim."[101] Yet instead of analyzing the ineffective-assistance claim through the lens of *Strickland v. Washington*[102] only, as Justice Alito's concurrence does,[103] the majority attempts to merge the structural-error doctrine with *Strickland*'s requirement that, to succeed on an ineffective-assistance claim, a defendant needs to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[104] Specifically, the majority concludes that it *can* reach the structural error counsel failed to object to, and that the structural error does not automatically satisfy *Strickland*'s prejudice prong.[105]

Both Justice Alito's concurrence and Justice Breyer's dissent are more faithful to the structural-error doctrine than is the majority opinion.[106] I am convinced Justice Alito's concurrence gets things exactly right: Justices Alito and Gorsuch concluded that, because *Strickland* prejudice was not shown, it did not matter that there may have been a not-objected-to structural error.[107] By contrast, Justices Breyer and Kagan conclude – also reasonably, if less convincingly – that counsel's failure to object to a structural error satisfied the *Strickland* prejudice standard and required reversal.[108] They reasoned that: (1) structural errors always require a new trial; (2) counsel failed to raise a structural error; (3) but for counsel's failure to raise the error, the defendant would have received a new trial; (4) therefore, the error was prejudicial.[109] What Justice Alito's concurrence and Justice Breyer's dissent have in common is that neither commits the doctrine-altering mistake of suggesting that not all structural errors require automatic reversal.[110]

D. In Weaver*'s Wake*

After reading *Weaver* (and the discussion above), one might reasonably think that the structural-error doctrine has departed drastically from its *Fulminante* roots. But much of Justice Kennedy's opinion in *Weaver*

101. *Id.*

102. Strickland v. Washington, 466 U.S. 668, 687 (1984).

103. *Weaver*, 137 S. Ct. at 1914 (Alito, J., concurring).

104. *Strickland*, 466 U.S. at 694.

105. *Weaver*, 137 S. Ct. at 1913.

106. *See id.* at 1914 (Alito, J., concurring); *id.* at 1917–18 (Breyer, J., dissenting).

107. *Id.* at 1914–16 (Alito, J., concurring).

108. *Id.* at 1917–18 (Breyer, J., dissenting).

109. *Id.* at 1916–18. As I explain in the section on waiver, this line of reasoning is flawed.

110. *Id.* at 1914–16 (Alito, J., concurring); *id.* at 1916–18 (Breyer, J., dissenting).

describing structural errors in general is descriptive dicta,[111] and this, coupled with the recent changes in the composition of the Court, leads one to believe that the structural-error doctrine remains almost entirely intact post-*Weaver*. To be more specific, the Court will likely limit its holding in *Weaver* to its application of the structural-error doctrine to ineffective-assistance claims under *Strickland*, and the "three-categories" approach will not obtain. The Court will probably rely on the pre-*Weaver* line of cases moving forward and turn to *Weaver* only when *Strickland* prejudice is at issue, or as a way of describing what kinds of errors the Court has deemed structural. To see why this is likely, it is worth taking a closer look at the current Justices' views on structural error, as revealed by *Weaver* and other cases. This Subpart argues that Justices Alito, Gorsuch, Kagan, Breyer, Thomas, and *probably* Chief Justice Roberts, are unlikely to read *Weaver* as changing the doctrine.

1. Justices Alito and Gorsuch

Neither Justice Alito nor Justice Gorsuch are likely to read Justice Kennedy's "three bases" discussion as anything more than dicta. Justice Alito's concurrence in *Weaver* reveals a clear commitment to the Court's earlier precedent: citing *Neder* and *Fulminante*, he stated that structural error only "comes into play when it is established that an error occurred at the trial level and it must be decided whether the error was harmless."[112] Pointing out that the high standard for prejudice under *Strickland* is "entirely different" from the mere possibility of prejudice looked for under harmless-error review, he concludes that it is irrelevant that the deprivation of the right to a public trial is a structural error.[113] As for Justice Alito's view on whether structural errors sometimes do not require automatic reversal, he would disagree: as he wrote in his dissent in *United States v. Gonzalez-Lopez*, "In *Fulminante*, we used these terms ["trial error" and "structural defect"] to denote two poles of constitutional error that had appeared in prior cases; trial errors always lead to harmless-error review, *while structural defects always lead to automatic reversal.*"[114] From these opinions, it seems clear Justice Alito is not interested in augmenting – let alone expanding – *Fulminante*'s narrow conception of structural error.

As for Justice Gorsuch, he has said little about structural error, either now or when he sat as a circuit judge. Yet his decision to join Justice Alito's *Weaver* concurrence,[115] coupled with his hesitance to take up a related

111. *See id.* at 1905–14 (majority opinion).

112. *Id.* at 1915 (Alito, J., concurring).

113. *Id.* at 1915–16.

114. United States v. Gonzalez-Lopez, 548 U.S. 140, 159 (2006) (emphasis added).

115. *See Weaver*, 137 U.S. at 1914 (Alito, J., concurring). Admittedly, in *Weaver* Justice Gorsuch also joins the majority opinion and Justice Thomas's concurrence, so perhaps we should not make much of this. *See id.* at 1904–05 (majority opinion); *id.* at 1914 (Thomas, J., concurring).

structural-error question a year after *Weaver* (in which he and Justice Thomas joined a dissent by Justice Alito),[116] suggests that he, too, is unlikely to be interested in augmenting or expanding the doctrine any time soon.

2. Justices Kagan and Breyer

Justice Breyer's dissent offers the strongest rejection of Justice Kennedy's augmentation of the structural-error doctrine.[117] Breyer speaks on the issue clearly enough that his dissent warrants a block quote:

> In its harmless-error cases, this Court has "divided constitutional errors into two classes": trial errors and structural errors. Trial errors are discrete mistakes that "occu[r] during the presentation of the case to the jury." Structural errors, on the other hand, "affec[t] the framework within which the trial proceeds."
>
> Our precedent […] simply views all structural errors as "intrinsically harmful" and holds that any structural error warrants "automatic reversal" on direct appeal "without regard to [its] effect on the outcome" of a trial.
>
> The majority here does not take this approach. It assumes that some structural errors—those that "lead to fundamental unfairness"—but not others, can warrant relief without a showing of actual prejudice under Strickland. While I agree that a showing of fundamental unfairness is sufficient to satisfy Strickland, I would not try to draw this distinction.[118]

Put simply, Justices Breyer and Kagan appear to straightforwardly defend not only the categorical approach taken by the Court since *Fulminante*, but also its bright-line rule that, when timely raised, structural errors always warrant automatic reversal.

3. Chief Justice Roberts

Unlike Justices Thomas, Gorsuch, and Alito (who all wrote or joined concurrences functionally disagreeing with Justice Kennedy's reasoning), Chief Justice Roberts joined the majority opinion without qualification.[119] Accordingly, it would be easy to argue that the Chief Justice by unequivocally joining the majority in Weaver, approves of revising the doctrine.

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116. McCoy v. Louisiana, 138 S. Ct. 1500, 1512 (2018) (Alito, J., dissenting).
117. *Weaver*, 137 S. Ct. at 1916 (Breyer, J., dissenting).
118. *Id.* (internal citations omitted).
119. *Id.* at 1904–05.

On the other hand, Chief Justice Roberts has cultivated a reputation for actively seeking the narrowest grounds on which to decide cases.[120] That fact alone suggests that, despite his having joined the majority in *Weaver*, he is likely to treat Justice Kennedy's "three bases" as descriptive dicta, rather than prescriptive law – especially because the three bases do not present a mechanism for identifying structural error ex ante.[121] Moreover, a few years earlier the Chief Justice joined Justice Alito's concurrence in *Gonzalez-Lopez*, in which Justice Alito had stressed that "structural defects always lead to automatic reversal."[122]

4. Justice Thomas

There is no reason to believe that Justice Thomas has changed his views on structural error since *Sullivan v. Louisiana* and *Neder v. United States* – two cases that rigorously applied *Fulminante*'s categorical approach to structural errors.[123] (Recall that in *Neder*, the court held that a "functional equivalence" test "would be inconsistent with our traditional categorical approach to structural errors."[124]) Moreover, Justice Thomas wrote a concurrence in *Weaver*, in which he stressed that he "d[id] not read the opinion of the Court to preclude the approach set forth in Justice Alito's opinion, which correctly applies our precedents."[125]

120. John Roberts, Chief Justice, Supreme Court of the U. S., Address at the Georgetown Law Center Commencement Ceremony (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, then in my view it is necessary not to decide more."); *see also* Geoffrey R. Stone, *A narrow view of the law*, CHI. TRIB., Feb. 6, 2007, https://www.chicagotribune.com/news/ct-xpm-2007-02-06-0702060147-story.html [https://perma.cc/43AC-Y43H].

121. By expressing that "[t]here appear to be at least three broad rationales" for finding an error to be structural, Justice Kennedy provided descriptions of three "buckets" into which we could place past structural errors—but his categories to not provide a mechanism for deciding whether an as-yet-unconsidered error is structural. *Weaver*, 137 S. Ct. at 1908. Consider the vagueness of his assertion that "an error has been deemed structural in some instances if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* Explaining that the Court has done something "in some instances" is purely descriptive; it does not offer any insight into what grounds are *sufficient* to make an error structural. *See id.*

122. United States v. Gonzalez-Lopez, 548 U.S. 140, 159 (2006).

123. Sullivan v. Louisiana, 508 U.S. 275, 281 (1993); Neder v. United States, 527 U.S. 1, 7 (1999).

124. *Neder*, 527 U.S. at 14.

125. *Weaver*, 137 S. Ct. at 1914 (Thomas, J., concurring).

5. Justice Kavanaugh

Justice Kavanaugh is arguably a wildcard: not only has he not heard a structural error case before the Supreme Court, but he also said little about structural error during his long tenure on the United States Court of Appeals for the District of Columbia Circuit. The most he says about structural error comes from one of the last opinions he authored while sitting on that court, but it reveals little about his views of the doctrine overall.[126] There is little in Justice Kavanaugh's record that would permit any prediction about how he is likely to rule in future structural-error cases, though of there is also little reason to believe he is likely to analyze such issues in the same way Justice Kennedy did. Only time will tell.

6. Justices Sotomayor and Ginsburg

Justice Sotomayor joined Justice Kennedy's majority opinion without reservation[127] – suggesting that she is open to a revision of the doctrine. It is worth pointing out that, while sitting as judge on the Second Circuit, Justice Sotomayor authored a dissent in *United States v. Yakobowicz* in which she stressed the automatic-reversal aspect of structural error: Structural errors are those that "so fundamentally undermine the fairness or the validity of the trial that they require voiding [the] result [of the trial] regardless of identifiable prejudice."[128] Still, her joining of the majority in *Weaver* as a Supreme Court justice should not be dismissed on the basis of this decade-old dissent as a circuit judge.

7. Justice Barrett

Justice Barrett has been a member of the judiciary for just a few years, and has only been a justice for a handful of months as of the publication of this Article. She has not yet had an opportunity to rule in a structural-error case, nor did she write on the subject before joining the court.

But we do have one datapoint: Justice Barrett clerked for Justice Scalia from 1998–1999, at which time the court issued its ruling in *Nader.*[129] As noted above, the *Neder* court ruled that a "functional equivalence" test "would be inconsistent with our traditional categorical approach to structural errors." We should not assume that Justice Barrett was in lockstep with the Justice for whom she clerked, but Justice Barrett herself has publicly noted Justice

126. *See* Laccetti v. Securities and Exchange Commission, 885 F.3d 724, 728 (D.C. Cir. 2018) (declining to decide whether the deprivation of the right to counsel during a PCAOB investigation was a structural error).

127. *See Weaver*, 137 S. C.t 1904–1905.

128. United States v. Yakobowicz, 427 F.3d 144, 155 (2d Cir. 2005) (quoting United States v. Feliciano, 223 F.3d 102, 111 (2d Cir. 2000)).

129. *Neder*, 527 U.S. at 14.

Scalia's influence on her own jurisprudence, noting at one point that "His judicial philosophy is mine too: A judge must apply the law as written."[130]

III. IDENTIFYING STRUCTURAL ERROR: HOLDINGS OF THE SUPREME AND CIRCUIT COURTS

What, then, is the state of the doctrine today – which constitutional errors are structural? The following Subparts answer that question. Subpart A begins by providing the reader with a functional definition a structural error. Subpart B describes in detail the nine constitutional errors that the Supreme Court has explicitly held are structural. And Subpart C discusses the many other structural errors identified by the circuit courts.

A. A Working Definition of Structural Error

One goal of this Article is to distill the Supreme Court's structural-error holdings into a functional and accurate framework that is both descriptive and prescriptive – a framework that can be used to correctly identify, and reject, new structural errors. In the course of the writing of this Article, it became apparent that nailing down an accurate but concise definition was critically important. Through a review of nearly nine hundred circuit-court opinions, the author uncovered over a dozen ostensibly "structural" errors that the circuit courts have identified but that the Supreme Court has yet to weigh in on.[131] And while the Supreme Court's list of structural errors is both conservative and cohesive, the "structural" errors identified by the circuit courts are anything but – exposing the need for a clearer and more accurate prescriptive definition of structural error. Compounding this problem is the Court's discussion of the doctrine in *Weaver* which, as this Article already argued, is both hopelessly vague and unhelpfully non-prescriptive.[132]

This Article proposes eschewing *Weaver*'s "three-categories" dicta and instead adopting the following functional definition of structural error: *Structural error is constitutional error that so alters the foundational constitutional framework of a case that the process itself has become defective and is no longer constitutionally adequate.* In addition to being consistent with the Supreme Court's past holdings describing and defining structural error,[133] this definition is simpler and more accurate than the "three-categories" approach and is more practical insofar as it is prescriptive, rather than merely descriptive.

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130. Marcia Coyle, Sept. 26, 2020, *'His Judicial Philosophy Is Mine': Amy Barrett Touts Scalia in Remarks From Rose Garden*, Law.Com (https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/?slreturn=20210016151916).

131. *See infra* Section III-C.

132. *See* discussion *supra* note 121.

133. *See* Neder v. United States, 527 U.S. 1, 7 (1999).

There are two additional reasons why this definition is more useful than the Supreme Court's past formulations. First, instead of describing harm that is difficult or impossible to measure, this definition stresses that the error unacceptably alters the constitutional framework itself. It is precisely because the constitutional framework has been altered that the harm is difficult or impossible to measure: the constitutional framework of the case is the measuring scale that courts use to weigh harm. If the scale is broken, it cannot accurately weigh anything; if the constitutional framework of a case is altered, the court cannot look to the "rest" of the proceedings to fairly determine harm.

Second, structural errors affect some *foundational* aspect of that framework. This is subtle but important: structural error damages something preliminary that should be present from the beginning to the end of a case. If the error does not damage a foundational part of the constitutional framework, then it is likely a trial error – an error inflicting a forward-looking harm that leaves the foundation of the proceedings intact (even though the harm to the outcome might still be utterly devastating to one of the parties). This is not to say that structural errors can only occur at the beginning of a case. Structural errors certainly can occur later in the proceedings, but their effect is on the foundation of the proceedings. Structural errors damage the constitutional framework itself, and (to recycle the analogy), the scale being broken, harm can no longer be accurately measured. This renders the proceedings constitutionally inadequate.

B. Structural Errors Identified by the Supreme Court

Since the introduction of the structural-error doctrine in 1991,[134] the Supreme Court has been judicious in deeming constitutional errors structural.[135] Still, the list has expanded, and our highest court has identified a total of nine distinct structural errors.[136]

1. The First Five Structural Errors

In *Fulminante*, Justice Rehnquist introduced the trial-error/structural-error dichotomy for the first time, and in doing so identified a total of five structural errors, reaching back through almost seventy years of past Supreme Court holdings.[137] These include (1) the total deprivation of counsel in a

134. *See* Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991).

135. Johnson v. United States, 520 U.S. 461, 468–69 (1997) (explaining that the Supreme Court "ha[s] found structural errors only in a very limited class of cases.").

136. *See infra* Section III.B.1–5.

137. *Fulminante*, 499 U.S. at 309–10. He began with *Tumey v. Ohio*, a 1927 case. *Id.* at 309 (citing Tumey v. Ohio*,* 273 U.S. 510 (1927)).

criminal case,[138] (2) having an impartial judge,[139] (3) the unlawful exclusion of members of the defendant's race from a grand jury,[140] (4) denial of the right to self-representation at trial,[141] and (5) the right to a public trial.[142]

The Court's rationale for deeming these errors structural was straightforward, if a little vague. Unlike "trial errors," which "occur[] during the presentation of the case to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt,"[143] these five errors "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."[144] In other words, "[t]he entire conduct of the trial from beginning to end is obviously affected" by these errors.[145]

It is worth reflecting on these two statements for a moment because, taken together, they illuminate one of the inherent difficulties the Court has had in applying the structural-error doctrine. To say that structural errors "defy analysis by harmless-error standards"[146] is to suggest that it is not *possible* to consider whether a structural error was harmless. Fair enough – but that does not seem to fit with the Court's same-paragraph assertion that the "entire conduct of the trial" is "obviously affected."[147] If it is "obviously affected," does that mean that the *harm* was obvious? In fact, Justice Rehnquist did not mean that at all, as is clear after reading *Fulminante* in broader context. He meant not that the outcome to the defendant was "obviously affected," but rather that the *structure* was obviously affected. Put another way, Justice Rehnquist was saying that determining the harmlessness of the error would be impossible because the error contaminated the very mechanism for measuring harmlessness; the structure of the trial itself. Quoting Justice Powell's majority opinion in *Rose v. Clark*, Justice Rehnquist clarified that "[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."[148]

Justice Rehnquist's explanation for why measuring harm would be impossible comports with the functional definition proposed in Subpart IIIA. Each of the five errors Justice Rehnquist identified damages the preliminary

138. *Fulminante*, 499 U.S. at 309 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

139. *Id.* (citing *Tumey*, 273 U.S. at 535).

140. *Id.* at 310 (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).

141. *Id.* (citing McKaskle v. Wiggins, 465 U.S. 168, 177–78 n. 8 (1984)).

142. *Id.* (citing Waller v. Georgia, 467 U.S. 39, 49 n. 9 (1984)).

143. *Id.* at 30–08.

144. *Id.* at 309.

145. *Id.* at 309–10.

146. *Id.* at 309.

147. *Id.* at 309–10.

148. *Id.* at 310 (quoting Rose v. Clark, 478 U.S. 570, 577–78 (1986)).

constitutional framework of the case, such that the proceedings on the whole no longer offer a way to fairly measure the harm to the outcome. The proceedings themselves are no longer constitutionally adequate, so a new trial – with a new, intact constitutional framework – is necessary.

2. Constitutionally Deficient Reasonable-Doubt Instructions

A few years later in *United States v. Sullivan*, the Court identified a sixth structural error – one that is a bit more nuanced than the five discussed in *Fulminante*.[149] In *Sullivan*, the trial judge had given a constitutionally deficient reasonable-doubt jury instruction that amounted to allowing conviction even where the jurors' doubts went beyond "no reasonable doubt."[150] Justice Scalia, writing for a unanimous Court, explained that because of the instruction, Sullivan was not actually convicted "beyond a reasonable doubt," as the Sixth Amendment requires. Furthermore, harmless-error analysis made no sense in this context, because to ask whether the jury instruction was "harmless" would be to ask whether the jury *would have* convicted Sullivan had the jury been given the proper instruction. This, Justice Scalia explained, would not do: a defendant has a constitutional right to *actually* be convicted beyond a reasonable doubt, so it would not satisfy that right to say that the jury *would have* convicted him if properly instructed.[151]

If you find this reasoning troubling, you are in good company.[152] What makes Justice Scalia's reasoning so confounding is that it *seems* like it could apply to *all* constitutional errors. After all, one might understand him to be saying that harmless error should never apply when a person's constitutional rights are violated, because they have a right not to have those rights *actually* violated and applying harmless-error review does not un-violate those rights.

In fact, Justice Scalia is pointing out something particular to the Sixth Amendment right to conviction beyond a reasonable doubt. Harmless error cannot apply to this right because the power to convict or acquit rests solely in the hands (and minds) of the jury.[153] It is of no consequence that, looking at the evidence, a judge might be certain that a reasonable jury would find a

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

150. *Id.* at 280–81.

151. *Id.* at 281 (quoting Rose v. Clark, 478 U.S. 570, 578 (1986)) ("[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty.").

152. Shortly after *Sullivan* was published, one scholar asserted that "Sullivan is a telling blow to the validity of the Fulminante dichotomy," and said that *Sullivan* invites the question of "just how committed to it most of the members of the Fulminante majority are." McCord, *supra* note 59, at 1425–28.

153. *See Sullivan*, 508 U.S. at 281.

defendant guilty beyond a reasonable doubt. Even in such a case, a judge is not allowed to bypass the jury and find a defendant guilty; again, the jury has the sole power to convict.[154] It follows, then, that harmless error cannot apply when a jury convicts someone based on the wrong legal standard. In such a case there is no actual jury conviction beyond a reasonable doubt, and to accept the conviction anyway on harmlessness grounds would be the same as bypassing the jury allowing the judge to enter a judgment of guilty.

Viewed through our proposed functional definition, this error is an example of structural error that, despite occurring very late in the proceedings, inflicts foundational damage. The entire constitutional framework of a criminal case is designed to require the government to prove to a jury the defendant's guilt beyond a reasonable doubt. To allow conviction under any other standard completely alters the constitutional framework of the case; the trial's very purpose has been subverted. Moreover, only the jury can convict or acquit, and the error has permanently damaged that jury. The concept of harmlessness is therefore inapposite, and a new trial must be had.

3. Denial of One's Counsel of Choice

The Supreme Court did not identify another structural error until thirteen years later when, in *United States v. Gonzalez-Lopez*, the Court concluded that the denial of one's counsel of choice was a structural error. Once again writing for the Court (but this time only for a majority), Justice Scalia explained that the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[155] As such, because harmless-error analysis speaks only to the fairness of the trial, it should not apply.[156]

It is noteworthy that Justice Rehnquist and three other members of the Court were unpersuaded by this reasoning. Writing for the dissent, Justice Alito opined that the Sixth Amendment guarantees the right to the *assistance* of counsel.[157] Accordingly, Justice Alito said that a better holding would be to say that the "erroneous disqualification of counsel does not violate the Sixth Amendment unless the ruling diminishes the quality of assistance that the defendant would have otherwise received."[158] This is an interesting take on the harmless-error doctrine: rather than simply concluding that an erroneous disqualification is susceptible to harmless-error analysis – which would look to whether the disqualification might have harmed the defendant – the dissent would have held that reversal is warranted when the quality of the lawyer is

154. *See id.* at 277.

155. United States v. Gonzalez-Lopez, 548 U.S. 140, 140 (2006).

156. *See id.* at 140–41.

157. *Id.* at 153 (Alito, J., dissenting). He also pointed out that the extent to which that guarantee grants a defendant the right to assistance is greatly circumscribed. *Id.* at 152–153 (Alito, J., dissenting).

158. *Id.* at 155 (Alito, J., dissenting).

perceptibly different. It is an interesting exercise to imagine the difficult position this rule would have put the courts of appeals in: what measuring rods might they have used in trying to decide who the higher quality lawyer was?

Just like the denial of the right to represent oneself, the denial of one's counsel of choice is an unusual constitutional protection because its enforcement can actually *cause* harm to a defendant. Just as eschewing appointed counsel and opting to represent oneself is usually a strategically poor decision, a defendant's chosen counsel may be inferior to other counsel the defendant has access to.[159] Denying a defendant's right to choose his own lawyer – just like denying one's right to self-representation – alters the preliminary constitutional framework of the case. A defendant's decision about representation is a decision about how she wishes to respond to the government's attempt to convince a jury of her guilt. Courts hold a defendant responsible for the words and actions of counsel[160] – and that is constitutionally permissible only if the defendant is represented by counsel of his own choosing. Accordingly, allowing the case to proceed in the face of an erroneous denial of one's right to choose their own counsel would unacceptably alter the foundational constitutional framework of the case.[161]

4. Magistrate Judge Presiding Over Jury Selection Without Consent

In *Gomez v. United States*, decided in 1989 before the introduction of the structural-error doctrine in *Fulminante*, the Supreme Court explained that one of a defendant's basic rights is "to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside."[162] The Court concluded that harmless-error analysis does not apply in a felony case in which, over the defendant's objections, the district court permits some other person to oversee jury selection.[163] Nearly twenty years later in *Gonzalez v. United States*, the Supreme Court relied on *Gomez* to rule that it is structural

159. *See, e.g.*, *supra* Section IV-C (discussing a hypothetical in the section entitled "Structural Error and Waiver").

160. *See* Wainwright v. Sykes, 433 U.S. 72, 113–14 n.13 (1977) (Brennan, J., dissenting).

161. United States v. Gonzalez-Lopez, 548 U.S at 146 (quoting Strickland v. Washington, 466 U.S. 668, 684-85 (1984)) ("'The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.' In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" (internal quotations omitted)); s*ee also supra* Section III-A (providing this article's functional definition of structural error).

162. Gomez v. United States, 490 U.S. 858, 876 (1989).

163. *Id.*

error for a magistrate judge to preside over jury selection without the consent of the parties.[164]

As for applying the functional definition, this structural error is easy: no matter how qualified and distinguished a magistrate judge is, that judge cannot preside over the critical stages of a trial without the consent of the parties.[165] Jurisdictional defects are about as "foundational" as errors get, and they certainly alter the constitutional framework of the case (for if jurisdiction is lacking, there can be no case at all).

5. Allowing Counsel to Admit Guilt Over Defendant-Client's Objections

In its most recent structural-error decision, *McCoy v. Louisiana*, the Supreme Court held that it is structural error for an attorney to admit a defendant-client's guilt over that client's objections.[166] Writing for the majority, Justice Ginsberg explained that "[s]uch an admission blocks the defendant's right to make the fundamental choices about his own defense."[167] Notably, Justice Ginsberg suggested this case fit into what Justice Kennedy described as the first rationale for structural error:[168] that this error is not designed to prevent unfairness to the outcome; it is designed "protects some other interest."[169] According to Justice Ginsberg, "The effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt.[170]

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164. Gonzalez v. United States, 553 U.S. 242, 252 (2008).

165. *Id.*

166. McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018).

167. *Id.* at 1511.

168. *Id.*; *id.* at 1508 (quoting Weaver v Massachusetts, 137 S. Ct. 1899, 1908 (2017)) ("Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to achieve a client's objectives; they are choices about what the client's objectives in fact are. ([S]elf-representation will often increase the likelihood of an unfavorable outcome but 'is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty')." (internal citations omitted)).

169. Weaver v Massachusetts, 137 S. Ct. 1899, 1908 (2017).

170. *McCoy*, 138 S. Ct. at 1511. A word on McCoy: as the dissent points out, the majority in McCoy arguably oversimplified the case, and arguably reached a question that the parties did not raise. *Id.* at 1512, 1517 (Alito, J., dissenting). But though the dissent's arguments have considerable merit, the majority's opinion is the law, and it held that allowing criminal-defense counsel to admit guilt over a client's objections is structural error. *Id.* at 1505, 1512. Despite how the majority

Given the way Justice Ginsberg described the error in *McCoy*, one could argue that this actually looks like an especially harmful trial error. After all, Justice Ginsberg told us that "a jury would almost certainly be swayed" by the lawyer's improper concession.[171] And what could be more harmful to one's defense than having your own lawyer turn against you before the jury (as the *McCoy* majority characterizes defense counsel as having done)? The majority appears to conclude that because such an action is always harmful, it is therefore structural.[172] But this rationale is deficient. Plenty of errors that the Court has characterized as trial errors definitely cause harm. Consider, for example, that the introduction into evidence of a coerced confession is only a trial error, despite its obviously prejudicial nature.[173]

The better rationale would be to place *McCoy* error in the same group as *Sullivan* or *Gonzalez* error.[174] As discussed *supra*, among the foundational trappings of a constitutionally-adequate criminal trial is that the government carries the burden of convincing the jury to convict the defendant beyond a reasonable doubt. Defense counsel that goes against his client's express wishes and admits guilt on her behalf provides no defense at all. In the extremely unlikely event that this occurs, the defendant's constitutional right to put on a defense – a foundational piece of any constitutional criminal trial[175] – is destroyed.

C. Structural Error in the Circuit Courts

Departing from the Supreme Court's short list of confirmed structural errors, this Article turns now to what structural errors the circuit courts have identified that the Supreme Court has not yet weighed in on. All published circuit-court opinions that include the phrase "structural error" – nearly 900 cases – were reviewed. Excluding the rulings overturned by the Supreme Court, at least fifteen errors that the circuit courts have concluded are structural but that the Supreme Court has not yet considered were identified. In some instances, the Supreme Court would likely agree that the error identified is structural – but in others – most, in fact – the circuit courts' analyses fall short and would likely be overturned were the Court to review them. This Subpart discusses each of these errors, the reasoning employed by

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reached the question, this article nonetheless engages with the court's holding and analysis.

171. *Id.* at 1511.

172. *See id.*

173. *See* Glebe v. Frost, 574 U.S. 21, 25 (2014) (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

174. *See* Sullivan v. Louisiana, 508 U.S. 275, 280–81 (1993) (explaining that faulty reasonable-doubt instructions are structural error); Gonzalez v. United States, 553 U.S. 242, 253 (2008) (holding that a magistrate judge presiding over jury selection without the consent of the parties or their attorneys is structural error).

175. *See* U.S. CONST. amend. VI.

the circuits that identified them, and the likely outcome of Supreme Court review.

1. Structural Errors the Supreme Court is Likely to Affirm

a. Presence of a Biased Juror

Let's start with an easy one: at least two circuits have concluded that the presence of a biased juror constitutes structural error.[176] In *United States v. French*, the First Circuit concluded that the presence of a biased juror is exactly the kind of error that "deprive[s] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'"[177] The presence of a biased juror, just like the presence of a biased judge,[178] alters the fundamental framework of the trial and contaminates the entire course of the proceedings; it is therefore structural. Furthermore, the Supreme Court has already said that the unlawful exclusion of a juror of the defendant's race is structural error,[179] and the root of that error is the potential bias it introduces into the jury pool.[180]

b. The Nonconsensual Absence of the Judge While the Trial Is Proceeding

It is also structural error for a trial judge to be totally absent during a critical stage of a trial, as the Third Circuit held in *United States v. Mortimer*.[181] As they put things,

> [a] trial consists of a contest between litigants before a judge. When the judge is absent at a 'critical stage' the forum is destroyed. . . There is no trial. The structure has been removed. There is no way of

176. *See* United States v. French, 904 F.3d 111, 119 (1st Cir. 2018), *cert. denied sub nom.* Russell v. United States, 139 S. Ct. 949 (2019); Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

177. *French*, 904 F.3d at 119 (quoting Neder v. United States, 527 U.S. 1, 8–9 (1999)).

178. *Dyer*, 151 F.3d at 973 n.2 .

179. Arizona v. Fulminante, 499 U.S. 279, 294 (1991) (citing Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986)).

180. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) ("The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy.").

181. United States v. Mortimer, 161 F.3d 240, 241 (3d Cir. 1998).

> repairing it. The framework 'within which the trial proceeds' has been eliminated.[182]

This is an excellent framing of why this is indeed a structural error; the total absence of an adjudicator during a critical part of the trial totally alters the fundamental framework in which the trial proceeds. Certainly, a judge does not have to be in the room all of the time: she could halt the proceedings and leave the room for a moment to take a phone call, for example, or possibly even conduct the trial via video conference (subject to the local rules, of course). But to allow the trial to move forward in her absence would be little different than letting her law clerk preside instead of her[183] – or, as was the case in *Gonzalez v. United States*, allowing a not-consented-to magistrate judge to do so.[184]

c. Invalid Jury Waiver During Guilty Plea

The Ninth Circuit has held that an invalid jury waiver is structural error,[185] and though the court did not provide much in the way of support for this ruling, it is nonetheless almost certainly correct. The Supreme Court in *Sullivan* stressed that depriving a defendant of the right to be convicted by a jury of guilt beyond a reasonable doubt constituted structural error.[186] The Court explained that the power to convicted rested in the jury alone, and allowing the court to enter a judgment of guilty despite having lowered the bar below "reasonable doubt" amounted to an unconstitutional directed verdict.[187] A simpler version of that same reasoning can be applied to cases of invalid jury waivers: if the waiver was invalid, then the defendant was deprived of his right to be convicted by a jury beyond a reasonable doubt.

d. *Cronic* Error

In *United States v. Cronic*, a pre-*Fulminante* (meaning pre-structural error) case, the Supreme Court concluded that there were three situations in which a defendant's right to the effective assistance of counsel is so totally violated that no showing of prejudice is required in order for a defendant to receive a new trial.[188] The first of these is "the complete denial of counsel" – a constitutional violation that, just a few years later, the Supreme Court

182. *Id.* at 241 (quoting *Fulminante*, 499 U.S. at 309–10).

183. One Illinois state court judge was accused of doing exactly that a few years back. *See* Jacob Gershman, *Illinois Judge Accused of Letting Clerk Dress in Judicial Robe and Hear Cases*, THE WALL STREET JOURNAL, August 8, 2016, https://www.wsj.com/articles/BL-LB-54345 [https://perma.cc/96H2-K9WZ].

184. *See* Gonzalez v. United States, 553 U.S. 242, 253 (2008).

185. United States v. Shorty, 741 F.3d 961, 969 (9th Cir. 2013).

186. Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993).

187. *See id.* at 280.

188. United States v. Cronic, 466 U.S. 648, 658–60 (1984).

confirmed was structural error.[189] The second such situation occurs when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[.]"[190] The third (and presumably rarest) situation arises when, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[191]

The Fourth Circuit has concluded that these second two situations – the second and third *Cronic* errors – are structural errors just like the first (total deprivation of counsel).[192] Given the Supreme Court's reasoning in *Cronic* and *Fulminante*, the Fourth Circuit is probably correct. In *Cronic*, Justice Stevens explained that "[u]nless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'"[193] Put differently, Justice Stevens explained that all three of these errors result in "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[194]

Though *Cronic* is a 1984 case, it seems clear that the Supreme Court conveyed that *Cronic* errors alter the constitutional framework of the trial so much that there is no way to repair the damage (what else could "constitutional error of the first magnitude" mean, after all?). Add to this the fact that the Supreme Court has already ruled – albeit without referencing this case – that the first *Cronic* error is indeed structural error, and there is every reason to believe the Supreme Court would agree that the other two *Cronic* errors are structural as well.

189. *Id.* at 659 ("Most obvious, of course, is the complete denial of counsel.").

190. *Id.* ("Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

191. *Id.* at 659–60. Such a scenario would be vanishingly rare. To offer one possible example, such a situation might be present if a trial court were to insist upon so speedy a trial that even a competent counsel could not adequately prepare a defense in the time allotted.

192. United States v. Ragin, 820 F.3d 609, 618 (4th Cir. 2016) ("*Cronic* errors are structural, requiring automatic reversal without any inquiry into the existence of actual prejudice.").

193. *Cronic*, 466 U.S. at 656 (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

194. *Id.* at 659.

2. Structural Errors the Supreme Court is Unlikely to Affirm

a. Appointments-Clause Violations

In *Landry v. F.D.I.C.*, the D.C. Circuit held that violations of the Appointments Clause[195] are structural errors.[196] To support this conclusion, it reached for two Supreme Court cases: *Freytag v. C.I.R.* and *Neder v. United States*. *Freytag*, written just months after *Fulminante*, described Appointments-Clause errors as belonging in "the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below."[197] Notably, *Freytag* did not reference or discuss *Fulminante* structural error – and, when viewed in its fuller context, by "structural" *Freytag* plainly meant "relating to the structure of the constitution," not "structural error" as described in *Fulminante*.

Nevertheless, with *Freytag* in hand, the D.C. Circuit then read *Neder* to say that the label "structural" always applies to *Fulminante* structural error.[198] It concluded without additional support that because Appointments-Clause matters relate to the structure of the constitution, such errors "seem most fit for the [structural-error] doctrine [because] it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss."[199]

This reasoning has nothing at all to do with *Fulminante* structural-error doctrine. *Fulminante* did not comment on the structure of the Constitution; instead, it explained that structural error is concerned with constitutional violations that take place during court proceedings. By contrast, *Landry* involved a challenge to a violation of a procedural rule in a statute that arguably related to the structure of that statute.[200] The court also erroneously suggested that *Fulminante*'s discussion of harmless-error review somehow related to injury.[201] It may well be true that Appointments-Clause violations

195. The Appointments Clause of the United States Constitution empowers the president of the United States to nominate "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for[.]" U.S. CONST. art. 1, § 2, cl. 2.

196. Landry v. F.D.I.C., 204 F.3d 1125, 1131 (D.C. Cir. 2000).

197. Freytag v. Comm'r, 501 U.S. 868, 878–79 (1991).

198. *Landry*, 204 F.3d at 1131 (quoting Neder v. United States, 527 U.S. 1, 8 (1999)) ("The Court recently noted its use of the label 'structural,' observing that only in a limited class of cases has it 'found an error to be "structural," and thus subject to automatic reversal.'").

199. *Id.*

200. *See id.* at 1330; 12 U.S.C. § 1818 (2000).

201. *Landry*, 204 F.3d at 1130-31 ("But the Court uses the term 'structural' for a set of errors for which no direct injury is necessary—such as a criminal defendant's indictment by a grand jury chosen in a racially or sexually

de facto cause injury, but whether or not a party has been actually injured sounds in constitutional standing doctrine and has nothing to do with any form of error review.[202]

b. Allowing the Government to Summarize Testimony After Each Witness

Samuel Yakobowicz was charged with four counts of filing false federal tax returns and one charge of trying to impede the administration of justice. During his trial and at the conclusion of each witness's testimony, the prosecutor was permitted to summarize for the jury each witness's statements.[203]

The Second Circuit concluded that "[a]llowing argumentative interim summations […] was a structural error requiring reversal."[204] As the court explained:

> The problem is not that any particular interim summation was unduly prejudicial. The problem is that the repetitive and cumulative summations altered and undermined the defense's use of the presumption of innocence as a defense and had indeterminable effects on defense strategy and tactics. It is simply beyond the power of harmless error analysis to determine the impact of a procedure that had a repetitive and cumulative effect.[205]

No doubt the error here was a problem – but equally certain is that this was trial error, not structural error. Dissenting from the majority opinion, then-circuit-judge, now-Justice Sotomayor stressed that "structural error encompasses defects in trial components that do not bear directly on the presentation or omission of evidence and argument to the jury, but rather that relate to the impartiality of the forum or the integrity of the trial structure writ large."[206] Citing several Supreme Court cases, she went on to point out that "[w]hile the repeated incidence of trial error does not transform it into structural error, repetition may bear on whether the error was harmless or prejudicial in a particular case."[207]

Justice Sotomayor had the right of it, of course. These summations, occurring during the course of the trial, were discrete errors that did not alter the constitutional framework of the case itself. As such, the errors – taken

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discriminatory manner.") This, of course, is *not* "structural error" in the *Fulminante* sense. *See* Arizona v. Fulminante, 499 U.S. 279 (1991).

202. F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 289–90 (2008) (discussing injury as a conditional requirement for standing).

203. United States v. Yakobowicz, 427 F.3d 144, 146 (2005).

204. *Id.* at 154.

205. *Id.*

206. *Id.* at 155.

207. *Id.* at 156.

individually or together – can be reviewed for harm in the context of the rest of the proceedings.

c. Conviction by a Jury of Less Than Twelve Jurors Without Party Consent

Near the start of Francisco Curbelo's federal trial for several drug- and firearm-related offenses, the district court excused one of the jurors after she called in sick.[208] Over Curbelo's objection, the court ordered that the trial proceed with only eleven jurors.[209]

On appeal, the Fourth Circuit concluded this was error and that, "[l]ike other structural errors, the error here has repercussions that are 'necessarily unquantifiable and indeterminate.'"[210] Invoking some of Justice Scalia's language in *Sullivan*, the Fourth Circuit went on to say that "[w]e simply cannot know what [e]ffect a twelfth juror might have had on jury deliberations[,]", and attempting to determine that "would involve pure speculation."[211]

There is a certain logic to this reasoning. If we assume that the right to be convicted by a twelve-member jury is a fundamental constitutional right, then it would seem that virtually all of Justice Scalia's reasoning in *Sullivan* would apply here. Recall that Justice Scalia explained that a faulty reasonable-doubt instruction was structural error, because its effect was that the jury's "conviction" was not a constitutionally sufficient conviction under the Sixth Amendment, meaning there actually was no conviction at all. Put differently, a fundamental part of the constitutional framework of any criminal trial is that a jury must convict the defendant of guilt beyond a reasonable doubt. Extending that reasoning here, one might say that if the composition of the jury is constitutionally deficient, then it follows that no Sixth-Amendment conviction has actually occurred.

But there is a serious flaw with this reasoning, as the dissent pointed out: the Constitution does *not* require a jury of twelve.[212] The majority tries to get around this inconvenience by suggesting that it does not matter. "[W]hether violative of the Constitution or not," it said, "the error is structural."[213] But declaring it does not make it so; structural errors, as the Supreme Court has stressed since the beginning, are a special class of constitutional errors. Accordingly, it is not structural error to be tried by a jury of fewer than twelve jurors; the Fourth Circuit got it wrong. Ironically, there was no reason for the

208. United States v. Curbelo, 343 F.3d 273, 275 (4th Cir. 2003).

209. *Id.*

210. *Id.* at 281.

211. *Id.*

212. Williams v. Florida, 399 U.S. 78, 86 (1970) ("We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth.").

213. *Curbelo*, 343 F.3d at 280.

court to try to squeeze the structural-error doctrine into this particular box: it held in the alternative that the error was not harmless. The Fourth Circuit should have left it at that.

d. Allowing Unplayed Tapes to Go Back to the Jury Room

As the reader might have noticed, one through-line connecting many of the circuit courts' erroneous structural-error rulings is that those courts mistakenly treat structural errors as quantitatively different from trial errors, rather than qualitatively different. Put another way, although the Supreme Court has stressed that trial errors and structural errors are *categorically* different,[214] circuit courts sometimes deem an error structural on grounds that the error is unusually harmful. That is not sound reasoning; the degree of harm does not make an error structural. After all, plenty of trial errors are utterly devastating to the defense; consider a conviction that rests on a false confession, for example.[215] It is the inherent nature of the error that determines whether it is trial or structural error – not its grievousness.

The Ninth Circuit's structural-error ruling in *United States v. Noushfar* explicitly relies on this kind of erroneous reasoning.[216] In *Noushfar*, several defendants were charged with conspiracy to import rugs from Iran despite an embargo on Iranian goods.[217] The trial judge erroneously permitted the jury to take fourteen audio recordings back to the jury room even though the tapes had never been presented in open court.[218]

The Ninth Circuit concluded that allowing the tapes to go back was structural error.[219] It acknowledged that a similar error – allowing the jurors to replay tapes that they had already listened to, but this time outside of the presence of the defendant – was susceptible to harmless-error review.[220] It nonetheless concluded that the error here could not be reviewed for harm, because "[a]llowing the jury to listen, without any guidance, to tapes that had never been presented in open court is a more grievous error than replaying them in a judge's presence."[221]

Grievous indeed – but also reviewable for harmlessness. Despite the severity of the error, it does not alter the fundamental framework in which the

214. *See* Neder v. United States, 527 U.S. 1, 14 (1999*)* ("Under our cases, a constitutional error is either structural or it is not. … such a [functional equivalence] test would be inconsistent with our traditional categorical approach to structural errors.").

215. *See, e.g.*, Glebe v. Frost, 574 U.S. 21, 25 (2014); Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

216. United States v. Noushfar, 78 F.3d 1442, 1445 (9th Cir. 1996), *amended by* 140 F.3d 1244 (9th Cir. 1998).

217. *Id.* at 1444.

218. *Id.*

219. *Id.* at 1445.

220. *Id.* 1444–45.

221. *Id.* at 1445.

trial proceeds; rather, it is an especially harmful admission-of-evidence error. The fact that the error undermined the fairness of the trial does not mean that the error is de facto structural; rather, it means that the outcome of a reviewing court's harmless-error analysis is a foregone conclusion.

e. Failure to Appoint an Independent Psychiatrist to Assist the Defense

In *Ake v. Oklahoma*, the Supreme Court held that when an indigent defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial, the state must provide a competent psychiatrist to provide examination, as well as to assist in the evaluation, preparation, and presentation of the defense.[222]

In *Hicks v. Head*, a post-*Ake* habeas-corpus case, the Eleventh Circuit had ruled that *Ake* error was trial error subject to harmless-error review.[223] Yet despite binding itself in that earlier case, in *McWilliams v. Commissioner*, the court concluded that *Ake* error was structural when raised on direct appeal.[224] The court insisted that the holdings of the two cases were consistent: it explained that the *Ake* violation was trial error when raised on collateral review, but when reviewed on direct appeal, that error is structural.[225] The court reasoned that in the earlier habeas case, the petitioner was able to present the expert opinions of the psychiatrist as evidence, which could be evaluated to determine whether the *Ake* violation was harmless.[226] By contrast, in *McWilliams* there was no psychiatric expert opinion to review, and without that evidence, the court could not review the *Ake* error for harmlessness.[227]

This reasoning is flawed for several reasons. First, it relies on the false premise that if a serious error can be reviewed for harmlessness in one context but not in another, then it is trial error in the first context and structural error in the second. But an "error is either structural or it is not."[228] The difference between trial error and structural error is categorical and qualitative; the nature of an error does not change based on the context in which it is raised on review.[229] Second, courts are not asked to decide whether an error is harmless in a vacuum; the parties have the burden of proving harmlessness to the court.[230]

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222. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

223. Hicks v. Head, 333 F.3d 1280, 1286 (11th Cir. 2003).

224. McWilliams v. Comm'r, Alabama Dep't of Corr., 940 F.3d 1218, 1224 (11th Cir. 2019).

225. *Id.* at 1225-26 ("Our decision in [*Hicks*] does not compel a different result.").

226. *Id.*

227. *Id.* at 1226.

228. Neder v. United States, 527 U.S. 1, 14 (1999).

229. *See id.*; Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991).

230. Molina-Martinez v. United States, 136 S. Ct. 1338, 1349 (2016) (Alito, J., concurring) (quoting United States v. Olano, 507 U.S. 725, 734 (1993)).

> When the defendant has made a timely objection to an error, the Government generally bears the burden of showing that the error was harmless[.] By contrast, when a defendant has failed to make a timely objection, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice."[231]

Accordingly, just because the Government lacked evidence to show harmlessness here, that does not mean the would-be trial error becomes de facto structural – it simply means the Government was unable to meet its burden.[232] That this lack of evidence resulted from the district court's erroneous decision is of no moment; so much the worse for the government, so much the better for McWilliams.

Third and more fundamentally, the *Ake* error is an evidentiary error. As the Supreme Court explained in *Ake*, the reason for requiring access to a competent psychiatrist is that "a defense may be devastated by the absence of a psychiatric examination and testimony."[233] By committing *Ake* error and not giving a defendant access to a psychiatrist's examination and testimony, the court functionally rejected the admission of material, admissible evidence.[234] As this Article has already discussed, admission-of-evidence errors that happen during the course of the trial proceedings do not "affect[t] the framework within which the trial proceeds."[235]

f. Exposure of the Potential Jury Pool During Voir Dire to Prejudicial Statements

During jury selection in William Mach's trial for sexual conduct with a minor, the judge questioned one potential juror, Ms. Bodkin, who happened to have some expertise in subject matter relevant to the case (she had taken several psychology courses, and had worked with children in the capacity of state social worker for years).[236] During the judge's questioning, and in the presence of the other potential jurors, the judge asked her several questions, during the course of which Bodkin said that she had never seen a case where a child's statements had not been proved true, and that she had never known a child to lie about sexual abuse.[237]

Using the same faulty reasoning that we have now seen several times – presuming that the degree of grievousness is what makes an error structural – the Ninth Circuit concluded that constituting a jury after they were exposed to

231. *Id.*

232. *Id.*

233. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

234. *See* McWilliams v. Comm'r, Alabana Dep't of Corr., 940 F.3d 1218, 1226 (11th Cir. 2019).

235. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

236. Mach v. Stewart, 137 F.3d 630, 631–32 (9th Cir. 1997), *as amended* (Nov. 20, 1997), *as amended* (Feb. 11, 1998).

237. *Id.*

prejudicial statements "rises to the level of structural error."[238] Yet ironically, the court based this conclusion on its finding that the error, in this *particular* context, had in fact biased the jury: "Given the nature of Bodkin's statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted . . . [and] [t]his bias violated Mach's right to an impartial jury."[239] This is ironic, because it makes crystal clear that it is not Bodkin's statements that violated Mach's constitutional rights, but rather the jury's bias. The Ninth Circuit concluded that Bodkin's statements amounted to structural error precisely *because* they were harmful.[240]

But there is a simpler, more obvious reason why the Ninth Circuit's reasoning (and ruling) is invalid. Not only is it not even a constitutional error for a juror to express bias during voir dire, *it is no error at all*. After all, one of the primary functions of voir dire is to *expose* juror bias so as to ensure that a biased juror is not impaneled.[241] Bodkin exposed her bias, and accordingly she was kept off the jury; voir dire served its purpose.[242]

That is not to say that no error occurred. There is no question that Bodkin's statements had the potential to bias the jury pool; all prejudicial statements have that potential, to varying degrees. As such, it would be error not to ensure that the potential jurors exposed to Bodkin's statements were not prejudiced. In fact, that might even rise to the level of a constitutional due-process violation: if there is a constitutional right to an unbiased jury, then the jury selection process must be adequate to safeguard that right – so if a pool of potential jurors is obviously exposed to prejudicial statements, a constitutionally adequate process probably requires the judge to discern the effects of those statements. But that error – failure to question jurors about their potential for bias after exposure to prejudicial statements – is not the error identified by the Ninth Circuit.

g. Precluding Argument on the Defense Theory and Instructing the Jury That No Evidence Supports That Theory

In several cases, the Ninth Circuit has concluded that it is structural error for a trial court to improperly restrict counsel from making an argument (because, for example, the district court mistakenly thinks that there is no

238. *Id.* at 633.

239. *Id.*

240. *Id.* at 633–34 ("Because the error in this case consisted of an unequivocal and highly prejudicial statement made before a jury was sworn and because the statement does not resemble the erroneous introduction of evidence that can be weighed against other evidence, we are reluctant to describe the error as 'trial error.'").

241. *See* Gomez v. United States, 490 U.S. 858, 873 (1989) ("Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice . . .").

242. *Mach*, 137 F.3d at 632.

evidentiary basis for that argument).[243] Though this error might well be highly consequential, it does not have an effect on the constitutional framework of the case. This is ultimately an evidentiary error in disguise: the "mistake" is preventing counsel from pursuing a line of argument. That is no error at all, so long as the district court is correct that there is no evidence in the record that could support that argument. On the other hand, if the district court *erroneously* believed that there was no evidence in the record supporting a theory, then precluding the argument was improper. The correct way of handling this error would be to review the judge's finding of "no evidence" for clear error; if there was indeed an error, then the government would have the burden of showing that the error was harmless. Perhaps she would be able to; perhaps not.

Notably, in one of the Ninth Circuit's cases ruling that argument preclusion is structural error, the court went on to conclude that the error was harmful[244] – so it is hard to argue that the error here "defies analysis by harmless-error standards."[245]

h. Failure to Include at Least One Teacher on an Individualized Education Team in Accordance with the Individuals With Disabilities Education Act

As should be apparent by now, the Ninth Circuit has not applied the structural-error doctrine as rigorously as Supreme Court precedent suggests it should have; of all of the errors the circuit courts have erroneously concluded were structural, this one should strike the reader as the most unlikely (except, perhaps, for the D.C. Circuit's confused Appointments Clause decisions[246]).

In *M.L. v. Federal Way School District*, a school district violated a procedural requirement of the Individuals With Disabilities Education Act that required every child's Individualized Education Team[247] to include at least one regular education teacher among its members.[248] The school district failed to include such a member in plaintiff's team, and the Ninth Circuit concluded that this was a "structural defect in the constitution of the IEP team."[249]

The Ninth Circuit then erroneously concluded that this was *Fulminante* structural error. Just because the statutory violation committed by the school district violated the "structure" of the Act does not mean that there was a *structural error* anywhere in the course of the trial.[250] There is little more to

243. *See, e.g.*, United States v. Brown, 859 F.3d 730, 737 (9th Cir. 2017).

244. *See, e.g.*, United States v. Miguel, 338 F.3d 995, 1003 (9th Cir. 2003) ("However, even if we were to conclude that harmless error analysis applies, as the Government suggests, we would still reverse.").

245. Hedgpeth v. Pulido, 555 U.S. 57, 67 (2008) (Stevens, J., dissenting).

246. *See, e.g.*, Landry v. F.D.I.C., 204 F.3d 1125 (D.C. Cir. 2000).

247. *See* 20 U.S.C. § 1414 (2000).

248. M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 649 (9th Cir. 2005).

249. *Id* at 636.

250. *See id.* at 646.

say about this; the supposed error here was actually just a statutory violation that gave rise to a civil lawsuit.[251] There was no constitutional error and certainly no structural error.

i. Failure to Instruct a Jury Orally

In a 1992 case, *People of Territory of Guam v. Marquez*, the Ninth Circuit ruled that a district court's failure to orally instruct a jury on the law it is supposed to apply is structural error.[252] It reaffirmed this holding in a 2019 case, *United States v. Becerra*.[253] In *Marquez*, the court reasoned that appellants are entitled to a "record of sufficient completeness" in order to allow them to identify a prejudicial error.[254] This is an overreading of Supreme Court precedent, but even if it were the law, the *Marquez* court misapplied it. The court said that even though the district court had issued written instructions, those instructions were inadequate because there was no way of proving that the jury actually *read* them.[255] Accordingly, because there was no way to know whether the jury read the instructions, there was no way to know whether the failure to orally instruct was harmful – and therefore, the error must be structural.[256]

In *Becerra*, the same situation occurred – except that this time, the district court specifically ordered each juror to read the instructions, and then, after, questioned each of them to confirm that they had.[257] The *Becerra* court nonetheless concluded that the district court committed structural error, declaring that oral instructions are easier to comprehend, and that the oral component has an air of "solemnity" important to the process.[258]

Judge Graber dissented from this view, and his opening paragraph is so succinct that it is worth quoting in its entirety:

> I respectfully dissent. The district court erred by failing to read all the instructions to the jury aloud. But the error was clearly harmless in this particular case. The court gave the jury written instructions—the final versions of which Defendant concedes were entirely correct—and orally instructed the jury to read those instructions. The jurors confirmed—individually and in open court—that they had in fact read

251. *Id.* at 636, 649–50.

252. Guam v. Marquez, 963 F.2d 1311, 1316 (9th Cir. 1992).

253. United States v. Becerra, 939 F.3d 995, 998 (9th Cir. 2019).

254. *Marquez*, 963 F.2d at 1315 (quoting Mayer v. City of Chicago, 404 U.S. 189, 194 (1971)).

255. *Id.* at 1315.

256. *Id*. at 1315–16.

257. *Becerra*, 939 F.3d at 998–99.

258. *Id.* at 1005.

> the written instructions, and the evidence of Defendant's guilt was overwhelming.[259]

He was right, of course. Leaving aside that *oral* jury instructions might not even be constitutionally required – there appears to be no Supreme Court caselaw holding that it is – it is *certainly* possible to determine whether this error is harmless. Anyway, the Supreme Court has also never ruled that it is error to assume that a juror reads what the judge tells her to read – in fact, the Ninth Circuit has declared that to be an appropriate presumption.[260] Nothing about this error alters the preliminary constitutional framework of the trial; it, too, is at most trial error – whether as it appeared in *Marquez*, or as it appeared in *Becerra*.

j. Exclusion of a Defendant from Trial

The Ninth Circuit has concluded that a trial conducted *in absentia* – that is, without the presence of the defendant – is a structural error. [261] This, too, is likely incorrect. First and foremost, *Fulminante* itself explicitly points out that the exclusion of a defendant from trial is trial error, not structural error: it listed this error as among those constitutional violations to which harmless-error review applied[262] (alongside Confrontation-Clause violations, which it also categorized as trial errors susceptible to harmless-error review[263]).

Because the Federal Rules of Criminal Procedure provide an exclusive list of when it is appropriate for a defendant to be absent from trial proceedings,[264] it is certainly true that trial *in absentia* is error if one of those listings does not apply. Yet interestingly, despite *Fulminante*'s having listed this error as a trial error (which, remember, is one category of constitutional error), the Supreme Court has been explicit that it has not yet decided whether such absences are constitutional errors at all. [265]

Even if this is in fact a constitutional error – perhaps on due-process grounds – it would not alter the constitutional framework of the trial except in the absurd (and probably impossible) case of a defendant (1) asserting his *Faretta* right to represent himself, and then (2) being forcibly prevented from being present during the trial. In that scenario the structural error technically woud not be the defendant's absence per se; it would be the deprivation of the defendant's fundamental right to self-representation.

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259. *Id.* at 1006 (Graber, J., dissenting).

260. United States v. Smith, 831 F.3d 1207, 1215 (9th Cir. 2016).

261. Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995).

262. Arizona v. Fulminante, 499 U.S. 279, 307 (1991).

263. *Id.*

264. *See* FED. R. CRIM. P. 43(b).

265. *See* Crosby v. United States, 506 U.S. 255, 262 (1993); *see also* Fairey v. Tucker, 567 U.S. 924 (2012) (cert. denial memorandum).

k. *Brecht v. Abrahamson* "footnote 9" Error

The Third Circuit has concluded that footnote 9 of the Supreme Court's opinion in *Brecht v. Abrahamson* describes a new structural error.[266] In its entirety that footnotes says,

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. Greer v. Miller, 483 U.S. 756, 769, 107 S. Ct. 3102, 3110, 97 L. Ed. 2d 618 (1987) (STEVENS, J., concurring in judgment). We, of course, are not presented with such a situation here.[267]

The Third Circuit misread this footnote. It does *not* describe a new class of structural error. Instead, it explains that there might be a *trial* error that, combined with a pattern of prosecutorial misconduct, warranted habeas relief absent a showing of prejudice. It is true that the *effect* of an error's being structural is that it is not subject to harmless-error review – but that does *not* mean that all errors not subject to harmless-review are structural. The Supreme Court was careful in *Brecht* not to call this kind of error structural;[268] that is a distinct category of error with distinct qualities. Here, the Court simply points out that its ruling in *Brecht* does not decide whether it is possible for some *combination* of trial errors to have the *effect* of rendering review for prejudice unnecessary.[269]

This may seem like wordplay, but the distinction matters: the Third Circuit's interpretation commits a kind of logical fallacy by presuming that if all structural errors are remediable without harmless-error review, then all errors remediable without harmless-error review are structural errors. By analogy, the Third Circuit suggests that, because it is true that all apples are fruits, it must be true that all fruits are not apples. Not so, of course.

At any rate, the most charitable reading of the *Brecht* footnote for the Third Circuit might be to say this: *Brecht* leaves open the possibility that some trial errors, in combination, can be *treated* as though they are structural errors for the purposes of prejudice review in habeas cases.

IV. UNRESOLVED QUESTIONS

The previous Part discussed the many errors identified by the Supreme Court and circuit courts as structural; this Part takes a step back to consider what implications there are in deeming an error structural. Specifically, this

266. Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993).
267. *Id.*
268. *See id.*
269. *Id.*

Part considers how the structural-error doctrine interfaces with two other common doctrines: plain-error doctrine and waiver doctrine. It concludes that a structural error always satisfies the third prong of the plain-error doctrine (but does not always satisfy the fourth), and that – perhaps surprisingly – structural errors are indeed waivable (though the situations in which this could occur are narrow).

A. Waiver or Forfeiture: What is the Difference, and Why Does It Matter?

An argument – or, more specifically for our purposes, an appellate or collateral attack argument asking a court to review an error – can be either waived or forfeited.[270] As the Supreme Court has explained:

> The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous. "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'"[271]

This distinction matters because waiver completely precludes review of a right intentionally relinquished, whereas forfeiture allows for the possibility of review in cases where the failure to raise the error was unintentional.[272]

Plea agreements offer one clear example of waiver. It is common for a plea agreement – in which a defendant agrees to plead guilty, usually in exchange for some kind of favorable treatment by the government – to include an appeal waiver.[273] Such a waiver amounts to an intentional relinquishment of a defendant's right to appeal the judgment in his case after he has formally pleaded guilty.[274] If he thereafter attempts to appeal his guilty plea, the reviewing court will reject that argument as waived.[275]

By contrast, forfeiture occurs when the relinquishment of a right was not intentional.[276] For example, if there is an error in a defendant's Sentencing Guidelines calculations that the defendant did not see and therefore did not object to – perhaps because he was not given enough time to review the

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270. *See* Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 (2017).

271. *Id.* at 17 n.1 (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

272. United States v. Olano, 507 U.S. 725, 733–34 (1993).

273. *See id.* at 733.

274. *See*, e.g., United States v. Young, 908 F.3d 241, 247 (7th Cir. 2018) (quoting United States v. Flores-Sandoval, 94 F.3d 346, 349 (7th Cir. 1996)) ("By stipulating to the conduct in the plea agreement' and embracing that stipulation in the presentence report, in his sentencing memorandum, and at his sentencing hearing, Young has 'waived any claim that he did not engage in that conduct.'").

275. *Id.*

276. United States v. Flores, 929 F.3d 443, 447 (7th Cir.), *cert. denied*, 140 S. Ct. 504 (2019).

calculations – that error would be deemed forfeited.[277] A forfeited argument, unlike a waived one, *is* reviewable on appeal – but the standard of review is narrow; the defendant would receive only plain error review on the forfeited issue.[278] We will start our discussion here, with the plain-error doctrine.

B. Structural Error and the Plain-Error Doctrine

This Article began by discussing the history and development of the harmless-error doctrine and explained that in the early part of the twentieth century, both the federal and state governments codified mandates ordering appellate courts to disregard any errors that do not affect substantial rights. Federal Rule of Criminal Procedure 52(a) is the modern federal criminal codification of this rule; it requires that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."[279] The companion provision, 52(b), codifies the plain-error doctrine, explaining that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[280]

Though it took some time, the Supreme Court has settled on what is required to satisfy the strictures of 52(b). A defendant must show four things:

> (1) There must be an error or defect that the appellant has not affirmatively waived; (2) it must be clear or obvious; (3) it must have affected the appellant's substantial rights, i.e., affected the outcome of the district court proceedings; and (4) if the three other prongs are satisfied, the court of appeals has the discretion to remedy the error if it seriously affects the fairness, integrity or public reputation of judicial proceedings.[281]

The question this Article considers is whether a structural error always satisfies the third and fourth prongs of this test.

In fact, the Supreme Court has implicitly answered the question whether the fourth prong is automatically satisfied by a structural error (we'll go back and discuss the third prong later). In *Johnson v. United States*, the Supreme Court dealt with an error subject to plain error review – an error the petitioner asserted was structural.[282] The Supreme Court agreed that the error satisfied the first and second prongs of the plain-error test.[283] But when the time came to decide whether the error satisfied the third prong, the Court dodged two

277. *See id.* at 448 (noting that the court "address[es] each omission in light of the surrounding circumstances to determine whether the defendant's decision not to object was knowing and intentional.").

278. *Olano*, 507 U.S. at 733.

279. FED. R. CRIM. P. 52(a).

280. FED. R. CRIM. P. 52(b).

281. Puckett v. United States, 556 U.S. 129, 135 (2009).

282. Johnson v. United States, 520 U.S. 461, 466–68 (1997).

283. *Id.*

issues at once: it explained that, *because the error did not satisfy the fourth prong of the plain-error test*, it did not need to decide whether the third prong was satisfied, nor decide whether the error was actually structural at all.[284] That last part – that the Court declined to decide whether the error was structural, yet *also* decided that the error did not satisfy the fourth prong[285] – is pregnant with the inference that even if the error *had* been structural, it still would not have satisfied the fourth prong of the test. Framed another way, if it were true that all structural errors *automatically* satisfy the fourth prong of the plain-error test, then the Supreme Court would have had to decide whether the error was structural *before* concluding that the fourth prong was not met.

Whether a structural error automatically satisfies the third prong of the plain-error test remains an open question; as we just saw, the Supreme Court has managed to avoid answering it so far.[286] But despite the Supreme Court's silence on the question, four circuit courts – the Third, Fourth, Sixth, and Ninth – have weighed in, and all agree that structural error automatically satisfies the third prong of the test.

The Third Circuit pointed to the Supreme Court's statements in *Olano* that "there may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome"[287] to conclude that "this category is coextensive with the category of structural errors."[288] The Fourth Circuit hinted at this reasoning in one of its first cases to address this issue[289] but did not actually answer the question until 2014 when, in cursory fashion, it declared it had previously ruled that all structural errors satisfy the third prong.[290] (In fact it had never so-ruled: the case it cited for that proposition held that a *particular* structural error – a faulty reasonable-doubt instruction as in *Sullivan* – satisfied the third prong; it did not say that was true for *all* structural errors.) The Sixth Circuit employed a too-strong version of the same reasoning provided by the Third Circuit, suggesting that in *Olano* the Supreme Court had already held that structural errors satisfy the third prong. (As noted earlier, that is not correct; the Court has so far reserved that question.[291]) Finally, the Ninth Circuit joined the Third and the Fourth, but without offering much in the way of a clear explanation why.

Despite the deficiencies in some of these circuits' reasoning, their ultimate conclusion that structural errors automatically satisfy the third prong of plain-error review is probably correct (although *Weaver v. Massachusetts* complicates the question, as we will soon discuss). Recall that harmless-error review and plain-error review have the same codified origins: Federal Rule of Civil Procedure 52. That rule says, in full,

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284. *Id.* at 469–70.

285. *Id.*

286. *Id.*

287. United States v. Olano, 507 U.S. 725, 735 (1993).

288. United States v. Syme, 276 F.3d 131, 153 (3rd Cir. 2002).

289. United States v. David, 83 F.3d 638, 647 (4th Cir.1996).

290. United States v. Ramirez-Castillo, 748 F.3d 205, 215 (4th Cir. 2014).

291. *See* United States v. Barnett, 398 F.3d 516, 526 (6th Cir. 2005).

> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.[292]

Each provision includes the phrase "substantial rights," and we are certainly obligated to give the phrase the same meaning wherever it appears in the same rule.[293] But notice that according to the rule, harmless-error review applies to errors that *do not* affect substantial rights, whereas plain error review applies to errors that *do* affect substantial rights. This matters to our third-prong inquiry because structural errors are not susceptible to harmless-error review – meaning courts do not affirmatively decide whether a structural error affected substantial rights. And if courts do not look into whether substantial rights were affected, then it is not true – at least as a matter of formal logic – that plain error review applies. Rule 52(b) says that *if* substantial rights are affected, *then* the error may be considered. If we have not confirmed that substantial rights were affected, then technically, the sufficient condition of Rule 52(b) has not been satisfied.

This quandary is exacerbated by courts' uncareful descriptions of structural error. Consider the dicta in *Weaver*, for example: recall that Justice Kennedy divided structural errors into three categories – one for which the error protects some other interest and might not affect substantial rights; another for which the effects of the error are too hard to measure; and a third for which the error definitely affects substantial rights.[294] If we were to apply these three categories rigorously, then only the third would satisfy Rule 52(b)'s "affects substantial rights" category – meaning only it would satisfy the third prong of plain-error review.

Recall, too, that historically, harmless-error review was introduced as *restrictive*, not a *permissive*, rule.[295] Before Rule 52 and its ancestry, courts tended to review all errors;[296] Rule 52(a) placed a restriction on what kinds of errors courts were allowed to review (specifically, they were no longer allowed to review harmless ones). Viewed through that historical and logical lens, structural errors are errors for which that restriction does not apply. That suggests, as a textual matter, that the third prong of plain-error review requires more than a mere showing that 52(a) does not apply.

Ultimately, though, these concerns are too technical, given how the doctrine has actually been applied by the Court. Despite *Weaver*'s confusing categories, it seems clear that every time the Supreme Court has identified a

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292. United States v. Yamashiro, 788 F.3d 1231, 1236 (9th Cir. 2015).

293. *See* ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS,* 170 (2012).

294. Weaver v Massachusetts, 137 S. Ct. 1899, 1908 (2017).

295. *See* Act of Feb. 26, 1919, ch. 48, 40 Stat. L. 1181; *see also* Kotteakos v. United States, 328 U.S. 750, 758 (1946).

296. Traynor, *supra* note 3, at 3.

structural error, it has concluded that it so-alters the constitutional framework of the trial that the fairness of the proceedings are destroyed – and it undeniably is a substantial right of a defendant to have a fair trial. Whether the ultimate *outcome* would be the same is certainly one kind of prejudice, but structural errors focus on more fundamental substantial rights than mere outcome determinacy. The Court will likely conclude on this basis that all structural errors satisfy the third prong.

In sum, it is likely the Supreme Court will rule that structural error automatically satisfies the third prong, and this Article argues that it has already ruled that a structural error does not automatically satisfy the fourth prong.

C. Structural Error and Waiver

The last question this Article addresses is whether structural error can ever be waived. The Supreme Court has not yet answered this question, though several circuits have weighed in. Before going to the circuits, it is worth pausing to think through the logic of why structural error should, or should not, be susceptible to waiver.

We know already that a structural error can be forfeited – so why couldn't one be waived? There is no technical or legal reason why structural errors cannot be waived, but there is a line of thinking that might lead us to conclude that they are not waivable in practice. Though that reasoning is incorrect, it is worth our time to walk through it.

Whatever else is true of structural error, one thing is certain: raising an objected-to structural error on direct appeal results in automatic reversal.[297] Put slightly differently, if properly objected to, a party is guaranteed to have the error remedied. Add to this what must be true of all waiver: it is the *intentional* relinquishment of a *known* right.[298] (The *unintentional* relinquishment of a known or unknown right is forfeited, as we discussed earlier.[299]) So to waive a structural error, one must *intentionally* relinquish the right to raise it. But let's expand this out a bit: waiving a structural error means intentionally giving up the right to raise an error that will *guarantee* you a new trial. On its face, it might seem like an absurd decision – one that, in practice, no party or counsel would ever make. As a result, one might argue that any accusation (by the government, for example) that a party waived a structural error must fail, because no party would ever intentionally give up the right to raise such an error.

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297. United States v. Davila, 569 U.S. 597, 611 (2013) (quoting United States v. Marcus, 130 S. Ct. 2159, 2164 (2010)) ("We have characterized as 'structural' 'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole.").

298. Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 13 (2017).

299. *Id.*

Though convincing on its face, this reasoning relies on the false premise that there are no good reasons to waive a structural error. That is simply untrue. Imagine that you are a criminal defendant with plenty of money in the bank – enough money to hire whoever you want to defend you. You have a lawyer as a family friend, and you really trust him: he always says smart-sounding things when he comes over for dinner, and he brags constantly about all the cases that he has won. After you are indicted, you try to retain him – but for some erroneous reason, the judge prevents him from representing you. (Let's stipulate that it was structural error to prevent you from hiring this attorney; he is in good standing and has defended criminal cases before in this court, but the judge just thinks he is obnoxious.)

When your newly court-appointed public defender stops by your jail cell, you are obviously upset. You tell her, "I don't even want you to represent me, you know – the court wouldn't let me use *my* lawyer, and he's the only one I want. Now I'm stuck with you." To your surprise, she tells you that it sounds like what the judge did was wrong, and that so long as there really is no good reason why your friend cannot practice before the court, you have a right to be represented by him. She then explains that the court committed what is called a *structural error*. She goes on to explain that, so long as you object to the denial and the court denies your objection, you can appeal, and the reviewing court will be forced to reverse the case no matter the result.

You are obviously relieved; *what a great attorney*, you think! You and she plan to raise that objection at the next hearing. In the meanwhile, you decide to look up some of your friend's cases to see for yourself how he handles his cases. You are horrified. His written work product is full of incomplete sentences and is impossible to read. Worse, you discover that despite all his bragging, in fact he has not won a single criminal case. In a panic, you look up your public defender and, to your great relief, discover that she has won multiple awards for outstanding advocacy. You are even more shocked and impressed to learn that she has the highest acquittal rate of any attorney in the city.

Needless to say, you tell her not to raise the objection. She represents you through trial and sentencing and does an amazing job, but you still ended up losing your case; a jury convicts you, and you are sentenced to twelve months' imprisonment. Remembering what your attorney told you about structural error (and recalling that she said something about automatic reversal), you decide to appeal. On appeal you invoke your right to self-representation and explain in your brief that you know all about structural error, that the district court committed one, and that you know that you have the right to a new trial.

What result? The answer is obvious: by not objecting, you waived your structural-error argument. In fact, you had an excellent strategic reason not to object: you got lucky, and your court-appointed attorney was far superior to the attorney the court erroneously prevented you from hiring. Sure, if you had objected you could have gotten a new trial with your counsel of choice – but the structural error you experienced ended up being a windfall; it would have

been foolish to object to it. There is no justification for giving you a second bite at the apple in this case, and waiver is appropriate.

And sure enough, this is the reasoning the circuit courts that have heard the issue have applied. In *United States v. Christi*, the First Circuit explained that "[i]t is of no matter to this waiver analysis that a violation of the Sixth Amendment public trial right is structural, as distinct from merely trial error."[300] The Eleventh Circuit agrees: "Structural defects do not absolve a defendant's waiver of a defense or objection."[301] And the Seventh Circuit explained that because "[d]octrines of default and waiver are grounded in federalism and comity," structural errors can indeed be waived – even when raised in a habeas petition.[302]

V. CONCLUSION

The modern structural-error doctrine represents one of the most interesting conclusions we have drawn in a centuries-long debate about how perfect court proceedings should be. In one sense, the doctrine represents a return to a nineteenth century way of thinking about error: the doctrine could be seen as a recognition of the concern, common to early-twentieth-century judges, that the effects of an error might not be predictable or visible, and so caution requires reversal. Structural errors underscore the complexity of the legal system and the impossibility of deeming some errors harmless or harmful – especially when those errors connect to so many other moving pieces that, because of the contaminating nature of the, can no longer be reliably weighed. Put differently, structural-error doctrine acknowledges that while most errors can be placed on a balance beam alongside the rest of a trial and weighed, other errors damage the balance beam itself.

As often happens with categorical rules, what seemed simple at first has threatened to become hopelessly complex with the passage of time. In less than thirty years we have gone from *Fulminante*'s narrow binary to *Weaver*'s multiple, vaguely descriptive categories. We have gone from just five structural errors in the Supreme Court to nearly thirty when we add the Supreme Court's errors and the circuit courts' errors together. And we still have not confirmed key questions about how structural error interfaces with waiver, forfeiture, and plain error.

This Article attempts to canvass what we know about structural error, not just from Supreme Court precedent but also by reviewing nearly 900 published opinions of the circuit courts. It concludes that in fact most of the "new" structural errors identified by the circuit courts are not structural errors at all, and thus calls for those circuits to revisit their rationales, and for the Supreme Court to issue a ruling to explain with more specificity and clarity what direction the doctrine should be pointed in.

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300. United States v. Christi, 682 F.3d 138, 142 (1st Cir. 2012).

301. United States v. Suescun, 237 F.3d 1284, 1288 (11th Cir. 2001).

302. Jackson v. Bartow, 930 F.3d 930, 934 (7th Cir. 2019).

Two final points. First, it is worth asking whether the structural-error doctrine would have been simpler to understand and to apply if the Supreme Court had retained Justice Rehnquist's label of them as structural *defects*, rather than *errors*. "Defect" connotes inherent brokenness, whereas "error" connotes mistake. Perhaps the entire *Fulminante* line of cases could have been simplified by more rigorously maintaining a distinction between errors and defects, rather than between trial errors and structural errors.

Finally, the Article closes by acknowledging what ground it has not covered – an area ripe for continued research by others interested in the subject. This Article has not evaluated the many errors that the Supreme Court and circuit courts have declared are not structural. This is a more substantial task, to be sure – but one that, when combined with the errors addressed here, might help to thicken the line between trial and structural errors, and in turn provide an even more useful resource for academics and practitioners alike.