the additional benefit of allowing California's courts to avoid examining the police's subjective motivations. Requiring articulable, individualized suspicion in these cases can help correct any unintentional, bias-driven decisions on the part of police officers — decisions that, once made, may compromise the ability of newly released prisoners to reintegrate into law-abiding society.

The *Samson* Court's failure to provide additional guidance for suspicionless searches of parolees strongly suggests that the Court does not hold in high regard the status and privacy rights of parolees. Although the Court's position may be constitutionally defensible — perhaps the states' rights to suspicionless searches of parolees are indeed coextensive with the Fourth Amendment — it may not be the best policy approach to assimilating released prisoners into society. Moreover, encroachments on parolee privacy rights in California have already created the concern that for ordinary, law-abiding citizens who are aware of the increasing surveillance capabilities of the State, privacy expectations are eroding and "[t]he fishbowl will [soon] look like home."[61] California may respond to these concerns with a weary shrug: the State must address its spiraling recidivism problem, after all, and random searches may eventually improve the State's overall recidivism rate.[62] But who will watch the watchers? Ultimately the Court is in the position to establish boundaries and guidelines that will maintain the integrity of privacy rights while giving the states room to adopt anti-recidivism strategies. The Court cannot perform this function if it shows too much deference to state-imposed limitations — like the "arbitrary, capricious, or harassing" standard in California — when defining reasonable search parameters.

7. Sixth Amendment — Blakely *Violations — Harmless Error Review*. — When an appellate court finds constitutional error to have been present at a criminal trial, the court must determine whether the error constitutes trial error, which is subject to harmless error review, or structural error, which mandates reversal of the conviction. A court applying harmless error review will uphold a conviction if it finds beyond a reasonable doubt that the error was harmless.[1] Since its 1967 holding that harmless error review can be applied to constitutional er-

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[61] United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting).

[62] It is ironic that a state that was the leader in rehabilitative justice, social reform, and restorative community programs now suffers from such a failure of imagination that the only solution to recidivism seems to be the threat of suspicionless searches. *See* John Pomfret, *California's Crisis in Prison Systems a Threat to Public: Longer Sentences and Less Emphasis on Rehabilitation Create Problems*, WASH. POST, June 11, 2006, at A3. The *Samson* Court appeared to accept California's conclusion that supervision and searches are the solution without question or comment. *See Samson*, 126 S. Ct. at 2200.

[1] Chapman v. California, 386 U.S. 18, 24 (1967).

rors,[2] the Supreme Court has vacillated between two conceptions of harmless error review[3] with little explicit consideration of the differences between them.[4] The effect-on-the-jury approach[5] asks the historical question whether the error was a substantial factor in the jury's verdict, whereas the guilt-based approach[6] asks the counterfactual question whether the defendant would have been convicted in a hypothetical trial absent the error.[7] Last Term, in *Washington v. Recuenco*,[8] the Court held that *Blakely*[9] error — failure to submit a sentencing factor to a jury — is not structural and is therefore subject to harmless error review. Although the Court's analysis centered on the dichotomy between trial and structural error, *Recuenco* also represents a strong, though only implicit, endorsement of the guilt-based approach to harmless error review.

Accused of threatening his wife with a gun, Arturo Recuenco was convicted of assault in the second degree on the basis of a special verdict that he had been "armed with a deadly weapon."[10] At sentencing, the judge imposed a mandatory three-year sentencing enhancement for being armed with a firearm, rather than the one-year enhancement for being armed with a deadly weapon.[11] The special verdict form did not ask whether Recuenco had been armed with a "firearm" as distinguished from a "deadly weapon."[12]

After the Washington Court of Appeals affirmed, but before the Washington Supreme Court heard the appeal,[13] the U.S. Supreme Court decided *Blakely v. Washington*. In *Apprendi v. New Jersey*,[14] the Court had held that "[o]ther than the fact of a prior conviction, any

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[2] *Id.*

[3] *See* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 325 (2002) (explaining that the effect-on-the-jury approach and the guilt-based approach have "battled for supremacy" in the decades following *Chapman*).

[4] *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1062 (2005). The Court's lack of clarity has led to confusion among lower courts, which often conflate the two approaches. *See, e.g.*, Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1348 & n.84 (1994).

[5] The effect-on-the-jury approach is also referred to as the effect-on-the-verdict approach, the actual-trial approach, and the error-based approach. *See* Solomon, *supra* note 4, at 1062 n.44.

[6] The guilt-based approach is also referred to as the overwhelming-evidence approach and the hypothetical-trial approach. *See id.*

[7] *See id.* at 1062, 1076.

[8] 126 S. Ct. 2546 (2006).

[9] Blakely v. Washington, 124 S. Ct. 2531 (2004).

[10] *Recuenco*, 126 S. Ct. at 2549.

[11] *Id.*

[12] *Id.*

[13] State v. Recuenco, 110 P.3d 188, 190 (Wash. 2005).

[14] 530 U.S. 466 (2000).

fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[15] *Blakely* clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[16] Because the jury in Recuenco's case had not found that he was armed with a firearm, the State conceded before the Washington Supreme Court that the firearm sentencing enhancement constituted a *Blakely* violation; the State argued, however, that the error was harmless.[17]

The Washington Supreme Court vacated the sentence and remanded.[18] The court applied its decision in *State v. Hughes*,[19] which held that *Blakely* violations can never be harmless.[20] The *Hughes* decision relied on *Sullivan v. Louisiana*,[21] in which the U.S. Supreme Court held that a constitutionally deficient reasonable doubt instruction could not be harmless because no complete guilty verdict existed on which to conduct harmless error review.[22] Similarly, the *Hughes* court reasoned, it would be impossible to conduct harmless error review on a sentencing enhancement imposed without jury findings warranting the enhancement.[23] A reviewing court could not ask whether, but for the error, the findings would have been the same; rather, it would have to speculate on what the jury would have found had the error not occurred.[24]

The *Hughes* court then distinguished *Blakely* error from the facts of *Neder v. United States*,[25] in which the U.S. Supreme Court held that harmless error review applied to a district judge's incorrect determination that the element of materiality in a fraud prosecution was a matter for the judge rather than the jury.[26] The jury in *Neder* returned a guilty verdict, enabling a reviewing court to ask whether the jury would have reached the same verdict absent the error.[27] In contrast, when a *Blakely* violation is at issue, the jury has not returned the verdict necessary for imposition of the sentencing enhancement, making it impossible for a reviewing court to consider whether, but for the

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15 *Id.* at 490.
16 Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004) (emphasis omitted).
17 *Recuenco*, 110 P.3d at 191.
18 *Id.* at 189.
19 110 P.3d 192 (Wash. 2005).
20 *Recuenco*, 110 P.3d at 192.
21 508 U.S. 275 (1993).
22 *Id.* at 277, 279–80.
23 *Hughes*, 110 P.3d at 206.
24 *Id.*
25 527 U.S. 1 (1999).
26 *Id.* at 4.
27 *Hughes*, 110 P.3d at 207.

error, the jury would have returned the same verdict.[28] A reviewing court is able only to speculate whether, but for the error, the jury would have made different findings.[29]

The U.S. Supreme Court reversed the Washington Supreme Court's decision in *State v. Recuenco* and remanded.[30] Writing for the Court, Justice Thomas[31] held that the imposition of the firearm sentencing enhancement absent the requisite findings of fact by the jury was subject to harmless error review. First, the Court rejected the argument that it lacked jurisdiction to hear the case because the Washington Supreme Court's decision rested on adequate and independent state law grounds.[32] The Court expressed doubt regarding Recuenco's contention that Washington law provided no procedure for the jury to find possession of a firearm as opposed to a deadly weapon and explained that, regardless, Washington law is not determinative of whether *Blakely* error can be harmless.[33] At most, the proper interpretation of Washington law could bear on whether the error was harmless in Recuenco's case.[34] Next, the Court analogized to *Neder* to hold that *Blakely* error is not structural and is therefore amenable to harmless error review.[35] *Apprendi* had previously established that, for the purposes of the Sixth Amendment, elements of a crime and sentencing factors are equivalent — both must be proved beyond a reasonable doubt to a jury.[36] Finally, the Court rejected the argument that the imposition of the firearm enhancement was the equivalent of a directed verdict and that applying harmless error review would "hypothesize a guilty verdict that [was] never in fact rendered."[37] Recuenco's sentencing, the Court explained, was no more an incomplete finding of guilt than the guilty verdict in *Neder*, which was held subject to harmless error review even though the jury had failed to consider the element of materiality.[38]

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[28] *Id.* at 207–08.

[29] *Id.*

[30] *Recuenco*, 126 S. Ct. at 2553.

[31] Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Breyer, and Alito joined the majority opinion. Justice Kennedy, who numbered among the dissenters in *Apprendi*, *Blakely*, and their progeny, wrote a separate concurrence in order to draw attention to the dissents in those cases, but he conceded that the *Recuenco* Court properly stated and applied those precedents. *Id.* at 2553 (Kennedy, J., concurring).

[32] *Id.* at 2550 (majority opinion).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 2551–52.

[36] *Id.* at 2552; *see also* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).

[37] *Recuenco*, 126 S. Ct. at 2552 (alteration in original) (quoting Brief for Respondent at 27, *Recuenco*, 126 S. Ct. 2546 (No. 05-83), 2006 WL 160299) (internal quotation marks omitted).

[38] *Id.* at 2552–53.

Justice Stevens dissented, criticizing the majority for granting certiorari in order to ensure that the Washington Supreme Court would not provide defendants with any more protection than the "bare minimum" required by the Constitution.[39] Justice Stevens also criticized the majority for failing to address Recuenco's argument that *Blakely* errors are structural because they deprive defendants of notice regarding the charges against them.[40]

Justice Ginsburg also dissented,[41] contending that no error occurred at Recuenco's trial.[42] The prosecutor charged Recuenco with assault in the second degree while armed with a deadly weapon, and the jury found him guilty of that offense.[43] Justice Ginsburg distinguished *Neder*, in which the judge made a finding "necessary to fill a gap in an incomplete jury verdict," from *Recuenco*, in which the charge, jury instructions, and special verdict contained no omissions.[44] In *Recuenco*, the judge simply imposed an unjustified sentencing enhancement.[45] As a result, unlike in the case of harmful error, a reviewing court would have no grounds for granting a retrial; nor would the court be justified in replacing the conviction with an uncharged greater offense, as it did in this case by replacing the conviction with one for assault while armed with a firearm.[46]

The *Recuenco* Court framed its inquiry as a straightforward application of the distinction between trial and structural error.[47] However, *Recuenco* bears not only on the question of when a court may apply harmless error review, but also on the nature of harmless error review itself. Although the *Recuenco* Court did not explicitly discuss the two methods of harmless error review, the Court's holding reflects an acceptance of the guilt-based approach and a rejection of the effect-on-the-jury approach. The significance of *Recuenco*'s affirmation of the guilt-based approach stems from the uncertain state of the law following *Sullivan* and *Neder*, the changing composition of the Court, the decision by Justice Scalia — possibly the Court's most vocal supporter of the effect-on-the-jury approach — to join the majority opinion, and

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[39] *Id.* at 2553–54 (Stevens, J., dissenting). Justice Stevens noted, however, that the Washington Supreme Court could still decide on remand that the absence of a procedure under Washington state law for finding possession of a firearm means that the error in Recuenco's case cannot be harmless, or that as a matter of state law, *Blakely* errors require automatic reversal of the unconstitutional portion of the sentence. *Id.*

[40] *Id.* at 2554.

[41] Justice Stevens joined Justice Ginsburg's dissent.

[42] *Recuenco*, 126 S. Ct. at 2555 (Ginsburg, J., dissenting).

[43] *Id.*

[44] *Id.* at 2556.

[45] *Id.*

[46] *Id.*

[47] *See id.* at 2551 (majority opinion).

the Court's rejection of a proposed reconciliation of *Sullivan* and *Neder*.

The *Recuenco* opinion focuses primarily on the dichotomy between trial and structural error, employing an analysis of that dichotomy that differs from the analysis in *United States v. Gonzalez-Lopez*,[48] decided on the same day as *Recuenco*. Since *Arizona v. Fulminante*,[49] commentators have bemoaned the absence of a clear definition of trial and structural error.[50] *Fulminante* suggests the presence of evidentiary,[51] durational,[52] and framework[53] dimensions of the dichotomy[54] but offers little guidance regarding the precise distinction between trial and structural error.[55] Confronted with the Court's muddled treatment of the dichotomy, several commentators have suggested that the Court's approach boils down to a fundamental fairness inquiry, with trial and structural error differing only in degree.[56] Potentially consistent with this view, the *Recuenco* majority cited *Neder* for the proposition that structural error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."[57] However, in *Gonzalez-Lopez*, the majority criticized the dissent for similarly asserting, in reliance upon *Neder*, that "*only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreli-

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[48] 126 S. Ct. 2557 (2006) (holding that erroneous deprivation of respondent's Sixth Amendment right to choice of counsel was structural error).

[49] 499 U.S. 279 (1991) (holding that harmless error review applies to coerced confessions).

[50] *See, e.g.*, David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401, 1412–16 (1997).

[51] *See Fulminante*, 499 U.S. at 307–08 (describing trial error as error that can be "quantitatively assessed in the context of other evidence").

[52] *See id.* at 307 (describing trial error as "error which occurred during the presentation of the case to the jury").

[53] *See id.* at 310 (describing structural error as error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself").

[54] *See* McCord, *supra* note 50, at 1412–16.

[55] Trial and structural error are hard to define partly because it is difficult to discern a common strand running through the errors in either category. Professor McCord notes that only half of the sixteen cases *Fulminante* cited as examples of trial error involved error that was evidentiary in nature. *Id.* at 1414. He also argues that the Court's decision in *Sullivan*, which characterized a constitutionally deficient reasonable doubt instruction as structural error, undermines the durational element of *Fulminante*, since jury instructions satisfy the durational requirement. *Id.* at 1427. Regarding the framework element, Professor Charles Ogletree writes that "[*Fulminante*] never clearly articulates the structure that the structural errors undermine." 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, 164 (1991).

[56] *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, 141 (1993); Ogletree, *supra* note 55, at 164. The language of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), also supports this conclusion by characterizing the trial-structural distinction as a "spectrum." *Id.* at 629.

[57] *Recuenco*, 126 S. Ct. at 2551 (quoting Neder v. United States, 527 U.S. 1, 9 (1999) (emphasis omitted)).

able are structural."[58] As a result, *Recuenco*, along with *Gonzalez-Lopez*, will likely be relevant to future debates over the precise definition of trial and structural error.

However, in addition to *Recuenco*'s explicit focus on the dichotomy between trial and structural error, beneath the opinion's surface lies an implicit pronouncement of the Court's views regarding the nature of harmless error review itself. With the unanimous decision in *Sullivan*, which held that a constitutionally deficient reasonable doubt instruction could never be harmless, the Court seemed to have repudiated the guilt-based approach,[59] which had predominated until that point,[60] in favor of the effect-on-the-jury approach. The *Sullivan* Court wrote:

> The 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. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict may be — would violate the jury-trial guarantee.[61]

Nonetheless, in *Neder*, in which the Court held that failure to submit an element of a crime to the jury was subject to harmless error review,[62] the Court endorsed the guilt-based approach: "We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"[63] As a result of the conflicting reasoning in *Sullivan* and *Neder*, scholars have disagreed about the proper interpretation of harmless error.[64]

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[58] United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564 n.4 (2006) (citing *id.* at 2570 (Alito, J., dissenting)). Reminiscent of the *Brecht* "spectrum" language, Justice Alito's dissent described trial and structural error as two poles. He wrote that trial errors are not the only errors subject to harmless error review and that not all errors affecting the trial's framework are structural. *Id.* at 2570 (Alito, J., dissenting).

[59] *See, e.g.*, Cooper, *supra* note 3, at 323 ("[The *Sullivan* Court's] strong statement of the need to inquire into the effect that an error had on the jury that heard the case, together with the fact that *Sullivan* was a unanimous opinion, seemed to represent a clear triumph for the effect-on-the-jury standard of harmless error."); Mitchell, *supra* note 4, at 1340 ("Following *Sullivan*, any harmless error test that permits an appellate court to engage in unguided speculation about guilt — that, in effect, allows the appellate court to sit as a new jury — should be considered an impermissible test."). Judge Harry Edwards wondered whether the trend embodied by *Sullivan* reflected a "brief aberration or, instead, the inception of some new and meaningful development in the Court's jurisprudence." Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1199 (1995).

[60] *See* Edwards, *supra* note 59, at 1188.

[61] Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

[62] *See Neder*, 527 U.S. 1.

[63] *Id.* at 18.

[64] *Compare* Cooper, *supra* note 3, at 311–12 ("[W]ith the 1999 decision in *Neder v. United States*, the Supreme Court, narrowly but clearly, has come down in favor of the overwhelming evidence standard." (footnote omitted)), *with* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 575 (2004) (suggesting that le-

Against this backdrop, *Recuenco* implicitly, but strongly, reaffirmed *Neder*'s endorsement of the guilt-based approach to harmless error review. It would have been logically impossible for the Court to reach its decision in *Recuenco* if it had accepted the effect-on-the-jury approach. That approach involves a historical, rather than counterfactual, inquiry, as *Sullivan* made clear:

> [T]he entire premise of [harmless error] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error.[65]

Since a jury never found that Recuenco had been armed with a firearm, a reviewing court could not ask whether the jury would have *still* found possession of a firearm absent the error. However, if the court accepts the guilt-based approach, no such problem exists: the court can ask whether a rational jury would have convicted in a hypothetical trial absent the error. Thus, although the *Recuenco* Court did not expressly discuss the nature of harmless error review, the Court's endorsement of the guilt-based approach was clear from its failure to employ a screening step, as the *Sullivan* Court did, before conducting the *Fulminante* analysis regarding trial and structural error.[66]

Recuenco's implicit affirmation of the guilt-based approach is particularly significant because of the specific Justices who supported it. The replacement of Chief Justice Rehnquist and Justice O'Connor with Chief Justice Roberts and Justice Alito created doubt regarding the current Court's view of harmless error review. Chief Justice Rehnquist had authored language supporting the guilt-based approach in *Fulminante*[67] and had written the majority opinion in *Neder*, which Justice O'Connor joined.[68] By supporting the guilt-based approach in

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gal decisionmakers have a choice between the effect-on-the-jury and guilt-based approaches), *and* Solomon, *supra* note 4, at 1062–63 ("At this point, scholars even disagree about the current state of the law.").

[65] *Sullivan*, 508 U.S. at 280.

[66] *See* Edwards, *supra* note 59, at 1201 ("[T]he *Sullivan* Court treats the *Fulminante* structural defect/trial error dichotomy . . . as an alternative method of evaluation to be considered only after the application of simple logic has already yielded a result.").

[67] *See* Arizona v. Fulminante, 499 U.S. 279, 310 (1991) ("When reviewing the erroneous admission of an involuntary confession, the appellate court . . . simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."); Cooper, *supra* note 3, at 321–22 (explaining the breakdown of the "fractured" opinion in *Fulminante*).

[68] Justices Kennedy, Thomas, and Breyer also joined.

Recuenco, Chief Justice Roberts and Justice Alito diminished any expectation that they might move the Court toward the effect-on-the-jury approach. Additionally, Justice Scalia, arguably the strongest proponent of the effect-on-the-jury approach,[69] voted with the majority in *Recuenco* rather than, at the very least, concurring. Justice Scalia's vote is noteworthy because he had authored the repudiation of the guilt-based approach in *Sullivan*[70] and had written a strong dissent in *Neder* in which he not so gently reminded the majority that "the Constitution does not trust judges to make determinations of criminal guilt."[71]

The *Recuenco* decision is also significant because it rejects an attempt, adopted by the Washington Supreme Court, to stake out a compromise between *Sullivan* and *Neder* — two cases that had previously seemed irreconcilable.[72] Recuenco argued that harmless error review could be applied in *Neder* because the jury reached a guilty verdict regarding the fraud offense, whereas the *Recuenco* jury did not reach a guilty verdict regarding possession of a firearm.[73] According to Recuenco's argument, a reviewing court could ask whether the *Neder* jury would have returned the same verdict absent the error, whereas a reviewing court could not do the same for Recuenco because of the absence of a guilty verdict regarding possession of a firearm.[74]

Although Recuenco's proposed approach may seem on its face to resurrect the effect-on-the-jury approach, by accepting the *Neder* decision it implicitly accepts the guilt-based approach. The Washington Supreme Court opinion bears out this acceptance of the guilt-based approach by conducting a counterfactual, but-for inquiry rather than a historical, substantial-factor inquiry.[75] In reality, Recuenco's proposed approach draws only a semantic line between *Neder* and *Recuenco* by emphasizing the existence of a guilty verdict for fraud in *Neder* even

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[69] *See* Solomon, *supra* note 4, at 1063 (describing Justice Scalia as "fiercely partial" to the effect-on-the-jury approach).

[70] *See Sullivan*, 508 U.S. at 276, 279–80 (1993).

[71] Neder v. United States, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part) (emphasis omitted). Justice Scalia also wrote:

> The Court's decision today is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).

Id.

[72] *See* Cooper, *supra* note 3, at 323 (writing that *Neder* "explicitly rejected the reasoning, if not the result, of *Sullivan*"). The *Neder* Court distinguished *Sullivan* by explaining that the deficient reasonable doubt instruction had "vitiate[d] all the jury's findings," unlike the failure to submit an element to the jury in *Neder*. *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281) (internal quotation marks omitted).

[73] *Recuenco*, 126 S. Ct. at 2552; *see also* State v. Hughes, 110 P.3d 192, 207–08 (Wash. 2005).

[74] *Recuenco*, 126 S. Ct. at 2552.

[75] *See Hughes*, 110 P.3d at 207.

though that verdict did not include the omitted element of materiality[76] — an approach that depends on a linguistic sleight of hand involving the word "fraud."[77] Even the *Recuenco* Court, in holding the sentencing enhancement subject to harmless error review, acknowledged that neither *Neder* nor *Recuenco* involved a complete guilty verdict.[78]

Recuenco's endorsement of the guilt-based approach has both normative and practical implications. Commentators criticize the guilt-based approach for eschewing the right to trial by jury,[79] for aiming not at the application of justice but rather at upholding as many convictions as possible,[80] and for exceeding courts' institutional competence,[81] while supporters highlight the impossibility of reading jurors'

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[76] Both the *Recuenco* majority and the *Neder* dissent, which disagreed on most points, saw the distinction as more than a semantic one. The *Recuenco* majority felt compelled to disavow the reasoning of *Sullivan*, *see* Recuenco, 126 S. Ct. at 2553 n.4, and the *Neder* dissent wrote: "The difference between speculation directed toward *confirming* the jury's verdict *(Sullivan)* and speculation directed toward *making a judgment that the jury has never made* (today's decision) is more than semantic." *Neder*, 527 U.S. at 38 (Scalia, J., concurring in part and dissenting in part).

[77] The jury returned a guilty verdict for the charge of "fraud," defined as elements *A*, *B*, and *C*, but Recuenco proposed applying harmless error review to a guilty verdict on a charge of "fraud" defined as elements *A*, *B*, *C*, and *D*.

[78] *See Recuenco*, 126 S. Ct. at 2552–53.

[79] *See, e.g.*, Edwards, *supra* note 59, at 1192. Justice Scalia wrote that no matter how compelling a particular result may seem to a reviewing court, "[t]he jury has the right to apply its own logic (or illogic) to its decision to convict or acquit." *Neder*, 527 U.S. at 35 n.2 (Scalia, J., concurring in part and dissenting in part).

[80] *See* James S. Liebman & Randy Hertz, Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1156 (1994) ("[I]t is difficult to avoid Justice O'Connor's suspicion that the Court's goal is not improvement in the administration of justice but, instead, 'denying [habeas corpus] relief whenever possible.'" (second alteration in original) (quoting Brecht v. Abrahamson, 507 U.S. 619, 656 (1993) (O'Connor, J., dissenting))); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 39 (2004) ("[T]he harmless error doctrine now reaches mistakes for which the adjective 'harmless' seems highly questionable.").

[81] *See, e.g.*, ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 20–21 (1970). Justice Traynor wrote:

> The appellate court is limited to the mute record made below. Many factors may affect the probative value of testimony, such as age, sex, intelligence, experience, occupation, demeanor, or temperament of the witness. A trial court or jury before whom witnesses appear is at least in a position to take note of such factors. An appellate court has no way of doing so. . . . What clues are there in the cold print to indicate where the truth lies? What clues are there to indicate where the half-truth lies?

Id. (footnote omitted).

minds[82] and note the practical benefits of affirming convictions supported by overwhelming evidence.[83]

Further, the choice of approach has the potential to determine what evidence the reviewing court will consider. Theoretically, under the guilt-based approach, the nature of the error itself should not figure into the analysis; the court should simply weigh the untainted evidence.[84] Under the effect-on-the-jury approach, the court should evaluate the relationship of the error to the untainted evidence.[85] However, in practice, the two approaches often blur considerably, since it is difficult to determine the effect an error had on a particular jury without independently weighing the evidence against the defendant.[86]

Only time will tell whether *Recuenco*'s implicit endorsement of the guilt-based approach has in fact settled the matter. At the very least, the new composition of the Court, Justice Scalia's decision to join the majority, and the Court's rejection of the proposed reconciliation of *Sullivan* and *Neder* add to *Recuenco*'s significance as a step toward acceptance of the guilt-based approach. Given the difficulty of conducting harmless error review, which has been compared to trying to "unring a bell that has already rung,"[87] one can only hope that the Court will provide in future cases an explicit and thorough discussion of the nature of harmless error review.

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[82] *See, e.g.*, Cooper, *supra* note 3, at 330–31 ("The impossibility of reading the jurors' minds means that if a court is determined to consider the effect of the error rather than the weight of the evidence, the court must consider not the actual jury that heard the case but the hypothetical reasonable jury."); Solomon, *supra* note 4, at 1064 ("The task of the judge in harmless-error determinations is to read the minds of twelve jurors — people the habeas judge has never met, and about whom he has virtually no information.").

[83] *See, e.g.*, *Neder*, 527 U.S. at 18 ("To set a barrier so high that it could never be surmounted would justify the very criticism that spawned the harmless-error doctrine in the first place: 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" (quoting TRAYNOR, *supra* note 81, at 50)).

[84] *See* Edwards, *supra* note 59, at 1205–06.

[85] *See id.*

[86] *See* Cooper, *supra* note 3, at 328. Professor James Solomon, in a series of citations to Supreme Court opinions, suggests that some Justices may not view the difference as important in practice for most cases. *See* Solomon, *supra* note 4, at 1064 n.54. For example, Justice O'Connor's dissent in *Brecht* suggested that harmless error review "requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae." Brecht v. Abrahamson, 507 U.S. 619, 656 (1992) (O'Connor, J., dissenting). Justice Stevens similarly wrote: "In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied." *Id.* at 643 (Stevens, J., concurring). Indeed, in *Neder*, Chief Justice Rehnquist suggested that while extending the logic of *Sullivan* to *Neder* would be defensible, "the life of the law has not been logic, but experience." *Neder*, 527 U.S. at 15 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881)). However, even if the two approaches do blur in run-of-the-mill cases, the distinction remains crucial for cases involving an incomplete jury verdict, such as *Sullivan*, *Neder*, and *Recuenco*.

[87] Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 21 (2002).