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ARTICLE

A CONTEXTUAL APPROACH TO
HARMLESS ERROR REVIEW*Justin Murray**

Harmless error review is profoundly important, but arguably broken, in the form that courts currently employ it in criminal cases. One significant reason for this brokenness lies in the dissonance between the reductionism of modern harmless error methodology and the diverse normative ambitions of criminal procedure. Nearly all harmless error rules used by courts today focus exclusively on whether the procedural error under review affected the result of a judicial proceeding. I refer to these rules as “result-based harmless error review.” The singular preoccupation of result-based harmless error review with the outputs of criminal processes stands in marked contrast with criminal procedure’s broader ethical vision, which also encompasses non-result-related interests such as providing defendants with space for autonomous decisionmaking, enforcing compliance with nondiscrimination norms, and making transparent the inner workings of criminal justice.

The vast scholarship relating to result-based harmless error review, though deeply critical of its current role in the administration of justice, has not put forward an alternative method of harmless error review that courts might realistically consider using. Commentators in this area have devoted much of their energy toward persuading courts to exempt large swaths of criminal procedure from harmless error review entirely and thus to require automatic reversal for errors involving exempted rules. Instead, courts have done just the opposite by subjecting an ever-expanding list of errors to harmless error review, and there is no reason to think this trend will abate in the foreseeable future.

I attempt in this Article to chart a different course. My proposal, called “contextual harmless error review,” has two essential features. First, it would assess harm in relation to the constellation of interests served by the particular procedural rule that was infringed and would not, as under existing law, automatically confine the harmless error inquiry to estimating the error’s effect on the outcome. Second, contextual harmless error review would examine whether the error harmed the interests identified in the first step of the analysis to a degree substantial enough to justify reversal.

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INTRODUCTION

[T]he Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the “principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”¹

[T]he Court in pursuing the theme of guilt/innocence must beware lest a dominant value become an exclusive one; lest a functional inquiry into a right’s consequences for accuracy crystallize a functionalist reduction of the right’s content.²

Modern criminal procedure is vast and complex — so much so that some degree of procedural error is virtually inevitable in all but the most straightforward of criminal trials.³ Some errors are caught and promptly rectified: the trial court might, for instance, initially give the jury an erroneous instruction but immediately correct itself after counsel brings the problem to its attention. Many errors, however, go undetected until the only available remedial devices — within the context of the criminal proceeding, at least — require courts to undo one or more key outputs of the adjudicative process. The most familiar remedy fitting this description is appellate reversal of the defendant’s conviction or sentence — a costly remedial option⁴ if we assume, as I will for the sake of argument, that the conviction is correct on the merits.⁵ Others include permitting the defendant to withdraw her plea, dismissing the indictment, and, less commonly, reducing the defendant’s sentence.⁶ For the sake of simplicity, but at the expense of

¹ *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted)).

² Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 *YALE L.J.* 1035, 1092 (1977).

³ See, e.g., *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (“[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968) (alteration in original))).

⁴ See, e.g., *United States v. Mechanik*, 475 U.S. 66, 72–73 (1986) (emphasizing the social cost of reversing factually supported convictions). *But cf.* *O’Neal v. McAninch*, 513 U.S. 432, 443 (1995) (stating that, although the government has a “legitimate and important” interest in avoiding retrial for individuals whose convictions were in fact unaffected by errors, this interest “is somewhat diminished . . . if one assumes . . . that retrial will often (or even sometimes) lead to reconviction”).

⁵ This assumption does not always hold true, of course, as proven by the recent spate of DNA exonerations. See, e.g., Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 *WIS. L. REV.* 35. I nevertheless accept it here, arguendo, to bring into focus a different set of problems associated with modern harmless error law.

⁶ Although American courts have been reluctant to reduce a defendant’s sentence to rectify errors unrelated to sentencing, Professor Sonja Starr has forcefully made the case that this remedial option ought to be available in appropriate cases. See Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 *GEO. L.J.* 1509 (2009).

technical precision, I use the term *reversal* as shorthand for all these forms of relief.

This Article is about harmless error review — a set of closely related remedial rules⁷ that, taken together, arguably constitute reviewing courts’ “strongest shield against reversal.”⁸ Although there are some circumstances in which reviewing courts contemplating reversal need not conduct harmless error review, those circumstances are exceedingly rare.⁹ And when courts do perform harmless error analysis, they conclude that the error under review is harmless with remarkable frequency.¹⁰ It is now well understood that harmless error review is a

⁷ Harmless error review is “best viewed as a question of the law of remedies” in that it deals with “whether a particular form of relief — the reversal of a conviction or the vacation of a judgment — should be available to redress the past wrong.” Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 17 (1994) (quoting Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1770 (1991)); *accord*, e.g., Bruno v. United States, 308 U.S. 287, 293 (1939) (characterizing a general harmless error statute applicable to federal courts at the time as a “remedial provision”).

⁸ Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 727 (2008). Available empirical data regarding the prevalence of harmless error review suggest that Starr might be right about this. See *infra* note 10.

⁹ See *infra* section I.B, pp 1805–10.

¹⁰ See Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 504 n.26 (1998) (finding, based on a review of published death penalty decisions by the Oklahoma Court of Criminal Appeals in 1995 and 1996, that in 72% of the cases “at least one claimed error was resolved by applying the harmless error rule”); Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 604, 617 (finding, based on a review of an intermediate California appellate court’s dispositions of appeals by criminal defendants during the fiscal year ending in June 1974, *id.* at 550, that “there was at least one harmless error reference in approximately a quarter of all affirmed and modified appeals,” *id.* at 604, and that “[i]ssues where . . . the harmless error rule . . . [was] likely to apply had very low success rates,” *id.* at 617); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 421 & nn.2–3 (1980) (estimating, based on citator references to the Supreme Court’s 1967 decision in *Chapman v. California*, 386 U.S. 18, 22 (1967) (holding that harmless error review applies to some constitutional errors), that, as of 1980, that decision had “determined as many cases as almost any precedent” decided during the 1960s, Goldberg, *supra*, at 421 n.2); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 62–72 (2002) (finding, based on a review of death penalty decisions by the California Supreme Court between 1976 and 1996, that during this period “the reversal rate in capital cases dropped from 94% to 14%,” *id.* at 62, and that the court’s “differential use of the harmless error doctrine” accounted for “nearly all of the difference in death penalty outcomes,” *id.* at 63); William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 182–84 (2001) (finding, based on a review of federal appellate criminal decisions between 1996 and 1998 that considered whether an error was harmless, that “[i]n 87 percent of the cases, the errors were held to be harmless,” *id.* at 184); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1065–67, 1067 n.64 (2005) (finding, based on a review of published federal appellate habeas decisions that conducted harmless error review between 1993 and 2004, that courts found errors harmless in “nearly two out of three analyses,” *id.* at 1067). *But cf.* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1180–81, 1180 nn.50, 52 (1995) (finding, based on a review of published federal appellate decisions (including civil cases), that only around 2% mentioned “harmless error” between 1969 and 1985 and approximately

leading contributor to the expansive gap between rights and remedies in criminal procedure.¹¹

Yet, despite the pivotal role the harmless error doctrine plays in determining the practical efficacy of procedural rules, there are worrying signs that reviewing courts are currently bungling that crucial function, at least in the criminal procedure context.¹² The concerns I find most troubling stem from the dissonance between the modern harmless error doctrine's reductionism and criminal procedure's diverse normative ambitions.¹³ Nearly all harmless error rules used by courts today focus exclusively on whether the procedural error affected the result of the proceeding under review¹⁴ (such as a trial,¹⁵ plea colloquy,¹⁶ sentencing hearing,¹⁷ or grand jury pro-

1.58% did so between 1986 and 1994, compared to the 0.79% of cases mentioning "harmless error" in 1966, before the decision in *Chapman*).

¹¹ See, e.g., *United States v. Pallais*, 921 F.2d 684, 691–92 (7th Cir. 1990) (Posner, J.).

¹² This Article does not address whether the harmless error doctrine presently functions as it should in civil and administrative cases, or how my proposed method might work outside the context of criminal procedure.

¹³ See, e.g., Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988). Although this normative tension is the primary concern my proposal aims to address, it bears note that commentators and judges have directed at least three other major objections at the prevailing approach to harmless error analysis as well. First, many argue that courts of review are institutionally ill equipped to perform the fact-intensive, and often retrospective, inquiry that result-based harmless error review entails. See, e.g., Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165 (2016). But cf. D. Alex Winkelman et al., *An Empirical Method for Harmless Error*, 46 ARIZ. ST. L.J. 1405, 1418–23 (2014) (finding that the reactions of randomly selected laypersons to vignettes loosely derived from the fact patterns of several published harmless error decisions had "some correspondence to the harmless error determinations made by real courts," *id.* at 1423). This concern is most acute with respect to errors during the sentencing phase of death penalty trials, where the factfinder's decision whether to impose a death sentence is highly discretionary and thus unpredictable. See, e.g., Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 GA. L. REV. 125, 154–57 (1993). Second, others contend that a decision to affirm on harmless error grounds "might be misread" by those who committed the error as "evidence of the court's willingness to tolerate" error or even as "winking at lawlessness." Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 662 (1972); accord, e.g., *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661–63 (2d Cir. 1946) (Frank, J., dissenting). And third, some worry that the lack of a meaningful relationship between the analysis involved in determining whether error occurred and that required to decide whether error affected the outcome enables courts of review in many cases to skip any consideration of the alleged error and to affirm solely on fact-bound harmless error grounds, impeding the law-declaration function of reviewing courts. See, e.g., Kamin, *supra* note 10, at 7. But cf. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 48–49 (1990) ("Particularly where the evidence of guilt at trial was very strong, . . . the appellate court may be reluctant to reverse. If such judicial bias against criminal appellants exists, the harmless error doctrine is a near-perfect means of ensuring that such bias does not affect the development of legal standards.").

¹⁴ See *infra* section I.A, pp. 1799–805.

¹⁵ See, e.g., *Chapman*, 386 U.S. at 23–24.

¹⁶ See, e.g., *United States v. Davila*, 133 S. Ct. 2139, 2150 (2013).

¹⁷ See, e.g., *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016).

ceeding¹⁸). I group these rules together under the label *result-based harmless error review*. Result-based harmless error review's preoccupation with the outputs of criminal processes stands in marked contrast with criminal procedure's broader ethical vision, which encompasses a diverse array of "non-truth-furthering" interests¹⁹ — interests that include providing defendants with space for autonomous decisionmaking, enforcing compliance with nondiscrimination norms, and making transparent the inner workings of criminal justice²⁰ — in addition to "truth-furthering" objectives.²¹

The goal of this Article is to formulate an alternative approach to harmless error analysis that better reflects the full range of interests enshrined in the law of criminal procedure. That approach, which I call contextual harmless error review, involves two steps.

A court using the method I propose would begin by identifying the interest (or range of interests) protected by whichever procedural rule was infringed. The interests that underpin various rules in criminal procedure are not all cut from the same cloth, as noted above, and the interests that are relevant to harmless error review in each case would reflect this variability. This is the first sense in which the style of harmless error analysis I envision is contextual.

After discerning the pertinent universe of legally protected interests, a court would conduct contextual harmless error review, in accord with the principle that remedies should generally correspond to "the nature of the interests that comprise the rights" they are meant to enforce.²² The court would balance the redressable harm caused by the error against the social cost of reversal and reverse if the former outweighs the latter. The harm engendered by error of course varies from one case to the next, as does the cost of reversal, which depends substantially on the type of reversal (in the broad and nontechnical sense in which I am using that term) sought by the defendant.

Shifting from the current result-based harmless error regime to the one I propose would have far-reaching benefits. Perhaps the most important effects of the reform I advocate relate to the large group of cases in which reviewing courts find that the prosecution presented overwhelming evidence against the defendant apart from and untainted by the error. Result-based harmless error rules almost universally forbid reversal in these situations, no matter how egregious the error, on the theory that the factfinder most likely would have rendered the

¹⁸ See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988).

¹⁹ Stacy & Dayton, *supra* note 13, at 94.

²⁰ See *infra* section II.A, pp. 1810–14.

²¹ Cover & Aleinikoff, *supra* note 2, at 1092; see also *id.* at 1092–94.

²² JAMES M. FISCHER, UNDERSTANDING REMEDIES § 3.1, at 11 (3d ed. 2014) ("The nature of an available remedy is clearly tied to the substantive right at issue.")

same decision based on the untainted evidence had the error not occurred.²³ By disassociating the defendant's entitlement to reversal from the gravity of the error in cases where the untainted evidence is overwhelming, result-based harmless error review gives prosecutors and trial judges unbridled license in those cases to commit error of the very worst kinds without risking reversal.

My proposal would alleviate this problem by leaving reversal on the table regardless of how strong the prosecution's untainted evidence might be. This is not to say that the strength of the prosecution's case would be irrelevant. Insofar as the errors under review implicate only truth-furthering interests — or non-truth-furthering interests that are result-correlated in the sense described below²⁴ — contextual harmless error analysis would yield outcomes similar or even identical to those produced by the current result-based rules. And even for errors that impinge on non-truth-furthering interests that are result-independent (again, as defined below²⁵), the reliability of the untainted evidence retains some relevance to contextual harmless error review because it is generally more costly to reverse an outcome backed by compelling evidence than an outcome that has weaker evidentiary support. But a contextual approach to harmless error review would not automatically treat the existence of overwhelming untainted evidence as dispositive with respect to rules that protect result-independent interests. No matter how compelling the evidence against the defendant, a court applying contextual harmless error review would still need to consider whether the error harmed result-independent interests to a degree warranting reversal.

Despite all this, I acknowledge that there are plausible arguments in favor of retaining the result-based harmless error regime. One might defend it, for example, on the grounds that (1) injuries to result-independent interests, though regrettable, are rarely if ever important enough to justify reversal,²⁶ (2) result-based harmless error review achieves a satisfactory level of systemic compliance with the law by disincentivizing errors caused by a desire to tilt the result in the prose-

²³ As explained below, there are rare situations in which a court applying result-based harmless error rules must reverse, despite the court's opinion that the prosecution's untainted evidence is overwhelming, *infra* note 69. This situation occurs when the record indicates that the factfinder did not find the evidence to be overwhelming. A jury might, for example, evince doubt regarding aspects of the prosecution's case by sending notes during deliberations, delivering a split verdict that convicts the defendant on some counts while acquitting or failing to achieve unanimity on others, or by deliberating for a period long enough to suggest that the jury did not view the case as a slam dunk for the prosecution.

²⁴ See *infra* p. 1814.

²⁵ See *infra* p. 1814.

²⁶ See, e.g., *United States v. Mechanik*, 475 U.S. 66, 72 (1986). *But see, e.g., Stacy & Dayton*, *supra* note 13, at 85.

cution's favor,²⁷ and (3) civil, disciplinary, and other remedies are superior, compared with reversal, as mechanisms for addressing errors that cause harm to interests unrelated to the outcome.²⁸

Although these arguments are not without problems, they would hold together well enough if there were no other viable way of approaching harmless error analysis — if, in other words, automatic reversal were the only alternative to result-based harmless error review. And that is certainly the impression one gets from much of the existing literature about harmless error review.²⁹ In their zeal to expand the list of procedural errors that are completely exempt from harmless error review of any kind,³⁰ commentators have for the most part overlooked the possibility of developing alternative methods of harmless error review that are not result-based.³¹ As we shall see, courts grade slightly better on this measure: in one understudied area of criminal procedure that deals with certain types of recusal errors, courts have formulated a non-result-based “special harmless error test” that I re-

²⁷ See, e.g., William R. Newlin, Recent Decision, *Fahy v. Connecticut*, 375 U.S. 85 (1963), 25 U. PITT. L. REV. 601, 603–04 (1964). But cf. sources cited *supra* note 13.

²⁸ See, e.g., Landes & Posner, *supra* note 10, at 186. But there is broad agreement that these remedies, however desirable they might be in the abstract, are currently all but nonexistent and thus that “for criminal defendants whose rights are violated at trial, it is ‘reversal or nothing.’” Meltzer, *supra* note 7, at 31 (modifying Justice Harlan’s statement in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that “[f]or [innocent] people in *Bivens*’ shoes, it is damages or nothing,” *id.* at 410 (Harlan, J., concurring in the judgment)). And although I agree that criminal defendants also need more expansive access to remedies other than reversal, proposals of that kind and efforts like mine to improve the rules that determine when criminal procedure remedies (in particular, reversal) are warranted are not mutually exclusive. See Nancy Leong & Aaron Belzer, *Enforcing Rights*, 62 UCLA L. REV. 306, 346 (2015) (discussing the advantages of “multiple remedial avenues” for procedural error).

²⁹ See, e.g., 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 854 (4th ed.) (Westlaw) (last visited Mar. 8, 2017) (“What Justice Rutledge wrote in [*Kotteakos v. United States*, 328 U.S. 750 (1946)]” — the most influential case describing the methodology of result-based harmless error review, see *infra* notes 43–51 and accompanying text — “may well be all that can usefully be said of the [harmless error] rule.”).

³⁰ See, e.g., David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483; Goldberg, *supra* note 10; Stacy & Dayton, *supra* note 13; Robert Pondolfi, Comment, *Principles for Application of the Harmless Error Standard*, 41 U. CHI. L. REV. 616, 629 (1974); *The Supreme Court, 1966 Term — Leading Cases*, 81 HARV. L. REV. 110, 205–09 (1967). But see, e.g., Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180 (2008).

³¹ There are a few exceptions to my claim that prior scholarship has neglected to explore non-result-based methods of harmless error review. The proposal most compatible with mine is that of Judge Chapel, which would ask “whether any error had a significant effect upon a right of the accused” and would answer that question based in part on the “purpose” of the infringed rule. Chapel, *supra* note 10, at 534; see also David McCord, *The “Trial”/“Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1454–57 (1997) (calling for a “case-by-case inquiry into whether a particular error requires reversal,” *id.* at 1454, which revolves around eight factors that include “[t]he degree of infringement” associated with the error, *id.* at 1455).

gard as a prototype for the method I propose in this Article.³² But courts have not adapted that test for use outside the narrow doctrinal context in which it emerged. And the academic literature relating to harmless error review has inexplicably failed even to notice its existence.³³

This Article raises as many questions as it answers. My purpose is not to identify and weigh all of the potential costs and benefits of transitioning from the current remedial order to one organized around contextual harmless error analysis. Rather, I intend to show that contextual harmless error review is a normatively plausible alternative to the current result-based rules, and to lay the groundwork for future scholarship that can systematically assess its viability.

I. THE NARROW PATHS TO REVERSAL FOR CRIMINAL PROCEDURE ERRORS

In this Part, I advance three primary claims.

First, harmless error review as currently applied in criminal cases almost invariably focuses on whether the error might have affected the outcome of the proceeding under review.³⁴ My label for this mode of inquiry is *result-based harmless error review*.

Second, harmless error review has largely crowded out alternative pathways to reversal such as automatic reversal and reversals based on a court's supervisory power, albeit without completely eliminating them.³⁵

And finally, the main ideas that commentators have put forward in their longstanding efforts to improve the law of harmless error have not borne much fruit. Those who argue that harmless error analysis should pay little or no heed to the prosecution's untainted evidence and should instead simply ask whether the error affected the outcome propose an impossible task, as courts cannot avoid examining the error's context to discern its probable effect, and that context necessarily includes the untainted evidence.³⁶ Others urge courts to exempt large swaths of criminal procedure from existing harmless error rules, but without offering any viable replacement to sweeten the deal.³⁷ Courts

³² *E.g.*, *Scott v. United States*, 559 A.2d 745, 746–47 (D.C. 1989) (en banc) (adopting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988)); *see infra* section II.C, pp. 1820–23.

³³ To be sure, commentators have helpfully analyzed the *Liljeberg* harmless error method as it relates to recusal law. *See, e.g.*, Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 *GEO. J. LEGAL ETHICS* 55, 73–75 (2000). My point is simply that the potential significance of *Liljeberg* and its progeny to the broader debate about harmless error review has thus far gone unexamined.

³⁴ *See infra* notes 40–51 and accompanying text.

³⁵ *See infra* section I.B, pp. 1805–10.

³⁶ *See infra* notes 64–72 and accompanying text.

³⁷ *See supra* notes 30–31 and accompanying text.

have balked at this proposal.³⁸ If we are to address the serious concern that “nearly ubiquitous use of a harmless error rule focusing on the outcome of the trial . . . denigrates important constitutional protections . . . that promote values other than the reliability of [guilty] verdicts,”³⁹ we will need to look for solutions elsewhere.

A. Result-Based Harmless Error Review

This section explores how the prevailing result-based method of harmless error review works, the principles it embodies, and from whence it came. I argue that much of the existing case law and commentary misunderstands important facets of the modern harmless error doctrine’s conceptual structure. These misunderstandings have impeded efforts to diagnose the ailment that has afflicted our courts of review and to determine how best to cure it. Clearing up these matters at the outset will facilitate the normative analysis that follows later in the Article.

Federal courts typically apply one of three rules when conducting harmless error review in criminal cases. These rules fairly represent the broader universe of harmless error rules currently used by American courts, subject to a few exceptions.⁴⁰ For most *constitutional* claims preserved by a timely defense objection (and reviewed on direct appeal), *Chapman v. California*⁴¹ holds that courts may declare the error harmless only if the prosecution “prove[s] beyond a reasonable doubt that the error . . . did not contribute to the verdict.”⁴² Federal courts reviewing preserved *nonconstitutional* claims, by contrast, ordinarily apply the standard set forth in *Kotteakos v. United States*,⁴³ which asks whether the court can say with “fair assurance” that the outcome “was not substantially swayed by the error.”⁴⁴ (Federal courts

³⁸ See *infra* notes 104–08 and accompanying text.

³⁹ Stacy & Dayton, *supra* note 13, at 80–81. I develop a similar argument in Part II. See *infra* Part II, pp. 1810–23.

⁴⁰ I discuss the most important of these exceptions — the harmless error rule applicable to certain types of recusal errors set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862–65 (1988) — in section II.C, *infra* pp. 1820–23.

⁴¹ 386 U.S. 18 (1967).

⁴² *Id.* at 24. *Chapman* left open the possibility that there might be “some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,” *id.* at 23, citing as examples the rule against admission of “coerced confession[s],” the “right to counsel,” and the requirement of an “impartial judge,” *id.* at 23 n.8. To mention just a few of the many excellent works analyzing *Chapman* and its progeny, see, for example, ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970); John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59 (2016); Philip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969); Meltzer, *supra* note 7; and Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973).

⁴³ 328 U.S. 750 (1946).

⁴⁴ *Id.* at 765.

also apply *Kotteakos* with respect to *constitutional* errors when considering those errors on *collateral review*, as in *Brecht v. Abrahamson*,⁴⁵ rather than on direct appeal.⁴⁶ And the federal harmless error standard for *unpreserved* claims, set forth in *United States v. Olano*⁴⁷ and related cases, calls for the “same kind of inquiry” but “with one important difference”: “the defendant rather than the Government . . . bears the burden of persuasion with respect to prejudice”⁴⁸ and must show a “reasonable probability” that “the result of the proceeding would have been different” without the error.⁴⁹

The feature that unites these rules is that each permits reversal only when the error might have affected the outcome. In other respects, of course, they differ. For one thing, *Chapman* and *Kotteakos* assign to the prosecution the burden of showing that the error is harmless,⁵⁰ whereas *Olano* allocates the burden of demonstrating harm to the defense.⁵¹ And each of these rules requires a different level of certainty that the error affected the result. But however important these variations might be, they relate only to (1) which party bears the burden of proof and (2) how certain the reviewing court must be with respect to the error’s effect or lack of effect. All three rules are fundamentally similar insofar as they define harm solely in terms of the likelihood that the error affected the outcome.

Precisely what it means for an error to affect the outcome has proven controversial, due primarily to the large subset of harmless error cases in which courts have affirmed on the ground that the un-

⁴⁵ 507 U.S. 619 (1993).

⁴⁶ *Id.* at 637–38. The Court has since reaffirmed *Brecht* in *Fry v. Pliler*, 551 U.S. 112 (2007). In that case, the Court rejected the defendant’s claim that Congress implicitly superseded *Brecht* by enacting 28 U.S.C. § 2254(d)(1) (2012), which requires federal courts to restrict their collateral review of state court proceedings to rulings that are “contrary to, or involve[] . . . unreasonable application[s] of, clearly established Federal law.” *Fry*, 551 U.S. at 119 (quoting § 2254(d)(1)); *id.* at 119–20.

⁴⁷ 507 U.S. 725 (1993).

⁴⁸ *Id.* at 734.

⁴⁹ *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)) (endorsing *Bagley* as “a sensible model” for application of *Olano* that bears “similarities to the *Kotteakos* formulation,” *id.* at 81). To prevail with an unpreserved claim, the defendant must establish not only that error occurred and that the error was harmful under the *Olano-Bagley* test, but also that the error is “clear or obvious” and “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *Olano*, 507 U.S. at 734, 736 (alteration in original)).

⁵⁰ *See, e.g., O’Neal v. McAninch*, 513 U.S. 432, 438–39 (1995) (noting that *Chapman* and *Kotteakos* “[b]oth . . . plac[ed] the risk of doubt on the State,” *id.* at 439, and disregarding language in *Brecht* that may have suggested otherwise about *Kotteakos*, *id.* at 438 (citing *Brecht*, 507 U.S. at 637)).

⁵¹ *See Olano*, 507 U.S. at 734.

tainted evidence against the defendant is “overwhelming.”⁵² Many commentators have argued that these cases represent a “guilt-based” harmless error test that is sharply at odds with the “effect-on-the-verdict approach” reflected in other decisions.⁵³ Most of those who take this position concede that even when applying the *effect-on-the-verdict* test, courts may properly consider the strength of the government’s untainted evidence as a factor in determining the error’s effect.⁵⁴ But they perceive a meaningful distinction, in theory if perhaps not in practical application, between asking (1) whether “the untainted evidence . . . alone compels a verdict of guilty”⁵⁵ without the error and (2) whether “the error might have swayed the factfinder.”⁵⁶ And they

⁵² *E.g.*, *Harrington v. California*, 395 U.S. 250, 254 (1969). Although truly overwhelming evidence “alone may be dispositive” in some cases, *State v. Romero*, 381 P.3d 297, 302 (Ariz. Ct. App. 2016), the relative strength or weakness of the evidence remains relevant even when the evidence is not overwhelming, *see, e.g., Brecht*, 507 U.S. at 639 (“[T]he State’s evidence of guilt was, if not overwhelming, certainly weighty.”). *See generally* WRIGHT ET AL., *supra* note 29, § 854 (“Perhaps the single most significant factor in weighing whether an error was harmful, although not the only one, is the strength of the case against the defendant.”).

⁵³ Edwards, *supra* note 10, at 1171. A nonexhaustive list of commentators who have thoughtfully endeavored to classify harmless error decisions in this fashion — and to criticize cases fitting the *guilt-based* description — includes Alschuler, *supra* note 13, at 661–62, 666; Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court’s Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 *passim* (2002); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16–19 (1976); John M.M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819 *passim* (1994); Griffin, *supra* note 13, at 197–203; Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1024 (2015); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 578–83 (2004); Solomon, *supra* note 10, *passim*; Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect Of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1176–92; and Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335 *passim* (1994). Some courts have accepted this analysis, but they are few and far between. *See infra* notes 71–72 and accompanying text.

⁵⁴ *See, e.g., The Supreme Court, 2005 Term — Leading Cases*, 120 HARV. L. REV. 125, 202 (2006). Some, however, contend without qualification that harmless error analysis “should not . . . consider the strength of the remaining evidence.” Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 366 (2015); *see also id.* at 371–72.

⁵⁵ Field, *supra* note 53, at 17.

⁵⁶ *Id.* at 16; *see also id.* at 16–18. The best attempt to pinpoint the difference between these formulations, I think, is Professor Jason Solomon’s explanation that the *guilt-based* test “plays out an alternative (counterfactual) history.” Solomon, *supra* note 10, at 1076 (quoting Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 346 (1992)). In Solomon’s view, the *guilt-based* approach asks the counterfactual question “whether, if not for the error, the defendant would have been convicted” whereas the “error-based approach asks not a counterfactual question but a historical one — essentially, was the error a ‘substantial factor’ in the jury’s verdict?” *Id.* But Solomon acknowledges that the “substantial factor test” after which he models his proposed harmless error rule has been “roundly criticized as indeterminate and unhelpful” in the tort domain from which it comes. *Id.* at 1075. And he ultimately concedes that “some assessment of the strength of the prosecution’s case is appropriate and usually necessary”

contend that courts should reject the *guilt-based* approach because, among other reasons, it allows “[s]trong evidence of guilt [to] trump even grave error,” which “undercuts the expressive, educational, and deterrent functions of appellate review.”⁵⁷

There was a time when this distinction between a *guilt-based* harmless error method and an *effect-on-the-verdict* alternative would have aptly described a significant split within the case law. Many cases during the nineteenth century and the early part of the twentieth embodied the *guilt-based* approach in holding that the party who lost at trial was “not harmed” by procedural error where “[t]he result is right, although the manner of reaching it may have been wrong.”⁵⁸ This approach, now known as the “[c]orrect [r]esult test,”⁵⁹ naturally invited courts to weigh the strength of the untainted evidence and potentially even the *tainted* evidence when deciding whether an error requires reversal. Another substantial group of harmless error opinions from this period rejected that approach,⁶⁰ however, and held — in language reflecting an *effect-on-the-verdict* orientation — that error is harmless only if the reviewing court “can say affirmatively the accused could not have been harmed from that cause.”⁶¹ This group of cases, much like the first, took into account the strength of the prosecution’s untainted evidence, even to the point of making that consideration

and that reviewing courts cannot solely “look[] at the error itself, but . . . should also assess the probability of conviction before the error.” *Id.* at 1084.

⁵⁷ Simon, *supra* note 53, at 582. Other common objections include the inability of reviewing courts operating under hindsight bias to reliably assess the strength of the prosecution’s case, *see, e.g.*, Griffin, *supra* note 13, at 197–99, and the “usurpation by the appellate court of the ultimate fact-finding responsibility, in contravention of the defendant’s right to a jury trial,” Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court’s “No Harm, No Foul” Debacle in Neder v. United States*, 28 AM. J. CRIM. L. 229, 230 (2001).

⁵⁸ Decatur Bank v. St. Louis Bank, 88 U.S. (21 Wall.) 294, 301 (1874).

⁵⁹ TRAYNOR, *supra* note 42, at 18 (internal quotation marks omitted).

⁶⁰ *See, e.g.*, Lipscomb v. State, 23 So. 210, 221 (Miss. 1898).

⁶¹ Austin v. People, 102 Ill. 261, 264 (1882), *quoted approvingly in* Wilson v. United States, 149 U.S. 60, 69–70 (1893). *See generally* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 21 (2d ed. 1923) (providing an extensive — but also polemical, and not entirely reliable — summary of harmless error decisions from this period). One can find still other analytical methods elsewhere in this nascent body of harmless error jurisprudence, methods that have long since fallen out of the dialogue concerning harmless error review and perhaps warrant renewed exploration. *See, e.g.*, Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U.S. 372, 383–84 (1928) (holding that the appellant’s submission of an unabridged appellate record, which violated a rule stating that the record must present the evidence in “simple and condensed form,” *id.* at 383, was not harmless, emphasizing that the “purpose of the statute” was to alleviate burdens on the courts and warning that “[r]epetition of [the error] in other cases would soon congest the dockets of the appellate courts,” *id.* at 384).

dispositive in certain circumstances.⁶² Yet they did so with a different purpose in mind: “not [to] say that the defendant is guilty,” but to estimate the likelihood that “the same result would have been reached” by an “average juror” and thus, inferentially, by the jury that actually rendered the verdict.⁶³

There is no comparable split, however, within the modern harmless error doctrine. During the early years of the twentieth century, Congress rebuffed an organized effort by the bar to codify a harmless error rule verging on the correct-result test,⁶⁴ choosing instead to enact a compromise measure that required federal courts to give judgment “without regard to technical errors . . . which do not affect the substantial rights of the parties”⁶⁵ — a formulation courts had already embraced for many years.⁶⁶ With time, courts fleshed out the details of this equivocal mandate by rejecting the correct-result test, due primarily to the concern that it usurped the jury’s prerogative to “determine guilt or innocence,”⁶⁷ and by embracing various *effect-on-the-verdict* formulations deemed more consistent with the premise that guilt must be “found by a jury according to the procedure and standards appropriate for criminal trials.”⁶⁸ Under these tests, too, courts examine the strength or weakness of the prosecution’s evidence, but

⁶² See, e.g., *State v. Cluff*, 158 P. 701, 705 (Utah 1916) (affirming on harmless error grounds where the prosecution proved its allegations with “good and undisputed evidence and by the defendant’s own and undenied admissions”).

⁶³ *Id.*

⁶⁴ See 5 A.B.A. J. 455, 455–56 (1919). The bill first proposed by the American Bar Association (ABA) in 1908 would have divested federal courts of the power to reverse unless there had been a “miscarriage of justice,” *id.* at 455, a term that most reformers believed encapsulated the correct-result approach, see, e.g., Charles F. Amidon, *The Quest for Error and the Doing of Justice*, 40 AM. L. REV. 681, 690–91 (1906); *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 31 ANN. REP. A.B.A. 542, 542 (1907). See generally 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, 437–50 (2009) (describing the roles played by several leaders of this reform movement). Although a minority of state legislatures endorsed the miscarriage-of-justice formulation, their courts generally construed such statutes in a grudging manner that brought them into conformity with the courts’ own views concerning proper harmless error analysis. See John H. Wigmore, *Reversible Error*, 19 J. AM. JUDICATURE SOC’Y 28, 29 (1935) (noting that the “indefinite phrase ‘miscarriage of justice’ has usually availed little to change the actual practice of appellate tribunals” because “[t]he habits of thought . . . have been too powerful to be overcome by a mere legislative form of words”).

⁶⁵ Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181, 1181.

⁶⁶ See, e.g., *Williams v. Great S. Lumber Co.*, 277 U.S. 19, 26 (1928) (“Since the passage of [the Act of Feb. 26, 1919], as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties ‘is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.’” (quoting *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926))).

⁶⁷ *Kotteakos v. United States*, 328 U.S. 750, 763 (1946).

⁶⁸ *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

with an eye to determining whether it was the error or an innocent cause — the untainted evidence — that precipitated the outcome.⁶⁹ The tests set forth in *Kotteakos*, *Chapman*, and *Olano* each fit comfortably within that tradition.⁷⁰

I, like many others, am troubled by the outsized role that consideration of the strength of the prosecution's case plays in harmless error review today. Nor do I think many courts fully anticipated how large — and logically unavoidable, once one accepts the basic parameters of result-based harmless error review — that role would become, as evidenced by passages in both *Chapman* and *Kotteakos* that try to downplay the centrality of untainted prosecution evidence to result-based harmless error analysis.⁷¹ But it did not take the Supreme Court long to figure out, a mere two years after *Chapman*, that in some cases the evidence truly is “so overwhelming” that its “probable impact” on a rational or “average” jury is so certain that a reviewing court can find “beyond a reasonable doubt” that the verdict resulted from that evidence rather than from the error.⁷² The question posed

⁶⁹ See, e.g., *Neder v. United States*, 527 U.S. 1, 17 (1999) (“In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error ‘did not contribute to the verdict obtained.’” (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967))). See generally Daniel J. Kornstein, *A Bayesian Model of Harmless Error*, 5 J. LEGAL STUD. 121 (1976) (arguing that modern harmless error jurisprudence is conceptually consistent in that it defines the *effect-on-the-verdict* test in terms of a “but-for” concept of causation under which “the probability of guilt given the [untainted] evidence] . . . is absolutely necessary to arrive at an intelligent conclusion regarding the error’s effect on the verdict,” *id.* at 143). Revealingly, modern result-based harmless error rules do not permit courts to affirm on the ground that the prosecution’s untainted evidence is overwhelming when the record contains reliable indications that the factfinder itself did not regard that evidence as ironclad. See, e.g., *Bollenbach*, 326 U.S. at 614 (rejecting the prosecution’s argument that its strong proof of guilt rendered the instructional error harmless given the “vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition”).

⁷⁰ See *supra* notes 41–51 and accompanying text.

⁷¹ See *Chapman*, 386 U.S. at 24; *Kotteakos*, 328 U.S. at 767.

⁷² *Harrington v. California*, 395 U.S. 250, 254 (1969); accord, e.g., *Brown v. United States*, 411 U.S. 223, 231–32 (1973); *Milton v. Wainwright*, 407 U.S. 371, 372–73, 377–78 (1972); *Schneble v. Florida*, 405 U.S. 427, 430–32 (1972). See generally Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 206–07 (“[C]ourts, particularly appellate courts, presume a rational jury that will act in accordance with the instructions given it. . . . [I]t is difficult to see how any other premise could be employed in a systematic way as a basis for judicial reasoning.”). The Court’s decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), briefly gave new life to the proposition that “[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” *Id.* at 279. But to the extent that *Sullivan*, a unanimous opinion, “seemed to represent a clear triumph for the effect-on-the-jury standard of harmless error,” *Neder* soon made clear that “the triumph was illusory.” Cooper, *supra* note 53, at 323; see also *supra* note 69 (quoting relevant language from *Neder*). To be sure, a small group of state courts still find it worthwhile to talk of a distinction between an “overwhelm-

by the guilt-based approach to harmless error review — whether the prosecution’s untainted evidence is so overwhelming that any reasonable jury would have reached the same verdict as the actual jury — is thus an indispensable ingredient of the effect-on-the-verdict approach and not something alien to it.

B. *Exceptions to the Harmless Error Rule*

In certain exceptional situations a defendant whose claim would not pass muster under the relevant harmless error standard might nevertheless obtain reversal by pursuing either of two alternative avenues. One involves the “supervisory authority”⁷³ of appellate courts to “maintain[] civilized standards of procedure,”⁷⁴ which encompasses the power to reverse without regard to “actual prejudice”⁷⁵ as a means of “detering illegality and protecting judicial integrity.”⁷⁶ The supervisory power has become “largely irrelevant”⁷⁷ in the criminal appeal context, however, in light of decisions making it available “only in the

ing evidence test,” which inappropriately “substitute[s] [the appellate court] for the trier-of-fact by . . . weighing the evidence,” and a test that focuses on “the effect of the error on the trier-of-fact,” which calls for a more limited inquiry regarding “whether there is a reasonable possibility that the error affected the verdict.” *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). But even those cases recognize — as do most commentators who recognize this distinction — that reviewing courts may consider the strength of the prosecution’s evidence as “one factor” among others in determining the effect of the error. *Ventura v. State*, 29 So. 3d 1086, 1091 (Fla. 2010).

⁷³ *McNabb v. United States*, 318 U.S. 332, 341 (1943).

⁷⁴ *Id.* at 340; *accord, e.g.*, *State v. Rose*, 46 A.3d 146, 153 (Conn. 2012). Professor Amy Coney Barrett aptly characterizes the Supreme Court’s supervisory-power decisions as a kind of “procedural common law” consisting of rules “not otherwise required by Congress or the Constitution.” Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 332 (2006). *But cf.* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1520 (1984) (arguing that courts use the term *supervisory power* to describe “several different forms of judicial power” and that some of these forms are legitimate while others are not).

⁷⁵ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987) (plurality opinion); *id.* at 809–14, 809 n.21 (holding, through exercise of the supervisory power, that it is reversible error for a federal court to appoint a private litigant’s attorney to prosecute a criminal contempt charge against that litigant’s adversary); *id.* at 815 (Scalia, J., concurring in the judgment) (supplying the fifth vote, though on other grounds, for the proposition that the error identified by the plurality requires automatic reversal).

⁷⁶ *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980).

⁷⁷ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 432 (1992); *see also id.* at 432 & n.244 (arguing that *United States v. Hasting*, 461 U.S. 499 (1983), and *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), rendered the supervisory power “subservient to the harmless error rule” and thus “largely irrelevant,” Gershman, *supra*, at 432, in determining when reversal is available to redress procedural error in federal cases). *But cf.* Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 118, 163 (1999) (finding, based on forty-five federal cases addressing claims that the prosecutor’s closing argument was improper, that “even when courts acknowledge the limitations of *Hasting*, they continue to write opinions that suggest that the *intention* of the prosecutor affects their decision to reverse,” *id.* at 163).

most extreme circumstances” and requiring courts to undertake a “careful . . . balancing[] of all the relevant interests”⁷⁸ (including “the interests preserved by the doctrine of harmless error”⁷⁹) before citing it as the basis for reversal. So the balance of this section will examine the somewhat larger group of cases in which courts have held, without exercising their supervisory power, that certain types of error require automatic reversal if preserved through a timely objection.⁸⁰

Most cases that have confronted this issue in recent years have applied the test articulated by the Supreme Court in *Arizona v. Fulminante*.⁸¹ In considering whether errors involving the admission of a defendant’s coerced confession warrant automatic reversal, the Court first observed that it had “applied harmless error analysis to a wide range of errors,”⁸² which it characterized as “trial error[s].”⁸³ It contrasted these so-called trial errors with “structural defects,”⁸⁴ “which are not subject to harmless error”⁸⁵ and which include (1) “total deprivation of the right to counsel at trial,”⁸⁶ (2) handling of the trial

⁷⁸ *Hasting*, 461 U.S. at 528 (Brennan, J., concurring in part and dissenting in part).

⁷⁹ *Id.* at 507 (majority opinion) (underscoring that “reversals of convictions under the court’s supervisory power must be approached ‘with some caution,’ and with a view toward balancing the interests involved,” *id.* at 506–07 (citation omitted) (quoting *Payner*, 447 U.S. at 734), and that “the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise . . . prosecutorial overreaching,” *id.* at 507); *accord, e.g.*, *State v. Pouncey*, 699 A.2d 901, 907 (Conn. 1997).

⁸⁰ *See generally* 7 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 27.6(d), at 143–68 (4th ed. 2015) (summarizing the Supreme Court’s automatic-reversal jurisprudence). The Court has yet to decide whether the exemptions from harmless error review it has developed with respect to preserved claims also apply to unpreserved claims. *See, e.g.*, *United States v. Marcus*, 560 U.S. 258, 263 (2010) (reserving this question).

⁸¹ 499 U.S. 279 (1991); *see, e.g.*, *Glebe v. Frost*, 135 S. Ct. 429, 431–32 (2014) (per curiam) (applying *Fulminante*). It remains unsettled whether *Fulminante*, which involved a constitutional error, 499 U.S. at 282, also furnishes the proper standard for deciding which nonconstitutional errors are amenable to harmless error analysis. *Compare, e.g.*, *Green v. United States*, 262 F.3d 715, 717–18 (8th Cir. 2001) (applying *Fulminante* in holding that automatic reversal is appropriate for violations of the nonconstitutional rule obligating district courts to appoint counsel under certain conditions for a petitioner challenging his sentence under 28 U.S.C. § 2255 (2012)), *with id.* at 719 (Bye, J., dissenting) (“Structural errors [as defined in *Fulminante*] appear to be confined to the constitutional sphere . . .”), and *Alabama v. Bozeman*, 533 U.S. 146, 152–53 (2001) (holding, without applying *Fulminante*, that violations of the Interstate Agreement on Detainers’s “anti-shuttling” provisions require automatic reversal).

⁸² *Fulminante*, 499 U.S. at 306.

⁸³ *Id.* at 307.

⁸⁴ *Id.* at 309.

⁸⁵ *Id.* at 310.

⁸⁶ *Id.* at 309 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). The Supreme Court has greatly diminished the practical import of this structural-error category by fashioning a “general rule” that, to establish a violation of the Sixth Amendment right to counsel, the defendant “must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). *Mickens* crystallized the low bar set by

by “a judge who was not impartial,”⁸⁷ (3) racial discrimination during selection of the grand jury,⁸⁸ (4) violation of the defendant’s right to represent herself at trial,⁸⁹ and (5) deprivation of the right to a public trial.⁹⁰ And the Court held that erroneous introduction of the defendant’s coerced confession is a trial error, at least to the extent that the police did not resort to “physical violence” in extracting the confession.⁹¹

The conceptual foundation of *Fulminante* is tenuous at best. The terms *trial error* and *structural defect* as used there refer, respectively, to *errors* or *defects* relating to the *procedure* or *structure* of a criminal trial. But *error* is virtually synonymous with *defect* in this context,⁹² and dictionary entries for *procedure* and *structure* suggest that *trial procedure* and *trial structure* likewise have similar meanings.⁹³ Confusing matters further, the Supreme Court has endorsed several “different and largely inconsistent” interpretations of the trial/structural-error dichotomy,⁹⁴ each ambiguous in its own right and unable to ex-

Strickland, whereby the presence of counsel, even if in name only, effectively insulates a conviction from reversal on Sixth Amendment grounds.

⁸⁷ *Fulminante*, 499 U.S. at 309 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)). When a judge’s erroneous failure to recuse herself runs afoul of judicial ethics rules but does not violate due process, however, many courts apply an unusual species of harmless error analysis derived from *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), rather than automatic reversal. See *infra* section II.C, pp. 1820–23.

⁸⁸ *Fulminante*, 499 U.S. at 310 (citing *Vasquez v. Hillery*, 474 U.S. 254 (1986)).

⁸⁹ *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)). Although *McKaskle* held that violation of the defendant’s constitutional right to represent herself at trial requires automatic reversal, see 465 U.S. at 177 n.8, it also made clear that improper restrictions on the defendant’s pro se efforts do not violate the Constitution unless they deprive the defendant of “a fair chance to present his case in his own way,” *id.* at 177.

⁹⁰ *Fulminante*, 499 U.S. at 310 (citing *Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984)).

⁹¹ *Id.* at 311.

⁹² The harmless error statute that governs appeals in federal courts, for example, applies to “errors” and “defects” alike and extends the same rule to both: “[T]he court shall give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties.” 28 U.S.C. § 2111 (2012); see also *Error*, BLACK’S LAW DICTIONARY (9th ed. 2009) (“An assertion or belief that does not conform to objective reality.”); *Defect*, BLACK’S LAW DICTIONARY, *supra* (“An imperfection or shortcoming.”).

⁹³ *Compare*, e.g., *Procedure*, BLACK’S LAW DICTIONARY, *supra* note 92 (“A specific *method* or course of action.” (emphasis added)), and *Procedural Law*, BLACK’S LAW DICTIONARY, *supra* note 92 (“The rules that prescribe the *steps* for having a right or duty judicially enforced.” (emphasis added)), with *Structure*, BLACK’S LAW DICTIONARY, *supra* note 92 ((1) “Any construction, production, or piece of work artificially . . . *composed of parts* purposefully *joined together*,” (2) “The *organization of elements or parts*,” or (3) “A *method* of constructing parts.” (emphases added)).

⁹⁴ McCord, *supra* note 31, at 1412. *Fulminante* defines structural defects both by means of contrasting them with trial errors, see *supra* notes 84–90 and accompanying text, and by suggesting that they (1) inhere “in the constitution of the trial mechanism,” *Fulminante*, 499 U.S. at 309, (2) “defy analysis by ‘harmless-error’ standards,” *id.*, (3) influence “[t]he entire conduct of the trial from beginning to end,” *id.*, (4) “affect[] the framework within which the trial proceeds,” *id.* at 310, (5) subvert “basic protections” without which the “trial cannot reliably serve its function as a

plain which errors the Court has subjected to harmless error review and which it has not.

Consider, for instance, the Court's widely cited pronouncement that *trial error* means "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence . . . to determine whether [it] was harmless beyond a reasonable doubt."⁹⁵ Read in context, this passage suggests that the first characteristic mentioned by the Court ("occurred during the presentation of the case to the jury"⁹⁶) logically entails the second ("may therefore be quantitatively assessed"⁹⁷) and that trial errors necessarily possess both⁹⁸ whereas structural errors do not.⁹⁹

These assumptions are unsupportable. Four of the five errors the Court characterized as structural in *Fulminante* can, and often do, "occur[] during the presentation of the case to the jury,"¹⁰⁰ bringing them within the first part of the above definition for *trial error*. And at least four of those errors, possibly even all five, can "be quantitatively^[101] assessed in the context of other evidence" in a considerable

vehicle for determination of guilt or innocence" and punishment cannot "be regarded as fundamentally fair," *id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)), and (6) "transcend[] the criminal process," *id.* at 311. Building on the fifth of these descriptions, several of the Court's post-*Fulminante* decisions indicate that for an error to be structural it must "always" or "necessarily" render the trial in which it occurs "fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 9 (1999); *see also, e.g., United States v. Marcus*, 560 U.S. 258, 265 (2010) (refusing to require automatic reversal where "[t]here is . . . no reason to believe that *all or almost all* such errors *always* 'affect[] the framework within which the trial proceeds'" (second alteration in original) (quoting *Fulminante*, 499 U.S. at 310), "or 'necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence'" (quoting *Neder*, 527 U.S. at 9)). Yet in one case, the Court expressly rejected as "inflexible" the notion that "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural," noting that some of its precedents had found structural error based on other criteria like "the difficulty of assessing the effect of the error" or "the irrelevance of harmlessness." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006).

⁹⁵ *Fulminante*, 499 U.S. at 307-08.

⁹⁶ *Id.* at 307.

⁹⁷ *Id.* at 307-08.

⁹⁸ *See id.*

⁹⁹ *See id.* at 310 (asserting that a structural defect differs from a trial error in that it "affect[s] the framework within which the trial proceeds" and is not "simply an error in the trial process itself").

¹⁰⁰ *Id.* at 307. The sole exception is the listed error of discrimination during the selection of the grand jury, which necessarily occurs before, not "during," the "presentation of the case to the [petit] jury." *Id.* But each of the other errors the Court saw fit to include on *Fulminante*'s list of structural defects — "total deprivation of the right to counsel at trial," *id.* at 309, trial before a judge who is "not impartial," *id.*, and violations of "the right[s] to self-representation at trial" and to a "public trial," *id.* at 310 — often occur during the trial or, more particularly, "during the presentation of the case to the jury," *id.* at 307.

¹⁰¹ The assertion that trial errors are *quantitatively* assessable must mean something along the lines that the impact of these errors on trial outcomes is "susceptible of measurement," AMERICAN HERITAGE DICTIONARY 1013 (2d college ed. 1985) (definition 1.b for *quantitative*), to the degree necessary for reviewing courts to determine whether they are "harmless beyond a

number of cases, such as cases in which the untainted evidence against the defendant was so overwhelming that the outcome was all but inevitable regardless of any error.¹⁰² The Court's own list of paradigmatic structural defects in *Fulminante* thus belies the notion that trial errors and structural defects represent opposite poles of a binary system.

Although *Fulminante*'s conceptual scheme is "baffling and mostly unhelpful,"¹⁰³ courts have remained consistent since *Fulminante*, as

reasonable doubt" under the *Chapman* standard, *Fulminante*, 499 U.S. at 308. Insofar as the Court meant to go further than this and suggest that harmless error review for trial errors is a "mathematical operation" that aims to calculate the error's effect in the form of an "exact amount or number," AMERICAN HERITAGE DICTIONARY, *supra*, at 1013 (definitions 3 and 1.C, respectively, for *quantity*), such a formulaic conception of harmless error analysis would be at odds with the Court's recognition in *Kotteakos* and elsewhere that "the discrimination [the federal harmless error statute] requires is one of judgment transcending confinement by formula or precise rule," *Kotteakos v. United States*, 328 U.S. 750, 761 (1946) ("Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance.").

¹⁰² *Fulminante*, 499 U.S. at 308. The four structural defects listed in *Fulminante* that I believe can be "quantitatively assessed," *id.*, in appropriate cases to determine their effect on the outcome are discriminatory grand jury selection, trial by a judge who is not impartial, and errors involving the rights to self-representation and to a public trial. Indeed, it is arguably easier for a reviewing court to discern the impact of these so-called structural defects than to measure the effect of certain trial errors. Discriminatory selection of the grand jury is perhaps the clearest example, at least when reviewed in a posttrial posture. Once the petit jury has returned a guilty verdict upon finding proof beyond a reasonable doubt, that verdict is powerful evidence that, even if no error had occurred during the grand jury phase, the grand jury likewise would have found the prosecution's evidence sufficient to indict under the far less demanding probable cause standard. See *United States v. Mechanik*, 475 U.S. 66, 67 (1986) (making this point with respect to violations of Rule 6(d) of the Federal Rules of Criminal Procedure).

Structural errors involving the "total deprivation of a the right to counsel at trial," *Fulminante*, 499 U.S. at 309, pose special problems. On the one hand, it is possible that in some cases courts can discern the effect of total right-to-counsel errors on the outcome where the evidence against the defendant overwhelmingly established both that she committed the crime and that no plausible affirmative defense was available to her. Such cases are exceedingly rare, however, because the prosecution's evidence often appears unchallengeable before it has been tested but becomes far weaker when defense counsel subjects it to scrutiny. And when the error not only taints the trial but reaches back into the pretrial phase as well, it is "virtually impossible" for a court to measure the effect counsel might have had on the defendant's "options, tactics, and decisions in plea negotiations" had the error not occurred. *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978); see *id.* at 490–91 (discussing the inability of courts to assess the likely impact of attorney conflicts of interest on case outcomes).

¹⁰³ Edwards, *supra* note 10, at 1207. To mention just a few of the many judges and commentators who have forcefully challenged *Fulminante*'s conceptual framework, see, for example, *Fulminante*, 499 U.S. at 290–91 (White, J., dissenting); McCord, *supra* note 31, at 1401; Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term — Comment: Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 161–65 (1991); Kendra Oyer, Comment, *Classifying Constructive Amendment as Trial or Structural Error*, 158 U. PA. L. REV. 609, 613–20 (2010). No one has attempted in any systematic way to defend the trial/structural-error conceptual framework against these and other attacks on its coherence. Kendra Oyer has cogently argued that "[s]hort of overruling *Fulminante*, the best way to reconcile" its disparate descriptions of the concept of structural error "is to view each one as isolating a cluster of recurring features — family resemblances — that some but not all structural errors share" rather than as "necessary" or "sufficient" conditions. Oyer, *supra*, at 622. Oyer rightly

they were before it, in their general aversion to creating new automatic-reversal rules or enforcing old ones. Troubled by the “risk that a sometimes-harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial,”¹⁰⁴ courts have embraced a “strong presumption” against automatic reversal¹⁰⁵ and have deviated from that presumption “only in a ‘very limited class of cases.’”¹⁰⁶ And it appears that courts often circumvent even what few automatic-reversal rules they have recognized through a process known as “remedial deterrence”¹⁰⁷ — holding, for example, that certain partial or temporary courtroom closures, though legally improper, are “too trivial” to violate the Sixth Amendment right to a public trial and thus do not require automatic reversal.¹⁰⁸ The upshot is that automatic reversal is potentially available only in rare and isolated niches of criminal procedure and that, in the great majority of cases, defendants who wish to obtain reversal must articulate their claims within the parameters of the applicable result-based harmless error rule if they are to prevail.

II. CONTEXTUAL HARMLESS ERROR REVIEW

A. Preliminary Sketch

This Part sketches an alternative method of harmless error analysis, called contextual harmless error review, which has two essential features. First, it assesses harm in relation to the constellation of in-

acknowledges, though, that this attempt at rationalizing the Court’s decisions runs counter to *Fulminante*’s apparent assumption that “its various descriptions . . . define the same, unitary concept.” *Id.* at 621.

¹⁰⁴ *Sherman v. Smith*, 89 F.3d 1134, 1138 (4th Cir. 1996) (en banc).

¹⁰⁵ *Rose v. Clark*, 478 U.S. 570, 579 (1986).

¹⁰⁶ *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

¹⁰⁷ Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999) (emphasis omitted) (“[T]he right may be shaped by the nature of the remedy that will follow if the right is violated. . . . Call this straightforward relationship between right and remedy *remedial deterrence*. The defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences.”).

¹⁰⁸ *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996); see also Kristin Saetveit, Note, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897 (2016) (arguing that *Peterson* and comparable decisions by other courts represent an effort to “surreptitiously redefine[],” *id.* at 902, the right to a public trial in reaction to the rule that unconstitutional courtroom closures require automatic reversal, *id.* at 901–02). Some commentators likewise believe that courts reviewing *Batson* claims have “strained not to find a violation in the first place,” Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998), out of frustration at their inability to “calibrate the remedy” of automatic reversal, *id.* at 2015. See generally Shepard, *supra* note 30, at 1188 (arguing that courts have “narrowed the definition of the error” for “all . . . errors to which the rule of automatic reversal applies”).

terests served by the particular procedural rule that was infringed. And second, it makes reversal available if the redressable harm that the error caused to those interests is substantial enough to justify reversal.

The defining characteristic of contextual harmless error review, and the one that sets it apart most starkly from result-based harmless error review, is that it focuses on the interest(s) protected by the infringed procedural rule. The inquiry's focus will often change from case to case for the simple reason that the normative priorities of criminal procedure likewise vary a great deal from one rule to the next. To be sure, in some circumstances — in particular, where the infringed rule exists solely to protect truth-furthering interests — contextual harmless error analysis would produce the same outcome, and would do so for substantially the same reasons, as result-based harmless error review.¹⁰⁹ But the two methods of harmless error review would diverge analytically, potentially yielding different remedial dispositions, when applied to rules that safeguard non-truth-furthering interests instead of (or in addition to) truth-furthering interests.

Courts often downplay or obscure criminal procedure's normative complexity when attempting to rationalize their embrace of result-based harmless error rules. In *Rose v. Clark*,¹¹⁰ for instance, the Supreme Court asserted — to support its holding that there is a “strong presumption” that the *Chapman* harmless error rule applies to most constitutional errors — that the overall normative “thrust” of criminal procedure is to maximize the accuracy of the adjudicative process.¹¹¹ Because contextual and result-based harmless error review would operate in much the same way with respect to truth-furthering interests, *Rose*'s reductive characterization of criminal procedure would be fatal to my proposal if that characterization were correct.

But the *Rose* decision is wrong about this, for criminal procedure is replete with not only “truth-furthering” rights, but “truth-obstructing” and “truth-neutral” ones as well.¹¹² Perhaps the clearest and most

¹⁰⁹ It bears note that the correct-result approach to harmless error review, as described in section I.A, *see supra* pp. 1802–04, and long ago rejected by American courts, would be a theoretically appropriate method of analysis with respect to truth-furthering interests. Because errors by definition do not compromise truth-furthering interests unless they further an outcome that does not reflect the truth (for example, a wrongful conviction), the correct-result test might ask the right question by focusing directly on the correctness of the outcome. I put this possibility to one side, however, both because it raises complex concerns beyond the scope of this Article and because it would divert me from my main purpose, which is to explore how harmless error review might be reformed so as to take into account and better vindicate non-truth-furthering (and result-independent) interests.

¹¹⁰ 478 U.S. 570 (1986).

¹¹¹ *Id.* at 579.

¹¹² Cover & Aleinikoff, *supra* note 2, at 1091; *see id.* at 1091–94; Stacy & Dayton, *supra* note 13, at 89.

consequential example of a truth-obstructing right in criminal procedure is the Fourth Amendment, which requires the exclusion of reliable evidence as a means of protecting privacy.¹¹³ Another impactful rule that often operates in a truth-obstructing manner is the privilege against self-incrimination, which excludes confessions that are sometimes reliable (and other times not¹¹⁴) out of “respect for the inviolability of the human personality.”¹¹⁵ These two rules account for such a disproportionate share of the procedural issues litigated in criminal cases that Professor William Stuntz was perhaps not far from the truth when he remarked that “[a] great many criminal procedure claims . . . correlate (if at all) only very slightly with strong claims on the merits.”¹¹⁶

Many other rules in criminal procedure are similarly designed at least in part to advance non-truth-furthering interests, often in conjunction with truth-furthering interests.¹¹⁷ The functions of the right to a jury trial, for instance, include “impress[ing] upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.”¹¹⁸ The rules that comprise the “right to a full defense” arguably serve “participatory or dignitary function[s]” by allowing a defendant to “have his voice heard in the proceedings in which his fate is decided, even if he has no reasonable chance of swaying a jury.”¹¹⁹ Rules prohibiting invidious discrimination during selection of both grand¹²⁰

¹¹³ *Stone v. Powell*, 428 U.S. 465, 482 (1976).

¹¹⁴ See generally Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (identifying some shared characteristics and apparent causes of known false confessions, but acknowledging that “we [do] not know how often confession contamination occurs,” *id.* at 1117).

¹¹⁵ *E.g.*, *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (“[T]he Fifth Amendment’s privilege against self-incrimination is not an adjunct to the ascertainment of truth.”). For a revisionist take on the function of the Fifth Amendment privilege, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (arguing that the need to guard against unreliable confessions furnishes the “best reason” for the privilege, *id.* at 859).

¹¹⁶ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 46–47 (1997).

¹¹⁷ Professors Tom Stacy and Kim Dayton helpfully note that some rights “have mixed purposes: they seek not only to foster the reliability of the fact-finding process, but also to promote other truth-neutral values such as participation or fair play.” Stacy & Dayton, *supra* note 13, at 89.

¹¹⁸ *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

¹¹⁹ Stacy & Dayton, *supra* note 13, at 112; *accord, e.g.*, *Faretta v. California*, 422 U.S. 806, 834 (1975). *But cf., e.g.*, *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (stating that, although the right to confront adverse witnesses serves “symbolic goals” by enabling “the accused and accuser [to] engage in an open and even contest in a public trial,” the right “primarily” aims to “promote reliability in criminal trials”).

¹²⁰ See, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 84 n.3 (1986).

and petit¹²¹ jurors, and rules governing the presentation of evidence and argument at trial,¹²² both aim to prevent a “mix of stigmatic, participational, and fairness harms to defendants, excluded jurors, and the community.”¹²³ And rules that forbid prosecutors from breaking promises made in plea deals rest “upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining.”¹²⁴

These illustrations, which offer just a small snapshot of the full range of interests that underpin the law of criminal procedure, belie the notion that the pursuit of truth — or any other single value — constitutes criminal procedure’s overarching “thrust.”¹²⁵ The preoccupation of existing harmless error rules with an error’s effect on outcomes thus is not, as *Rose* and other cases¹²⁶ suggest, a natural reflection or logical implication of the normative structure of criminal procedure. To the contrary, the monistic and result-based conception of harm that undergirds the modern harmless error doctrine seems profoundly misaligned with the eclectic normative objectives of criminal procedure. The alternative I propose, by contrast, would adjust the metric of harm in each case to reflect the purpose of the rule that was infringed. By doing so, my approach would better reflect the diverse norms of criminal procedure and comply with the principle that “[t]he nature of [the] available remedy is . . . tied to the substantive right at issue.”¹²⁷

¹²¹ See, e.g., *Allen v. Hardy*, 478 U.S. 255, 259 (1986).

¹²² See, e.g., *State v. Monday*, 257 P.3d 551, 557–58 (Wash. 2011) (en banc).

¹²³ Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 119 (1996) (making this point in the context of describing *Batson* jurisprudence).

¹²⁴ *Puckett v. United States*, 556 U.S. 129, 141 (2009).

¹²⁵ *Rose v. Clark*, 478 U.S. 570, 579 (1986).

¹²⁶ E.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (“The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial . . .” (citation omitted)). While there can be no serious dispute regarding the existence — indeed, even the pervasiveness — of rules in criminal procedure that serve non-truth-furthering interests, there is some controversy regarding whether and under what circumstances reversal can meaningfully redress the harm error has caused to those interests. See Stacy & Dayton, *supra* note 13 (conceding that the issue of redressability is more complex for harm involving non-truth-furthering interests, *see id.* at 94, but arguing that reversal sometimes can redress harm to non-truth-furthering interests, *see id.*, as, for example, when denial of the defendant’s right of self-representation at trial deprives her of autonomy that can be restored by providing a retrial in which her right to proceed on her own behalf is honored, *see id.* at 110–113). Although this Article does not endeavor to sort out the circumstances in which various non-truth-furthering interests are redressable or not, my definition of contextual harmless error review accounts for this problem (to the extent it is a problem) by restricting the purview of the balancing analysis to harms that impinge on redressable interests.

¹²⁷ FISCHER, *supra* note 22, § 3.1, at 11.

*B. Contextual Harmless Error Review
for Non-Truth-Furthering Interests*

To clarify how contextual harmless error review differs in practical application from result-based harmless error review, it will help to complicate criminal procedure's familiar taxonomy of truth-furthering and non-truth-furthering interests¹²⁸ by distinguishing among two subtypes of non-truth-furthering interests. A *result-correlated interest* is one that, although non-truth-furthering, nevertheless correlates with the result in the following sense: whenever an error implicating that interest affects the result adversely to the defendant, that error necessarily also harms the result-correlated interest to a degree substantial enough to justify reversal;¹²⁹ but whenever the error does not tilt the result against the defendant, it also will not impair the result-correlated interest enough to justify reversal. A *result-independent interest*, by contrast, is one for which there is no strict correlation between the degree to which an error harms the result-independent interest and the likelihood that the error affected the result. For an error that implicates a result-independent interest, it is certainly possible that the error could substantially affect both (or neither of) the outcome and the result-independent interest. But any such correspondence in particular cases between the error's effect on the result and its impairment of the result-independent interest would happen through sheer coincidence and not due to any causal link or broader pattern.

By introducing these concepts, I do not mean to suggest that non-truth-furthering interests in reality fit completely within one class or the other. To the contrary, I have defined both categories in such extreme terms that they are unlikely to fully describe many (or any) actual interests.

Still, they serve a valuable heuristic function. Non-truth-furthering interests often lean toward one pole of the dichotomy or the other, and the direction and extent of that leaning for any particular interest largely determines whether result-based harmless error review can adequately protect that interest. Non-truth-furthering interests that are result independent cannot obtain reliable redress under a result-based harmless error regime, but result-correlated interests can — as long as we assume, as I do for the sake of argument, that result-based harm-

¹²⁸ See *supra* section II.A, pp. 1810–14.

¹²⁹ The definition revolves around “substantial” harm because the distinction between substantial and insubstantial harm is essential to any method of harmless error review, contextual or otherwise. *E.g.*, 28 U.S.C. § 2111 (2012) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”). Although it may be worthwhile to explore other means (such as civil damages) of redressing harm that does not rise to the level needed to warrant reversal, that goal is not the point of harmless error rules.

less error review can reliably detect when an outcome-determinative error has occurred.¹³⁰ Several illustrations will help clarify the meaning of these concepts and show why they are important.

Consider, first, two gun-possession cases in which the trial court erroneously admitted evidence of a gun obtained in violation of the Fourth Amendment. In the first, police found the gun (illegally) in the defendant's coat pocket, and that gun was the prosecution's sole evidence of guilt. In the second, police found not just one gun, but three. This time, they lawfully searched the defendant's coat pocket, finding a gun there, and while doing so spotted another gun in plain view right beside him. The only unlawful police conduct stemmed from a search of the defendant's car that occurred later (according to the police, at least¹³¹), through which they found a gun that possibly belonged to the defendant, but probably belonged to his brother or sister, who were borrowing the car at the time.

The error in each of these hypotheticals implicates a non-truth-furthering interest that is heavily result-correlated. The interest protected by the Fourth Amendment exclusionary rule, as presently conceived of by the Supreme Court, is non-truth-furthering in the sense that it is concerned with privacy rather than with enhancing the reliability of factfinding in criminal trials.¹³² And that interest is substantially result-correlated in that the mechanism through which the exclusionary rule protects privacy (if, in fact, it does) is by diminishing the government's incentive to violate the Fourth Amendment in future cases as a means of obtaining evidence that will lead to convictions.¹³³ Errors cause harm to that interest only to the degree that they enhance the probability of conviction.

¹³⁰ Existing discussions of harmless error review overlook this point insofar as they suggest that result-based harmless error review is inappropriate with respect to all non-truth-furthering interests. See, e.g., Stacy & Dayton, *supra* note 13.

¹³¹ For anyone curious about the rest of the (hypothetical) backstory to this case, here's the scoop: Strong evidence indicated that the police initially suspected, but as of yet could not prove, that the defendant was a drug dealer. Based on the unreliable tip of an anonymous informant who said that drugs were in his car, they searched it. The police later searched the defendant's person only because they had already found a gun in the car. Had the trial court credited this evidence, the exclusionary rule would have required suppression of all three guns as "fruits" of the illegal initial search. See *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963). Perhaps recognizing this risk, the police claimed that they searched the defendant first — based on seeing him make furtive gestures in his waistband area suggesting that a gun might be there — and later searched his car only after finding the guns on or near him. The trial court bought the officers' story. Cf. Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2201–06 (2015) (citing studies suggesting that "testilying" is "routine" in Fourth Amendment suppression hearings and that it depends on the "cooperation of prosecutors, police officers, and judges who are willing to ignore obvious falsehoods in the courtroom," *id.* at 2202).

¹³² See *supra* note 113 and accompanying text.

¹³³ See *Stone v. Powell*, 428 U.S. 456, 486 (1976).

In both hypotheticals, contextual and result-based harmless error review should, if applied correctly, produce the same outcomes on appeal, albeit for somewhat different reasons.

An appellate court applying contextual harmless error review would begin by identifying the interest (here, privacy) served by the infringed procedural rule (here, the exclusionary rule). It would then examine whether the error substantially harmed that interest. In the first case, the answer to that question is yes, so the court would reverse: because the sole evidence of guilt was admitted in error, the error handed the prosecution a conviction it could not otherwise have obtained and thereby substantially impaired the exclusionary rule's goal of depriving the government of its ill-gotten gains as a means of disincentivizing future privacy violations. But in the second case, the answer is no, and the court would affirm: the error merely enabled the government to introduce evidence of a third gun that was only tenuously connected to the defendant when it already had evidence of two other guns, found on or near his person, that all but ensured his conviction. Because the error in the second scenario did not substantially increase the probability that the defendant would be convicted, which was already a near certainty, the error also — and for the same reason — did not substantially enhance the government's incentive to violate the Fourth Amendment during future investigations in the hope of gaining more convictions.

A court applying result-based harmless error review would reach these same conclusions, and it would take fewer analytical steps in doing so. Without first identifying the interest protected by the underlying procedural rule, the court would immediately turn to the question of whether the error affected the result.¹³⁴ And for the reasons outlined above, the court would reverse in the first hypothetical and affirm in the second.

Generalizing from these examples, contextual and result-based harmless error review would reach the same outcome, though on different grounds, in any case where the non-truth-furthering interests implicated by the error are result-correlated. To be clear, neither harmless error method expressly takes into consideration the fact that the interests are result-correlated. Contextual harmless error review concerns itself only with whether the error substantially harmed the relevant interests whereas result-based harmless error review focuses solely on whether the error affected the result. But whenever non-truth-furthering interests are result-correlated in the sense I use that term, substantial harm to those interests necessarily goes together, or

¹³⁴ See *supra* notes 40–51 and accompanying text (summarizing the most common variations of result-based harmless error review).

“correlates,” with an effect on the result, producing identical outcomes under both harmless error methods despite their discordant analytical foci.

Not so for result-independent interests. To explain why, I use a hypothetical from a different area of law based on the facts in *Neill v. Gibson*,¹³⁵ with a few variations noted below. Jay Neill and Grady Johnson were gay lovers who plotted an armed bank robbery, which Neill then carried out, committing several gruesome murders in the process. Neill did not dispute committing the murders during the guilt phase of his Oklahoma death-penalty trial. But he did present mitigating evidence during the trial’s penalty phase, arguing (among other things) that he committed the murders out of desperation to save his failing relationship with Johnson. Purportedly in response to this mitigation argument, the prosecutor urged the jury to impose the death penalty in part because Neill was gay. Trial counsel objected to one of the prosecutor’s homophobic remarks, but the trial court overruled the objection. The jury gave Neill a death sentence; four of them, in fact. The state courts affirmed Neill’s convictions and sentences, and the Tenth Circuit did the same. Regarding Neill’s prosecutorial-misconduct claim, the Tenth Circuit ultimately agreed that the prosecutor committed misconduct but concluded that, because the prosecution’s evidence of aggravating circumstances was “overwhelming,” habeas relief was unwarranted.¹³⁶

Although the prosecutorial-misconduct claim arrived at the Tenth Circuit beset by procedural complications, I would like to simplify the hypothetical by placing the misconduct claim back before an intermediate Oklahoma state court on direct appeal. My purpose in doing so is to show how the disposition of Neill’s misconduct claim on direct appeal might come out differently depending on whether the court applied a contextual or a result-based method of harmless error review.

Here, as in the previous set of hypotheticals, a court applying contextual harmless error review would begin by identifying the interests protected by the infringed procedural rules — rules that disallow arguments and evidence that play upon invidious prejudice.¹³⁷ One interest served by those rules is, of course, a truth-furthering interest

¹³⁵ 263 F.3d 1184 (10th Cir.), *modified on reh’g*, 278 F.3d 1044 (10th Cir. 2001). For a comprehensive study of the *Neill* case, see Joan W. Howarth, *The Geronimo Bank Murders: A Gay Tragedy*, 17 LAW & SEXUALITY 39 (2008).

¹³⁶ *Neill*, 278 F.3d at 1062; *see also id.* at 1049–50, 1060–62.

¹³⁷ The prohibition on invidiously discriminatory argumentation on the part of the prosecution derives from constitutional requirements, *see, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 775 (2017), as well as nonconstitutional rules of evidence and procedure, *see generally* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (“[R]acial imagery may be evaluated against the various standards for pretrial prejudice, the admissibility of relevant evidence, the limits on proper summations, and so on” *Id.* at 1767.).

in ensuring that the factfinder renders its decision based on evidence rather than accuracy-impairing biases.¹³⁸ That interest, like all truth-furthering interests, is perfectly result-correlated. If a bigoted argument by a prosecutor prompts the jury to convict an innocent defendant, the prosecutor's error completely subverts the rule's truth-furthering interest. Otherwise — if, for instance, the jury wrongfully convicts an innocent defendant for reasons wholly unrelated to the prosecutor's argument, or if the jury properly convicts a guilty defendant — the error has no bearing on the pursuit of truth.

But the promotion of accurate factfinding is not the sole function of rules forbidding bigoted prosecutorial argument. As the Supreme Court emphasized in a recent case involving testimony based on racial stereotypes, discrimination “‘poisons public confidence’ in the judicial process”¹³⁹ and “thus injures not just the defendant, but ‘the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.’”¹⁴⁰ These interests, moreover, correlate with results, if at all, only incidentally and by happenstance, for it is every bit as much a subversion of nondiscrimination norms for a prosecutor to make bigoted arguments directed at a plainly guilty defendant as it is when the defendant is innocent.

Contextual harmless error review in a case like *Neill*, then, requires a court to examine harm in relation to multiple distinct interests, some of which are truth-furthering and result-correlated, but some of which are non-truth-furthering and result-independent. The court's harm analysis with respect to truth-furthering interests might look similar or identical to a traditional result-based harmless error analysis, requiring reversal only if the prosecutor's bigotry swayed the outcome.¹⁴¹ The same cannot be said, however, for the non-truth-furthering, result-independent interests safeguarded by rules barring discrimination. Whether or not the prosecutor's remarks might have affected the result, a court applying contextual harmless error review would need to separately inquire whether the prosecutor's remarks substantially harmed the underlying rule's non-truth-furthering objectives. I think most, though not all, would agree that on the facts of *Neill* the prosecutor's bigoted remarks — uncorrected in any way by the trial court, which overruled the defense's objection — harmed these interests to a

¹³⁸ See, e.g., *Miller v. North Carolina*, 583 F.2d 701, 706–07 (4th Cir. 1978).

¹³⁹ *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

¹⁴⁰ *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)); see also, e.g., *State v. Monday*, 257 P.3d 551, 557–58 (Wash. 2011) (en banc) (“[R]esorting to racist arguments is so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained. . . . [I]t fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct.”).

¹⁴¹ See *supra* note 109.

degree that warrants reversal of Neill's death sentences, at least on direct appeal.¹⁴²

Would result-based harmless error review produce the same disposition as contextual harmless error review here as it did in the exclusionary-rule scenarios? Perhaps so, as suggested by Judge Lucero's Tenth Circuit dissent in which he challenged the majority's conclusion that the prosecution's case supporting a death sentence was so overwhelming that the jury assuredly would have rendered the same verdict absent the error.¹⁴³

But the answer to that question depends strictly on whether the majority was correct in its view that the evidence against the defendant was so overwhelming as to preclude any realistic possibility of a different verdict.¹⁴⁴ For reasons explained in section I.A, the emphasis on "overwhelming evidence" in *Neill* is emblematic of a much larger pattern that pervades the case law on result-based harmless error review.¹⁴⁵ When reviewing courts find that the prosecution's so-called

¹⁴² There is certainly room for disagreement on this point, as is often the case with respect to remedial rules like the one I propose that call for balancing competing interests. *Cf.* *Smith v. Farley*, 59 F.3d 659, 663–64 (7th Cir. 1995) (denying the defendant's habeas petition, despite remarks by the prosecutor that improperly characterized a black witness's testimony as "shucking and jiving" and compared the black defendant to "super-fly," and explaining that "[t]he cost in judicial and prosecutorial resources that would be consumed in retrials designed to vindicate an abstract principle . . . has been thought too high," *id.* at 664). *See generally* Shana Heller, *Dehumanization and Implicit Bias: Why Courts Should Preclude References to Animal Imagery in Criminal Trials*, 51 CRIM. L. BULL. 870 (2015) ("The numbers of cases where courts have failed to overturn convictions in the face of prosecutorial misconduct based on racial bias vastly outnumber the cases where convictions have been reversed." *Id.* at 882.). On balance, though, I would reverse under the circumstances presented in *Neill* based on the belief that "[t]he costs of prosecutorial appeals to race and or gender bias are enormous" and that "failure to address this sort of prosecutorial misconduct will allow confidence in the criminal justice system to continue to erode." Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 338 (2001); *accord, e.g.*, *Calhoun v. United States*, 133 S. Ct. 1136, 1137–38 (2013) (Sotomayor, J., respecting the denial of certiorari) (criticizing a prosecutor's "attempt to substitute racial stereotype for evidence," *id.* at 1137, and noting that "[s]uch conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law," *id.* at 1138).

¹⁴³ *Neill v. Gibson*, 263 F.3d 1184 (10th Cir.), *modified on reh'g*, 278 F.3d 1044 (10th Cir. 2001) (Lucero, J., dissenting).

¹⁴⁴ *See, e.g., Smith*, 59 F.3d at 663–64 ("The cases hold that one or two isolated references to race or ethnicity, wholly unlikely to sway a jury, do not compel a new trial on federal constitutional grounds when the defendant's guilt is established by overwhelming evidence." *Id.* at 664.).

¹⁴⁵ *See, e.g., Neder v. United States*, 527 U.S. 1, 16–19 (1999); *United States v. Hasting*, 461 U.S. 499, 511–12 (1983); *Brown v. United States*, 411 U.S. 223, 231 (1973); *Milton v. Wainwright*, 407 U.S. 371, 372–73, 377–78 (1972); *Schneble v. Florida*, 405 U.S. 427, 430–32 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969); *Lutwak v. United States*, 344 U.S. 604, 619–20 (1953); *Motes v. United States*, 178 U.S. 458, 475–76 (1900); *Gregg v. Moss*, 81 U.S. (14 Wall.) 564, 569 (1871); *see also Berger v. United States*, 295 U.S. 78, 88–89 (1935); *Wilson v. United States*, 149 U.S. 60, 70 (1893). *See generally* WRIGHT ET AL., *supra* note 29, § 854 ("Perhaps the single most significant factor in weighing whether an error was harmful, although not the only one, is the strength of the case against the defendant.").

untainted evidence against a defendant is overwhelming, they presume that the factfinder would have convicted in an error-free trial on the strength of the untainted evidence alone and thus that the error at issue did not affect the result.¹⁴⁶ Relying on this logic, courts are prepared to disregard almost any error, even those that gravely compromise the fairness of the proceeding, so long as they are convinced that overwhelming untainted evidence supports the result reached. As a consequence, result-based harmless error review bears the potential to systematically deprive redress for result-independent, non-truth-furthering interests in cases where the evidence of guilt is overwhelming.

C. A Prototype

Although much of the caselaw concerning harmless error review is inhospitable terrain for the non-result-based mode of analysis I am proposing,¹⁴⁷ there is one procedural rule — a judge’s duty to recuse herself under circumstances where a reasonable person could question her impartiality — for which the Supreme Court and many other courts have developed a “special harmless error test” that is not primarily result focused.¹⁴⁸ Due to its uniqueness and potential significance as precedent for my proposal, this test merits a detailed summary in this section.

The leading case is *Liljeberg v. Health Services Acquisition Corp.*¹⁴⁹ There, the Supreme Court determined that the trial judge violated his obligation under 28 U.S.C. 455 § (a) to “disqualify himself in [a] proceeding in which his impartiality might reasonably be questioned” due to a conflict of interest¹⁵⁰ but noted that this conclusion “does not . . . end our inquiry” because, “[a]s in other areas of the law, there is surely room for harmless error.”¹⁵¹ The Court stated that, be-

¹⁴⁶ See sources cited *supra* note 145; see also *supra* note 52.

¹⁴⁷ See *supra* notes 41–51 and accompanying text (describing variation among the current result-based harmless error rules).

¹⁴⁸ See, e.g., *Scott v. United States*, 559 A.2d 745, 746–47 (D.C. 1989) (en banc) (adopting the harmless error test set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), to determine when reversal is the appropriate remedy for a trial judge’s failure to “disqualify himself in a proceeding in which his impartiality might reasonably be questioned,” *Scott*, 559 A.2d at 747 (quoting CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (AM. BAR ASS’N 1972))).

¹⁴⁹ 486 U.S. 847.

¹⁵⁰ *Id.* at 858 (quoting 28 U.S.C. § 455(a) (2012)); see also *id.* at 858–61. The conflict of interest stemmed from the fact that the trial judge was a member of the Board of Trustees of Loyola University, which, at the time of trial, was negotiating a real-estate transaction with Liljeberg (the defendant), and the “benefit to Loyola of these negotiations turned, in large part, on Liljeberg prevailing in the litigation.” *Id.* at 850.

¹⁵¹ *Id.* at 862 (“[T]here is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition

cause § 455(a) “neither prescribes nor prohibits any particular remedy for a violation,” Congress had “delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.”¹⁵² Recognizing that the “purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety,” the Court deemed it “critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question [the trial judge’s] impartiality.”¹⁵³ The Court thus formulated the following test:

[I]n determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public’s confidence in the judicial process.¹⁵⁴

The Supreme Court then applied these factors and held that the Fifth Circuit had correctly vacated the trial court’s judgment.¹⁵⁵

The Supreme Court’s analysis in *Liljeberg* — which has been widely, though not universally, applied by other courts with respect to recusal errors comparable to violations of § 455(a)¹⁵⁶ — exemplifies key elements of the harmless error method I have outlined.

against any relief in cases involving forgetful judges.” (footnote omitted)). One dissenting judge has argued, by contrast, that the Supreme Court’s single mention of “harmless error” in *Liljeberg* does not refer to the harmless error doctrine. See *United States v. O’Keefe*, 169 F.3d 281, 285–89 (5th Cir. 1999) (Dennis, J., dissenting from order granting United States’ motion for temporary stay pending appeal). In Judge Dennis’s view, “*Liljeberg* does not create a special harmless error test at all” but merely outlines “appropriate equitable considerations” for courts to consider in civil, but not criminal, cases when “determining whether a party should be relieved of a final civil judgment under Fed. R. Civ. P. 60(b)(6).” *Id.* at 285. But all other judges who have considered this issue understand *Liljeberg* as crafting a “harmless error analysis” for violations of § 455(a). See, e.g., *Shell Oil Co. v. United States*, 672 F.3d 1283, 1292 (Fed. Cir. 2012). Based on that understanding, most courts (to the extent they have addressed the matter) have applied *Liljeberg*’s remedial analysis, in civil and criminal cases alike, with respect to violations of both § 455(a), see, e.g., *United States v. O’Keefe*, 128 F.3d 885, 892–93 (5th Cir. 1997), and comparable state rules, see, e.g., *Tierney v. Four H Land Co.*, 798 N.W.2d 586, 596 (Neb. 2011).

¹⁵² *Liljeberg*, 486 U.S. at 862.

¹⁵³ *Id.* at 865.

¹⁵⁴ *Id.* at 864.

¹⁵⁵ *Id.* at 850, 870.

¹⁵⁶ Compare, e.g., *Tierney*, 798 N.W.2d at 596 (adopting *Liljeberg* for “determining when the rulings of a judge, who should have recused himself or herself, will be vacated”), with *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374, 387 (W. Va. 1995) (holding that, although “a breach of our disqualification standards calls into question the judicial process,” the “plain language of our harmless error rules” requires that “evidence of actual bias or prejudice must be presented” to obtain a new trial (internal quotation marks omitted)), and *Blaisdell v. City of Rochester*, 609 A.2d 388, 391 (N.H. 1992) (noting that “[w]e are not bound by *Liljeberg*” and “declin[ing] to implement a harmless error test when evaluating violations of the code by the members of the New Hampshire bench”).

As a court employing contextual harmless error review would do, the Supreme Court began by acknowledging that it needed to identify the interests protected by the infringed rule so that it could “fashion[] the remedies that will best serve the purpose of the legislation.”¹⁵⁷ Having identified the relevant interests — summed up in the proposition that “the administration of justice should reasonably appear to be disinterested as well as be so in fact”¹⁵⁸ — the Court indicated that those interests should serve as the “guiding consideration”¹⁵⁹ of the remedial inquiry.

In laying out its three-factor test, the Court directed reviewing courts to focus their balancing inquiry on factors that, again, track the interests reflected in § 455(a).¹⁶⁰ One of these factors, “the risk of injustice to the parties in the particular case,”¹⁶¹ is result related¹⁶² — and appropriately so, for one aim of § 455(a) is the truth-furthering goal of ensuring that justice should be “disinterested” not just in appearance but also “in fact.”¹⁶³ Yet the other two factors do not relate to the effect of the error on the outcome of the case under review but instead to deterring future infractions (“the risk that the denial of relief will produce injustice in other cases”¹⁶⁴) and shoring up judicial legitimacy (“the risk of undermining the public’s confidence in the judicial process”¹⁶⁵), giving effect to the other, non-truth-furthering policy

¹⁵⁷ *Liljeberg*, 486 U.S. at 862.

¹⁵⁸ *Id.* at 869–70 (quoting *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 467 (1952) (Frankfurter, J., opinion in chambers)); *see also id.* at 867 (concluding that several facts “create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent”); *id.* at 864 (emphasizing, right after announcing the three-factor test, that “[w]e must continuously bear in mind that ‘to perform its high function in the best way “justice must satisfy the appearance of justice”’” (quoting *In re Murchison*, 349 U.S. 133, 136 (1995) (citation omitted))).

¹⁵⁹ *Id.* at 869 (quoting *Pub. Utils. Comm’n*, 343 U.S. at 467 (Frankfurter, J., opinion in chambers)).

¹⁶⁰ Compare *id.* at 864 (articulating the three-factor test), with *id.* at 865 (“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety . . .”). By instructing courts to focus their remedial analysis on these factors without making any particular factor a necessary or sufficient condition for reversal, *Liljeberg* suggests that courts should weigh them (potentially alongside other relevant interests) in a “balancing” process. *Powell v. Anderson*, 660 N.W.2d 107, 121 (Minn. 2003) (adopting the *Liljeberg* test and stating that it involves “balancing” interests relating to the fairness of the trial and the appearance of justice “against the potential burdens placed on the judicial system and the parties by reopening a final judgment”).

¹⁶¹ *Liljeberg*, 486 U.S. at 864.

¹⁶² In applying this factor the Supreme Court emphasized, among other things, that “a careful study of [the nonrecusing judge’s] analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of *Liljeberg* than there is in allowing a new judge to take a fresh look.” *Id.* at 868.

¹⁶³ *Id.* at 870 (quoting *Pub. Utils. Comm’n*, 343 U.S. at 467 (Frankfurter, J., opinion in chambers)).

¹⁶⁴ *Id.* at 864.

¹⁶⁵ *Id.*

§ 455(a) is designed to promote — “that the administration of justice should reasonably appear to be disinterested.”¹⁶⁶

Why have many courts deviated so strikingly from their usual result-based harmless error rules — and endorsed a harmless error method that bears much closer resemblance to contextual harmless error review — in this context? The *Liljeberg* opinion does not explain this anomaly, nor even address it. Other courts have tried to do so, explaining that it would be “inconsistent” with the non-truth-furthering objective of the infringed recusal rule if courts were to condition relief on “a review of the record for actual prejudice under the traditional harmless error standard.”¹⁶⁷ The point is a fair one. But it cannot be more than a partial explanation, for as we have seen, the same could be said of numerous other rules in criminal procedure that protect non-truth-furthering interests ignored by result-based harmless error review.¹⁶⁸ Regardless of what the full reason might be,¹⁶⁹ *Liljeberg* and its progeny might suggest the sorts of rules that arise when a court appreciates that a procedural rule serves important non-truth-furthering objectives that are “inconsistent”¹⁷⁰ with the narrow purview of result-based harmless error review. If courts could be persuaded that other procedural rules, like recusal rules, serve comparable objectives, then perhaps they could likewise be persuaded to fashion contextually appropriate harmless error standards better suited to the remedial needs of those rules.

CONCLUSION

I recognize that *stare decisis* may prove to be a formidable obstacle to harmless error reform of the kind proposed in this Article. Apart from the “special harmless error test”¹⁷¹ that applies to errors involving 28 U.S.C. § 455(a) and comparable state statutes,¹⁷² decades of “settled precedent”¹⁷³ in both federal and state courts arguably establish result-

¹⁶⁶ *Id.* at 869–70 (quoting *Pub. Utils. Comm’n*, 343 U.S. at 467 (Frankfurter, J., opinion in chambers)).

¹⁶⁷ *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (en banc).

¹⁶⁸ See *supra* section II.B, pp. 1814–20.

¹⁶⁹ One hypothesis is that reviewing courts, protective of their own legitimacy and sensitive to threats to that legitimacy, have a better understanding of — or simply care more about — the non-truth-furthering interests jeopardized by judicial bias (or its appearance) than other kinds of non-truth-furthering interests. Cf. Alschuler, *supra* note 13, at 685–93 (finding that reviewing courts approach judicial-misconduct claims “in a different spirit from that which typifies their opinions in cases of prosecutorial misconduct,” *id.* at 687, and that “courts have demonstrated their extreme reluctance to hold courtroom misconduct by trial judges nonprejudicial,” *id.* at 689).

¹⁷⁰ *Scott*, 559 A.2d at 750.

¹⁷¹ *Id.* at 747.

¹⁷² See *supra* section II.C, pp. 1820–23.

¹⁷³ *Neder v. United States*, 527 U.S. 1, 15 (1999) (referring to the general rule that reversal depends on “the effect of the error upon the verdict”).

based harmless error review (or, in rare situations, automatic reversal¹⁷⁴) as the law of the land. Many of these decisions embracing result-based harmless error review purport to construe applicable statutes,¹⁷⁵ potentially implicating the principle that “*stare decisis* weigh[s] heavily in the area of statutory construction.”¹⁷⁶ At first blush, then, the goal of fostering “evenhanded, predictable, and consistent development of legal principles”¹⁷⁷ might appear to militate against adoption of contextual harmless error review by the courts without prior legislative authorization. And legislative fixes to harmless error review are probably not in the cards, given the tendency of Congress and state legislatures to delegate the task of operationalizing harmless error rules to the judiciary through a combination of inactivity and vaguely phrased statutes.¹⁷⁸

But these concerns may be surmountable. Textual considerations do not compel courts to employ a result-based method of harmless error analysis, as most harmless error rules use ambiguous terms (typically, whether the error “affect[ed] . . . substantial rights”¹⁷⁹), leaving courts with broad discretion to work out the details.¹⁸⁰ The very same

¹⁷⁴ See *supra* section I.B, pp. 1805–10.

¹⁷⁵ See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 762–65 (1946) (construing the precursor to the general federal harmless error statute). The roots of the *Chapman* harmless error standard are harder to pinpoint. Some cases and commentators suggest that *Chapman* is best understood as an application of Rule 52(a) of the Federal Rules of Criminal Procedure, see *Neder*, 527 U.S. at 7, or of 28 U.S.C. § 2111 (2012), see TRAYNOR, *supra* note 42, at 41–42. Others reject this interpretation, I think correctly, for the simple reason that *Chapman* imposed the harmless error rule it announced on state courts, to which neither § 2111 nor the Federal Rules of Criminal Procedure apply, and not just on federal courts. See, e.g., Meltzer, *supra* note 7, at 19–20. Most commentators believe that the justification for the *Chapman* rule, if there is one, must involve the logic of either constitutional necessity, see, e.g., Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912–18 (2014), or “constitutional common law,” Meltzer, *supra* note 7, at 26–29. See generally Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (defining constitutional common law as “a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions,” *id.* at 2–3).

¹⁷⁶ *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)). See generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (describing, and criticizing, the “hierarchy of *stare decisis*” under which “[s]tatutory precedents . . . enjoy a super-strong presumption of correctness,” *id.* at 1362). One reason why courts are especially reluctant to overrule statutory precedents is that, unlike when courts establish erroneous constitutional precedents, legislatures “remain[] free to alter” judicial interpretations of statutes. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *id.* at 172–73.

¹⁷⁷ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁷⁸ See *supra* notes 64–66, 152 and accompanying text.

¹⁷⁹ 28 U.S.C. § 2111.

¹⁸⁰ See, e.g., FED. R. CRIM. P. 11 advisory committee’s notes to 1983 amendments (“Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of ‘harmless error,’ which is left to the case law.”).

pattern of legislative deference that renders statutory harmless error reform improbable also makes the case for adhering to precedent less convincing, for “[r]evisiting precedent is particularly appropriate where . . . the precedent consists of a judge-made rule.”¹⁸¹ There are reasons to worry, moreover, that courts’ embrace of the result-based approach to harmless error review was an unwise, and not entirely self-aware,¹⁸² exercise of their discretion to specify the mechanics of harmless error analysis. According to most commentators who have studied judicial implementation of result-based harmless error rules, courts have proven incapable of applying those rules in a reliable, consistent, or efficient manner.¹⁸³ Perhaps these problems are severe enough that courts should consider abandoning the result-based method of harmless error analysis as “unworkable.”¹⁸⁴

One might also argue that the traditional result-based tests for harmless error review fail to explain much of what courts actually do when they decide whether to grant relief to criminal defendants based on procedural error. It is not easy to discern, for instance, why result-based harmless error rules authorize courts to consider — as they often do when purporting to apply those rules — whether an error was intentional or inadvertent, and whether it was an isolated event as opposed to a recurring pattern of misconduct.¹⁸⁵ By rationalizing these and other anomalous features of criminal procedure’s remedial apparatus, a contextual approach to harmless error review might supply a more “empirically accurate explanation” of not only the “results

¹⁸¹ *Pearson*, 555 U.S. at 233; see also *id.* at 233–34 (overruling the so-called order-of-battle rule announced in *Saucier v. Katz*, 533 U.S. 194 (2001), reasoning in part that “the *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations” and thus that “[a]ny change should come from this Court, not Congress”).

¹⁸² I am unaware of any cases in which courts considered whether to adopt a harmless error approach resembling the one I have proposed and nevertheless chose result-based harmless error review as the better rule. Indeed, both of the Supreme Court’s most influential harmless error decisions — *Kotteakos v. United States*, 328 U.S. 750, 763–64 (1946), and *Chapman v. California*, 386 U.S. 18, 23–24 (1967) — betray deep discomfort with certain ineradicable features of result-based harmless error review (in particular, the fact that result-based harmless error review compels courts to excuse just about any imaginable error when the strength of the prosecution’s case is overwhelming) and indicate that the Court has simply been unable to contemplate an alternative, non-result-based methodology.

¹⁸³ See *supra* note 13.

¹⁸⁴ *Cf.* *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (“Unless inexorably commanded by statute, a procedural principle of [significant] importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.”). One could argue, moreover, that courts should be especially willing to entertain administrability arguments in this context on the ground that “[s]tare decisis applies much more strongly to rights than to remedies” because “constitutional theory takes for granted that remedies are expected to change along with political and policy preferences.” Levinson, *supra* note 107, at 935.

¹⁸⁵ See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

[courts] have reached,” but also many of the reasons they have given in support of those results.¹⁸⁶

These reflections are tentative. Replacing result-based harmless error review with the method sketched in this Article would have far-reaching consequences, which merit further exploration. Once these implications are better understood, courts will be in a better position to know if the time is ripe to abandon the result-based harmless error regime or if, instead, they should prefer the devil they know to the devil they don't.

¹⁸⁶ Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004).