Land & Water Law Review

Volume 27 | Issue 2 Article 13

1992

Constitutional Law - Harmless Constitutional Error Analysis - Are Coerced Confessions Fundamentally Different from Other Erroneously Admitted Evidence - Arizona v. Fulminante

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CONSTITUTIONAL LAW—Harmless Constitutional Error Analysis—Are Coerced Confessions Fundamentally Different from Other Erroneously Admitted Evidence? *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

> It is common courtroom knowledge that extortion of confessions by "third-degree" methods is charged falsely as well as denied falsely.
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> —JUSTICE JACKSON, *Stein v. New York*, 346 U.S. 156, 181 (1953).

On September 16, 1982, the slain body of an eleven-year-old girl was found in the desert east of Mesa, Arizona. She had been shot twice in the head at close range and a ligature was found around her neck.[1] The child's stepfather, Oreste Fulminante, became a suspect after making inconsistent statements to the police both about his relationship with his stepdaughter and about her disappearance.[2] Not until more than two years later was he ultimately indicted and convicted of his stepdaughter's murder and sentenced to death.[3] Meanwhile Fulminante had left Arizona. Fulminante already had prior felony convictions for impairing the morals of a child and for forgery,[4] and within six weeks of the Arizona murder, he began serving a series of sentences for felony firearms offenses in New Jersey.[5]

While Fulminante was serving his second sentence for possession of a firearm by a felon, he confessed to the murder of his stepdaughter to another inmate, Anthony Sarivola.[6] Sarivola was a paid informant of the Federal Bureau of Investigation and masqueraded as a mobster.[7] Sarivola was able to trade protection from "rough" treatment by other inmates in return for the truth from Fulminante,[8] since rumors that Fulminante was suspected of killing a child circulated the

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1. State v. Fulminante, 778 P.2d 602, 605 (Ariz. 1988), *aff'd*, Arizona v. Fulminante, 111 S. Ct. 1246 (1991).
2. *Id.* at 605-06.
3. *Id.*
4. *Id.* at 606. Fulminante had a 1965 New Jersey felony conviction for impairing the morals of a child and a 1971 New Jersey conviction for "uttering" a check with a forged instrument. *Id.*
5. *Id.* Police alerted the Bureau of Alcohol, Tobacco, and Firearms of their Arizona investigations. On October 28, 1982, Fulminante was sentenced to a minimum of two years in federal prison for possession of a firearm by a felon, and upon release was re-arrested and imprisoned once more for the same offense. *Id.* Apparently the defendant did not serve minimum time in either case.
6. *Id.*
7. *Id.* Sarivola was, in fact, a mobster. He had worked previously both as a police officer and as a goon for the Columbo family. Brief for Appellee at 1-2, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839).
8. State v. Fulminante, 778 P.2d 602, 606 (Ariz. 1988), *aff'd*, 111 S. Ct. 1246 (1991).

prison.[9] Fulminante admitted that he did shoot the "little bitch" after first choking and sodomizing the child and then finally making her "beg a little."[10] Fulminante made a second confession about six months later when Sarivola, who already had been released from prison, and his fiancee picked up Fulminante upon Fulminante's release.[11] Fulminante explained to Sarivola's fiancee that he could not return to his home in Arizona because he had killed a little girl there. He did say that he would return one day in order to "piss on her grave."[12]

Following yet another arrest for a weapons violation, Fulminante was finally indicted for the murder of the young girl.[13] After denying Fulminante's motion to suppress his confessions, the trial court found him guilty as charged and sentenced him to death.[14]

The Arizona Supreme Court affirmed the trial court's decision.[15] It held that the first confession which Fulminante made to Sarivola should have been suppressed since the State could not prove it was voluntary.[16] The court found the second confession admissible and noted that any error in the admission of the first confession was harmless beyond a reasonable doubt.[17]

However, after a motion for reconsideration by the defendant on federal constitutional grounds, the court issued a supplemental opinion setting aside the conviction.[18] Although harmless error analysis can be applied to some violations of constitutional rights, the court realized that it had mistakenly applied the analysis to a coerced confession.[19] Acknowledging that United States Supreme Court precedent

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9. *Id.*

10. Brief for Appellant at 5, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839).

11. *Fulminante*, 778 P.2d at 606.

12. Brief for Appellant, *supra* note 10, at 6.

13. Arizona v. Fulminante, 111 S. Ct. 1246, 1250 (1991).

14. *Id.* at 1251.

15. *Fulminante*, 778 P.2d at 626.

16. *Id.* at 609. Relying on Bram v. United States, 168 U.S. 532 (1897), the court found that the state did not carry its burden of proving that the confession was obtained without "the exertion of any improper influence." *Id.* The states may leave the issue of voluntariness to either the judge or the jury, provided the same jury does not decide guilt. Jackson v. Denno, 378 U.S. 368, 391 & n.19 (1964). Unlike the determination of harmlessness, state courts need prove voluntariness only by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). Once in federal court, "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Fulminante*, 111 S. Ct. at 1252 (quoting Miller v. Fenton, 474 U.S. 104, 110 (1985)). The Fourteenth Amendment requires that each confession be assessed by the "totality of circumstances." Haynes v. Washington, 373 U.S. 503, 514 (1963). *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2(c) (1985). "Coercion that vitiates a confession . . . can be 'mental as well as physical' [the question being] whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' " Garrity v. New Jersey, 385 U.S. 493, 496 (1967).

17. *Fulminante*, 778 P.2d at 609-10.

18. *Id.* at 627.

19. *Id.* The court had relied on cases where confessions held harmless were in

indicated the admission of a coerced confession[20] cannot be found harmless, the Arizona Supreme Court ordered a retrial without use of the first confession "until and unless the Supreme Court changes the law."[21]

The State of Arizona appealed the grant of a new trial. The United States Supreme Court granted certiorari and affirmed the state court's decision.[22] A closely divided Court held that the first confession to Sarivola was coerced since there was a sufficiently credible threat of physical violence.[23] A different majority of Justices then found the use of this confession merely an error in the trial process and, as other "trial errors," the use is subject to harmless error analysis.[24] This denomination of a coerced confession as a "trial error"—which may be "*quantitatively assessed in the context of other evidence* presented in order to determine whether its admission [is] harmless beyond a reasonable doubt"[25]—is the crux of the decision. A third majority of the Court, however, went on to hold that this illegal admission of evidence was *not* harmless error beyond a reasonable doubt since the State failed to meet its burden of proof that the admission of Fulminante's first confession did not contribute to the verdict.[26] The Court affirmed the Arizona Supreme Court judgment concluding that Fulminante was entitled to a new trial without the confession to Sarivola.[27]

This casenote examines three rationales that have been generally

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violation of the defendant's Miranda rights, as opposed to the defendant's Fifth Amendment rights, as in this case. *Id.* at 626.

20. The Court uses "involuntary" and "coerced" interchangeably. *Fulminante*, 111 S. Ct. at 1253 n.3.

21. *Fulminante*, 778 P.2d at 627.

22. *Fulminante*, 111 S. Ct. at 1261.

23. *Id.* at 1252-53. Justice White wrote this part of the opinion for the Court, joined by Justices Marshall, Blackmun, Stevens, and Scalia.

24. *Id.* at 1265. Chief Justice Rehnquist delivered this section of the opinion of the Court, joined by Justices O'Connor, Kennedy, Souter, and Scalia.

25. *Id.* at 1264 (emphasis added). This "overwhelming evidence" formulation is not the standard adopted by the different majority which ultimately found the error not harmless. That standard mandates the State must demonstrate "that the admission of the confession . . . *did not contribute to* . . . *the conviction*." *Id.* at 1257 (emphasis added). The Chief Justice apparently seeks to "kill two birds with one stone" with this well-laid dictum. *See infra* notes 56, 179 and accompanying texts. This hidden issue gains significance once heads are counted on the Court's determination of whether the error was harmless. *See Fulminante*, 111 S. Ct. at 1249, for the tally. Of the majority finding the error to not be harmless, Justice Marshall has since left the Court and Justice Kennedy, who found the confession to Sarivola *not* coerced, joined the majority only to provide the Arizona Supreme Court a "clear mandate." But Justice Kennedy found the admission not harmless "when viewed in light of all the other evidence." *Id.* at 1267 (Kennedy, J., concurring). Justice Souter did not vote on this issue. Consequently, only three of the Justices presently on the Court could be expected to adhere to the more stringent "contribute to the verdict" formulation were the question to arise again.

26. *Id.* at 1257. Justice White again wrote for the Court in this last section, joined by Justices Marshall, Blackmun, Stevens, and Kennedy.

27. *Id.*

posited as making coerced confessions so fundamentally different from other evidentiary errors that automatic reversal is required. Although the evidentiary exclusion of coerced confessions has solid constitutional bases, the justification for automatic reversal when coerced confessions are erroneously admitted is more difficult to pin down.

The history and cases surrounding coerced confessions and harmless error are full of subtle distinctions. The foundation for the historical exclusion of coerced confessions from harmless constitutional error analysis is found in a mere Supreme Court case footnote,[28] and its present application is based on admitted dicta.[29] Much of coerced confession law concerns the erstwhile enforcement through a less exacting Fourteenth Amendment Due Process rationale,[30] and the latest defense of the automatic reversal hinges on what Justice White terms "fundamental differences."[31] This casenote looks at these fundamental differences, what has become of them, and what this may mean.

BACKGROUND

Three concepts underlie this United States Supreme Court decision: harmless error analysis generally, harmless error analysis applied to constitutional violations, and treatment of coerced confessions in particular. The harmless error doctrine blocks "setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial."[32] The doctrine of harmless *constitutional* error analysis seeks to determine when violations of an individual's constitutional rights will also be considered minor or harmless error.[33] A confession is coerced or involuntary when the person's will has been so overborne and his capacity for self determination so impaired[34] as to compel him to incriminate himself.[35] Until *Fulminante*, the error of admission in evidence of a coerced confession would vitiate a judgment of conviction.[36] The *Fulminante* decision determines the present extent of a defendant's constitutional rights[37] when a trial court makes such an error.

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28. Chapman v. California, 386 U.S. 18, 23 n.8 (1967).

29. Chief Justice Rehnquist acknowledged later that the application of the harmless error doctrine in *Fulminante* was dicta but that the Court was justified in deciding that point because of judicial economy. Charles J. Ogletree, Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 159 n.66 (1991).

30. *See infra* note 63.

31. *See infra* text accompanying note 97.

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

33. *See id.*

34. *Fulminante*, 111 S. Ct. at 1261 (Fourteenth Amendment violation).

35. Malloy v. Hogan, 378 U.S. 1, 7 (1964) (Fifth Amendment violation).

36. Payne v. Arkansas, 356 U.S. 560, 568 (1958).

37. The use of coerced confessions is controlled by both the Due Process Clause of the Fourteenth Amendment and the Self-Incrimination Clause of the Fifth Amendment. *See infra* note 63.

Harmless Error

In the eighteenth century, American courts adopted from the English judiciary the Exchequer Rule of appellate review.[38] Under this rule, courts presumed prejudice whenever there was an erroneous admission of evidence at trial. The policy was to avoid encroachment on the fact-finding function of the jury.[39] In America, this rule was applied so strictly that eventually widespread reforms were necessarily instituted to cure rampant abuse.[40] Consequently, harmless error legislation and rules were adopted by the states and by 1967 were in effect throughout the nation.[41] This legislative reform was intended to protect an otherwise meritorious verdict from "mere etiquette of trials" and "minutiae of procedure"[42] by substituting case-by-case judgment of harmlessness for the automatic application of rules.[43] Federal legislation and court rules were adopted requiring harmless error analysis.[44]

Harmless error analysis involves a balancing test, weighing the danger of affirming the conviction of an innocent defendant against the waste of a re-trial for the same result.[45] Automatic reversal is a substantial cost to society,[46] but it is justified unless the risk to individual rights is too slight to out-weigh the advantages of harmless error treatment.[47] This is a cost-benefit analysis. A difficult question for the courts has been whether, and if so which, constitutional rights may also be put on this balance with efficiency.

Harmless Constitutional Error

Until the *Chapman v. California*[48] decision, federal courts assumed that harmless error treatment did not apply to constitutional

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38. LAFAVE & ISRAEL, *supra* note 16, § 26.6(a); *see generally* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422 (1980).

39. ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR 13 (1970). Traynor argues that concerns about invading the jury province were ill-founded. Traynor was the Chief Justice of the California Supreme Court when People v. Teale, 404 P.2d 209 (Cal. 1965), *rev'd sub nom.* Chapman v. California, 386 U.S. 18 (1967), was decided.

40. Kotteakos v. United States, 328 U.S. 750, 759 (1946) (attorneys often would deliberately "sow" error at trial as a hedge against a loss on the merits).

41. Chapman v. California, 386 U.S. 18, 22 (1967). The Wyoming harmless error rule is typical: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." WYO. R. APP. P. 7.04.

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

43. *Chapman*, 386 U.S. at 49 (Harlan, J., dissenting).

44. 28 U.S.C. § 2111; FED. R. CRIM. P. 52(A); FED. R. CIV. P. 61; FED. R. EVID. 103(a).

45. Philip J. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519, 520 (1969).

46. United States v. Mechanik, 475 U.S. 66, 72 (1986).

47. "A reversal and remand is an empty gesture if the new trial . . . will clearly have the same result." Charles L. Black, Jr., *The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 207 (1967).

48. 386 U.S. 18 (1967).

violations.[49] Prior to *Chapman*, when the Supreme Court found constitutional error, it reversed the conviction without harmless error application. This was arguably a "rule" of automatic reversal.[50] However, state courts generally did not accept this assumption and applied their state's harmless error rules to all errors, including federal constitutional violations.[51] In *Chapman*, the Supreme Court addressed for the first time whether harmless error analysis could be applied to constitutional violations.[52] The Court resolved that constitutional violations could be harmless, but it also held that this would be a federal question, requiring a federal rather than a state standard of harmlessness.[53] The federal standard developed mandates that a reviewing court be convinced "beyond a reasonable doubt that the error did not contribute to the verdict obtained."[54]

Although the *Chapman* Court was reacting against the California courts' use of the "overwhelming evidence" of guilt to determine harmlessness,[55] the Court has often accepted this standard.[56] The modern view seems to balance the risk of prejudice, rather than the sure denial of prejudice, against the burden of re-trial.[57]

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49. *See* Goldberg, *supra* note 38, at 423 & n.19. Goldberg argues that non-application to constitutional violations was for good reason. "Improper search of home shouldn't be equated with the State's omission of the word 'the' from defendant's charging papers." *Id.* at 441-42.

50. Case law prior to *Chapman* reflects the courts' uncertainty whether constitutional error may ever be harmless. At both federal and state courts there was a split of authority on this question. *See* Shannon L. Bybee, Jr., Comment, *A Comment on Application of the Harmless Constitutional Error Rule to "Confession" Cases*, 1968 UTAH L. REV. 144, 146 (1968). This uncertainty was based on conflicting early rulings. *See* Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 1000-01 & n.38 (1973).

51. Saltzburg, *supra* note 50, at 1012.

52. *Chapman*, 386 U.S. at 21-22. *See infra* note 171. The Court in Fahy v. Connecticut, 375 U.S. 85 (1963), first suggested that constitutional error might be found harmless, but it did not resolve the issue since the Court found that the state court had applied its own standard incorrectly and that the error was therefore not harmless. *Id.* at 86-87.

53. *Chapman*, 386 U.S. at 21.

54. *Id.* at 24. The Court fashioned a restatement from three sources: the common law harmless error rule, which put the burden on the beneficiary of the error that there was no injury; the federal rule, which focuses on the substantial rights of the defendant; and the Court's previous formulation in *Fahy* of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23-24.

55. *See Chapman*, 386 U.S. at 23 & n.7. The Court found that evidence which "possibly influenced" the jury could not be harmless. *Id.* at 23-24.

56. *See infra* note 179 and accompanying text. There are three possible approaches to determine harmlessness: whether tainted evidence contributed to the verdict, *Chapman*, 386 U.S. at 24; whether untainted evidence is overwhelming, Milton v. Wainwright, 407 U.S. 371, 377-78 (1972); and whether tainted evidence is merely cumulative, Harrington v. California, 395 U.S. 250, 254 (1969). *See* Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 16-17 (1976-77). The dissent suggested the latter rationale in the state court. State v. Fulminante, 778 P.2d 602, 633 (Ariz. 1988) (Cameron, J., dissenting), *aff'd*, 111 S. Ct. 1246 (1991). It was similarly rejected in this case. *Fulminante*, 111 S. Ct. at 1259.

57. *See* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and*

> It is the duty of a reviewing court to consider the trial record as a whole and ignore errors that are harmless, including most constitutional violations . . . . The goal . . . is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.[58]

The Supreme Court qualified its holding in *Chapman* by excepting constitutional rights which are "so basic to a fair trial that their infraction can never be treated as harmless error."[59] The Court suggested three decisions as illustrations of constitutional rights immune from harmless error treatment.[60] One decision cited, *Payne v. Arkansas*,[61] dealt with coerced confessions.[62] In *Payne*, although the prosecution argued that adequate evidence existed to sustain the verdict without the coerced confession, the error of its admission required reversal since it violated the Due Process Clause of the Fourteenth Amendment.[63] The *Chapman* ruling did not extend to coerced

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Constitutional Remedies, 104 HARV. L. REV. 1731, 1772 (1991); *Cf.* James D. Cameron & Richard Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109 (1984).

58. United States v. Hasting, 461 U.S. 499, 509 (1983). *See also* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 85 & n.35 (1988). *But see* Goldberg, *supra* note 38, at 440 (harmless error analysis exists as a means of judicial economy but harmless *constitutional* error treatment increases court congestion).

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

60. For an exhaustive list of errors which may be deemed harmless as well as errors which can never be subject to harmless error analysis, see *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1989-1990*, 79 GEO. L. J. 1179, 1202-07 & nn.2700-24 (1991) [hereinafter *Review*].

61. 356 U.S. 560 (1958).

62. *Chapman*, 386 U.S. at 23 & n.8. The other two cases were Gideon v. Wainwright, 372 U.S. 335 (1963), and Tumey v. Ohio, 273 U.S. 510 (1927). The *Gideon* Court overruled Betts v. Brady, 316 U.S. 455 (1942), in order to hold that the Sixth Amendment's guarantee of counsel "is fundamental and essential to a fair trial" and therefore incorporated to the states by the Fourteenth Amendment. *Gideon*, 372 U.S. at 342, 345. *Betts* had held that counsel was not essential to a fair trial and therefore not a fundamental right. *Betts*, 316 U.S. at 473. *Gideon* was not based on the fairness of the actual trial but on the *integrity of the adversarial system*. *Gideon*, 372 U.S. at 342, 344.

The *Tumey* Court reversed the conviction of Ed Tumey, a drinking man during the Prohibition. An ordinance had provided that the fees and costs of the trial judge were to be paid by the defendant - but only if convicted. Ex-President Chief Justice Taft cited English law back to the fourteenth century to support his opinion that a defendant's due process rights under the Fourteenth Amendment are violated when the judge has a direct, personal, and substantial pecuniary interest in his conviction. *Tumey*, 273 U.S. at 523-24.

63. *Payne*, 356 U.S. at 568 (coerced confessions are "illusory and deceptive evidence" and therefore a false foundation for any conviction). "The Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." Malloy v. Hogan 378 U.S. 1, 6 (1964). Justice Brennan suggested that the Fourteenth Amendment was already adequate enforcement on the states for coerced confession purposes. *Id.* at 10-11. The incorporation addressed a state court judgment of contempt on a defendant's refusal to answer self-incriminating questions. *Id.* at 3. Before *Malloy*, the Court used the Due Process

confessions.

Coerced or Involuntary Confessions

Confessions have long been regarded the strongest evidence of guilt but only when truly voluntary.[64] The seminal case on coerced confessions is *Bram v. United States*.[65] In *Bram*, the Supreme Court held that only a free and voluntary confession is admissible, and since it is impossible to measure the force of the influence used, any statement is inadmissable into evidence where "any degree of influence has been exerted."[66] "If [such a statement is] found to have been illegally admitted, reversible error will result."[67] The rationale was that if a statement first asserted by the prosecution to prove guilt was illegally admitted, the State could not logically later contradict this assertion so as to avoid the consequences of the error.[68] In at least twenty-five opinions since *Bram*, the Court has held that convictions must be reversed where coerced confessions have been introduced, regardless of the sufficiency of other untainted evidence.[69] *Fulminante* is the first case since *Chapman* to "squarely" address whether the admission of an involuntary confession may be subject to harmless error analysis.[70]

PRINCIPAL CASE

Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy,

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Clause of the Fourteenth Amendment to limit the use of coerced confessions in state criminal cases. In Brown v. Mississippi, 297 U.S. 278 (1936), the Court first held that coerced confessions admitted into evidence violated the Fourteenth Amendment's Due Process Clause, but it also stated that this did not involve the privilege against self-incrimination. *Id.* at 285.

64. Hopt v. Utah, 110 U.S. 574 (1884). The confession's reliability and value cease when the defendant is deprived of "that freedom of will or self control essential to make his confession voluntary." *Id.* at 585. Otherwise, confessions are considered so reliable, they are classed as nonhearsay by the Federal Rules of Evidence. FED. R. EVID. 801.

65. 168 U.S. 532 (1897). The *Bram* Court also noted that the Fifth Amendment's Self-Incrimination Clause controlled the coerced confession issue, but this was not incorporated to the states until 1964. *See supra* note 63.

66. *Id.* at 542-43.

67. *Id.* at 541.

68. *Id.* at 542.

69. Brief of Appellee, *supra* note 7, at 23-24. For example, in Payne v. Arkansas, 356 U.S. 560 (1958), the coerced confession case cited in *Chapman*, the Court reversed a murder conviction on Fourteenth Amendment due process grounds after finding from the totality of the circumstances that the confession, elicited through the threat of mob violence, deprived the defendant of a fundamentally fair trial. *Id.* at 567-68. Other evidence besides the confession, possibly sufficient to support a conviction, was not considered. *Id.*

70. United States v. Murphy, 763 F.2d 202, 208 (6th Cir. 1985), *cert. denied*, Stauffer v. United States, 474 U.S. 1063 (1986) (where the middleman was eliminated—harmless error analysis applied to allegedly coerced confession obtained by police dog). By "squarely," the Sixth Circuit suggested the apparent ambiguity between *Payne* and Milton v. Wainwright, 407 U.S. 371 (1972). *Id.* at 208. *Milton* was a Sixth Amendment decision. *See infra* notes 73, 110.

Souter, and Scalia, delivered the portion of the opinion which concluded that the harmless error rule adopted in *Chapman* is applicable to the admission of involuntary confessions.[71] Initially, the majority declared that constitutional violations can be categorized as either "trial errors" or "structural defects."[72] According to the Court, "trial errors," those which occur during the presentation of the case to the jury, are suitable for harmless error treatment.[73] The majority held that coerced confessions are "trial errors."[74] On the other hand, "structural defects in the constitution of the trial mechanism," affecting the entire conduct of the trial from beginning to end, defy harmless error analysis.[75] "Structural errors" are distinguished from "trial errors" as those errors "affecting the framework in which the trial proceeds, rather than simply an error in the trial process itself."[76] These errors require reversal since the framework affected is a necessary protection to keep the criminal trial fundamentally fair.[77]

Second, the Rehnquist majority stated that *Payne*, the coerced confession case cited in *Chapman*, did not itself reject harmless error treatment of coerced confessions.[78] The *Payne* Court only rejected a mere *sufficiency of the evidence* standard of harmless error, whereas

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71. Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991).

72. *Id.* at 1264-65. This distinction tracks traditional *non-constitutional* harmless error analysis. "Trial errors" are primarily errors relating to the presentation of evidence. Courts generally will look to the *weight of the evidence* and juror impact to analyze these errors. *See* LAFAVE & ISRAEL, *supra* note 16, § 26.6(a). Of constitutional evidentiary related errors, only coerced confessions were immune from harmless error treatment and required reversal. *See id.* § 26.6(d). "Structural errors" can be mere technical violations or take from a defendant substantive protection of the right violated. Where violation of the substance of the right occurs, courts will not look to the weight of the evidence but instead require automatic reversal. The question of reversal is usually couched in terms of the scope of the right violated. *Id.* § 26.6(a).

73. *Fulminante*, 111 S. Ct. at 1264. Among such "trial" errors cited by the Chief Justice are: improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause, United States v. Hasting, 461 U.S. 499 (1983); admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause, Brown v. United States, 411 U.S. 223, 231-232 (1973); confession obtained in violation of Massiah v. United States, 377 U.S. 201 (1964), Milton v. Wainwright, 407 U.S. 371 (1972); admission of evidence obtained in violation of the Fourth Amendment, Chambers v. Maroney, 399 U.S. 42, 52-53 (1970). *Fulminante*, 111 S. Ct. at 1263.

74. *Fulminante*, 111 S. Ct. at 1265. The Chief Justice reasons that use of a coerced confession is an error which occurs "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 1264.

75. *Id.*

76. *Id.* at 1265. The Court gives case illustrations of such structural errors: the right to a public trial, Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984); unlawful exclusion of members of the defendant's race from a grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986); the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); and an impartial judge, Tumey v. Ohio, 273 U.S. 510 (1927). *Fulminante*, 111 S. Ct. at 1265.

77. *Fulminante*, 111 S. Ct. at 1265 (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986)).

78. *Id.* at 1264.

the *Chapman* rule requires the more stringent determination of harmlessness *beyond a reasonable doubt*.[79] In other words, according to Justice Rehnquist, it is consistent to use the *Chapman* standard to analyze coerced confessions, since the *Chapman* Court basis for excluding *Payne* confessions was mistaken.[80]

Third, the majority determined that the *Chapman* Court never really decided the coerced confession issue, anyway.[81] Whether or not involuntary confessions could be subject to harmless error analysis cannot be inferred from the language of the holding, nor does the relegation of *Payne* to a footnote indicate that it should be regarded as more than a "historical reference."[82] In short, this part of confession law is dicta.[83]

Justice White, writing the dissenting opinion,[84] disagreed point by point with everything the Chief Justice asserted.[85] First, the dissent maintained that the division of constitutional violations into "trial errors" and "structural defects," a "meaningless dichotomy,"[86] cannot adequately address inconsistent treatment in Supreme Court precedent.[87] Past rulings on harmless error treatment "can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial."[88]

Second, *Payne* held that no amount of evidence was capable of determining "what credit and weight the jury gave to the confession."[89] *Payne* addresses inability to assess the effect on the verdict, not the adequacy of other untainted evidence.[90] Therefore, the dissent

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79. *Id.*
80. *See id.*
81. *Id.*
82. *Id.*
83. *See id.*
84. Justice White was joined by Justices Marshall, Blackmun, and Stevens.
85. *Id.* at 1253-57 (White, J., dissenting).
86. *Id.* at 1254. *But see supra* note 72.
87. Justice White contrasts Kentucky v. Whorton, 441 U.S. 786 (1979), where failure to instruct the jury on presumption of innocence was harmless error, with Jackson v. Virginia, 443 U.S. 307 (1979), where failure to instruct the jury on the reasonable doubt standard was not harmless error. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting). Significantly, both the presumption of innocence and the burden of persuasion are elements of the accusatorial criminal justice system. *See* LAFAVE & ISRAEL, *supra* note 16, § 1.6(b).
88. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting). Justice White argues, in effect, that the admission of a coerced confession is a "structural error," regardless of its evidentiary nature. *See supra* note 72.
89. *Id.* at 1254. It is unclear whether the *Payne* holding is based on the amount of evidence at all. *Payne*, 356 U.S. at 567-68. The *Payne* Court cited two cases for support: Malinski v. New York, 324 U.S. 401 (1944), and Lyons v. Oklahoma, 322 U.S. 596 (1944). *Payne*, 356 U.S. at 568 n.15. *Malinski*, citing *Lyons*, uses the same language as the *Payne* Court. The *Lyons* Court, however, uses clearer language: "Whether or not other evidence in the record is sufficient to justify the general verdict of guilty is *not necessary to consider*." *Lyons*, 322 U.S. at 597 n.1 (citing Bram v. United States, 168 U.S. 532 (1897)) (emphasis added). This seems to better support the dissent's position.
90. *Fulminante*, 111 S. Ct. at 1254. The *Payne* Court based the due process violation on the inability to assess the weight given to the coerced confession when a gen-

asserted that the majority was wrong to suggest that the *Payne* Court might have reached a different result had it been considering a harmless error test requiring proof beyond a reasonable doubt.[91]

Third, the dissent maintained that exclusion of a coerced confession from harmless error analysis is not based on the *Payne* decision alone, but on a "vast body of precedent."[92] The doctrine of stare decisis therefore requires adherence to this historic exclusion.[93]

Finally, conceding that the damaging impact of an illegally admitted confession is an insufficient reason to bar *any* confession, Justice White countered that coerced confessions are so untrustworthy that the truth-seeking function of the trial is threatened.[94] Their use also runs contrary to the underlying accusatorial principle of American criminal law.[95] Use of involuntary confessions suggests an un-American inquisitorial system that gives the police a power which threatens our lives and liberty.[96] In essence, precedent should be adhered to because coerced confessions are "*fundamentally different* from other types of erroneously admitted evidence to which the [*Chapman*] rule has been applied."[97]

ANALYSIS

The ultimate fundamental difference of coerced confessions concerns fundamental fairness to the defendant subjected to outrageous police misconduct. Automatic reversal has been but a remedy for illegal police methods - a deterrence rationale. This decision limits the scope of due process, which no longer vitiates the tainted conviction, but subjects the convictions to the case-by-case, cost-benefit analysis that is harmless error doctrine. Although this new harmless error application logically distorts the integrity of the judicial system, "the life of the law has not been logic: it has been experience."[98] Indeed, reversal is the proper remedy when coerced confessions are gained or used. It is a poor syllogism that reversal must be *automatic*. The process must be fair, "[b]ut justice, though due to the accused, is due to the accuser also."[99]

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eral verdict was returned. *Payne*, 356 U.S. at 568.

91. *Fulminante*, 111 S. Ct. at 1254 (White, J., dissenting).

92. *Id.*

93. *Id.* at 1257. *But see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 & n.1 (1932) (Brandeis, J., dissenting) (the doctrine of stare decisis has only a limited application in the field of constitutional law).

94. *Fulminante*, 111 S. Ct. at 1255-56 (White, J., dissenting).

95. *Id.* at 1256.

96. *Id.* Later in the 1991 term, Justice White joined the members of the *Fulminante* majority to deny that the Court preferred an inquisitorial system of justice. McNeil v. Washington, 111 S. Ct. 2204, 2210 n.2 (1991).

97. *Fulminante*, 111 S. Ct. at 1254 (emphasis added).

98. OLIVER W. HOLMES, THE COMMON LAW 1 (1881).

99. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (Cardozo, J., writing for the majority).

Fundamental Differences

As illustrated by Justice White's comprehensive defense of precedent, three rationales generally emerge which set coerced confessions apart as "fundamentally" different, although all are somewhat intertwined: integrity of the accusatorial system; integrity of the truth-finding function; and deterrence of police misconduct.[100] For the argument to succeed, it is important that the "fundamental difference," if any, be not the latter rationale alone.[101]

Integrity of the Accusatorial System

Justice White argued that the automatic reversal rule protects against more than harm to a defendant.[102] This may be implied by the highest burden of proof in constitutional harmless error cases.[103] A constitutional and procedural safeguard,[104] the accusatorial system maintains the integrity of the judicial system and is supported primarily by the constitutional privilege against self-incrimination.[105]

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100. *E.g.*, Michigan v. Tucker, 417 U.S. 433, 446-50 (1974). These rationales were styled as a "complex of values" underlying the prohibition on the use of coerced confessions by Chief Justice Warren. Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960). *Cf.* Cameron & Lustiger, *supra* note 57, at 122 (Judicial integrity arguments are identified with Professor Kamisar and the Warren Court).

101. *Cf.* Mapp v. Ohio, 367 U.S. 643, 683-84 (1961) (Harlan, J., dissenting) ("The 'coerced confession' rule is certainly not a rule that any illegally obtained statements may not be used in evidence. [W]e are concerned not with an appropriate remedy for what the police have done.").

102. *Fulminante*, 111 S. Ct. at 1256.

103. Fallon & Meltzer, *supra* note 57, at 1772 n.222.

104. In the United Sates, the criminal procedure is accusatorial, requiring the government to accuse and bear the burden of proving the guilt of a person for a crime. Rogers v. Richmond, 365 U.S. 534, 541 (1961). The accusatorial system seeks to keep an even balance in the adversarial process. LAFAVE & ISRAEL, *supra* note 16, § 1.6(b). To maintain a 'fair state-individual balance,' to require the government to 'shoulder the entire load,' . . . our accusatorial system of justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors." Miranda v. Arizona, 384 U.S. 436, 460 (1966). The accusatorial system was developed in reaction to the English Star Chamber inquisitions. Watts v. Indiana, 338 U.S. 49, 54 (1949). The accusatorial system is also a "constitutional commitment to protect fundamental values, such as the presumption of innocence, proof beyond a reasonable doubt, lay adjudication, and the privilege against self-incrimination." Eric D. Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123, 135-36 & nn.41-42 (1983). Establishing an accusatorial system is an underlying goal of criminal process. LAFAVE & ISRAEL, *supra* note 16, § 1.6(b). An inquisitorial system is the antithesis of the accusatorial system. *See Fulminante*, 111 S. Ct. at 1256 (White, J., dissenting). Nevertheless, there are strong inquisitorial elements in American criminal procedure. One attribute of this inquisitorial component is imposing an affirmative obligation on state officials to ensure that procedural policies, such as *harmless error analysis*, will be carried out. Judges are the dominant figures in inquisitorial procedure, *see* Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018 (1974), but the rule of automatic reversal, however, is "decidedly jury orientated." Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 200 (1989).

105. "[T]he American system of criminal prosecution is accusatorial . . . [and] the

This expansive "structural" scope of the Fifth Amendment to the framework of a fair trial[106] would have a broad sweep.[107] The Chief Justice effectively rejects this "transcendental"[108] or "fundamental"[109] error by reference to inconsistent treatment of Fourth and Sixth Amendment violations of similar magnitude and importance and involving the same level of police misconduct.[110]

The jury is an essential part of the accusatorial system.[111] Coerced confessions, as any confession, are different in that they have *inordinate* impact on a jury.[112] Chief Justice Rehnquist agreed that, in some cases, this impact could be devastating.[113] The defendant may have to waive the privilege against self-incrimination to rebut the confession,[114] taking much of the burden off of the prosecution to prove

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Fifth Amendment privilege is its essential mainstay. Governments . . . are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." Malloy v. Hogan, 378 U.S. 1, 7-8 (Brennan, J., writing for the majority). In contrast, European procedure is predominately inquisitorial. LAFAVE & ISRAEL, *supra* note 16, § 1.6(a) n.2.

106. Although admitting it is unclear from the *Fulminante* opinion, Professor Ogletree asserts that the fair trial is the "structure" which structural errors undermine. Ogletree, *supra* note 29, at 164.

107. The privilege against self-incrimination has been given a broad scope over "the natural concern . . . that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." Michigan v. Tucker, 417 U.S. 433, 440-41 (1974). Traditionally, the privilege was only applicable where there was "legal" compulsion, but it has since been extended to "all settings." Miranda v. Arizona, 384 U.S. 436, 467 (1966). The defendant's due process rights extend to the "whole course of proceedings," including the questioning and detention before arraignment. Malinski v. New York, 324 U.S. 401, 416-17 (1944).

108. *Fulminante*, 111 S. Ct. at 1265. "Appeals to judicial integrity have an evanescent quality, in part because they are boundless." Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 258 (1988).

109. *Fulminante*, 111 S. Ct. at 1265.

110. *Fulminante*, at 1265-66. One example is Milton v. Wainwright, 407 U.S. 371, 372 (1972), where the admission of a confession in violation of Massiah v. United States, 377 U.S. 201 (1964), was held to be harmless. *Massiah* held that the Sixth Amendment right to counsel applies to all post indictment interrogations and that statements deliberately elicited from an indicted defendant without counsel are inadmissable. *Id.* at 206. *See generally* Stacy & Dayton, *supra* note 58, at 79, 101-02 & n.88. *Massiah*, like *Miranda*, is a prophylactic rule enforcing constitutional provisions on the states even in the absence of a constitutional violation. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 305 (1985). Although these procedural presumptions may bear directly on the substantive rights of litigants, *see, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965), use of a coerced confession is a per se constitutional violation. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964). The Fifth Amendment, however, has been held to be subject to harmless error analysis. United States v. Hasting, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause). Although the state court reversed on Fifth Amendment grounds, State v. Fulminante, 778 P.2d 602, 626 (Ariz. 1988), *aff'd*, 111 S. Ct. 1246 (1991), the United States Supreme Court talks primarily in Fourteenth Amendment Due Process Clause terms.

111. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting). *See supra* note 104.

112. *Id.*

113. *Id.* at 1266.

114. Ogletree, *supra* note 29, at 166.

its case independent of the accused's "own mouth."[115] Furthermore, "[t]o allow an appellate court to uphold a verdict on its own evaluation of the weight of the evidence would [also] seemingly dispense with the jury's function of passing on the persuasive effect of the prosecutor's case."[116] In fact, reluctance to invade the jury province was the original reason for the automatic reversal rule.[117]

However, the rejection of a harmless error rule for *involuntary* confessions does not depend on any "*unique* evidentiary impact,"[118] as the dissent in *Fulminante* concedes.[119] The impact on the jury cannot set coerced confessions apart as fundamentally different when other types of unconstitutionally admitted confessions have been subject to harmless error treatment.[120] That the Court has refused to find harmless error where other evidence of guilt was overwhelming indicates juror impact cannot be "fundamental" error.[121] The impact on the jury, coupled with a coerced confession's inherent unreliability,[122] is nevertheless recited by the majority as requiring the reviewing court to exercise extreme caution.[123]

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115. Society cannot establish its case against the accused "out of his own mouth." Watts v. Indiana, 338 U.S. 49, 54 (1949). It is unlikely that the government could deny the confession had some effect on the jury since the prosecution was risking reversal by use of the confession. *See supra* text accompanying note 68; *see also* Field, *supra* note 56, at 30 & n.56; *see also, e.g.*, Jackson v. Denno, 378 U.S. 368, 388-89 (1964) (concern about the jury "unconsciously" laying doubts to rest "by resort to the confession" are a substantial threat to "a defendant's constitutional rights to have an involuntary confession entirely disregarded"). Both the privilege against self-incrimination and the accusatorial system prohibit the state from easing its burden of proof in this way. LAFAVE & ISRAEL, *supra* note 16, § 1.6(b).

116. 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, 1180 (1983). The "overwhelming evidence" test that the Court sometimes uses has the effect of denying the defendant or appellant the right to a trial by jury. Goldberg, *supra* note 38, at 431.

117. LAFAVE & ISRAEL, *supra* note 16, § 26.6(a).

118. Chapman v. California, 386 U.S. 18, 43 & n. 1 (1967) (Stewart, J., concurring) (emphasis added).

119. *Fulminante*, 111 S. Ct. at 1255 (White, J., dissenting). Even though it is impossible to know "what credit and weight the jury gave the confession," Payne v. Arkansas, 356 U.S. 560, 568 (1958), jury deliberations are always a mystery to a reviewing judge. Bruce Fein, *Crying Wolf on a Coerced Confession Case*, TEX. LAW., Apr. 22, 1991, at 28. *See generally* Teitelbaum et al., *supra* note 116. The Court bases its judgment on the minds of an "average" jury. Harrington v. California, 395 U.S. 250, 254 (1969). The weight of a confession is for the jury to determine, rejecting either a portion or all. 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 650 (14th ed. 1987). *But see supra* note 115. The *Chapman* Court itself suggested that a showing of harmlessness was possible even if the error was "highly prejudicial." "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Chapman*, 386 U.S. at 24.

120. *Fulminante*, 111 S. Ct. at 1265. *See supra* note 110.

121. *E.g.*, Haynes v. Washington, 373 U.S. 503, 518 (1963).

122. Spano v. New York, 360 U.S. 315, 320 (1959).

123. *Fulminante*, 111 S. Ct. at 1258. These were factors the Court used to find that the use of Fulminante's coerced confession was not harmless.

Integrity of the Truth-Finding Function

The combination of jury impact and the untrustworthiness of coerced confessions is a stronger rationale for setting coerced confessions apart as "fundamentally" different than jury impact alone.[124] The "solemn purpose of endeavoring to ascertain the truth . . . is the *sine qua non* of a fair trial."[125] Coerced confessions are different because they combine persuasiveness with "illusory and deceptive evidence."[126] The evidence is persuasive, since it is out of the defendant's own mouth,[127] and illusory and deceptive because coercion "not only breaks the will to conceal or lie, but may even break the will to stand by the truth."[128]

However, inherent unreliability does not set coerced confessions apart as fundamentally different.[129] The deprivation of due process does not turn on the truth or falsity of the confession.[130] Although the confession is coerced, it may be reliable[131] or there may be such other overwhelming untainted evidence of guilt that the veracity of the co-

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124. *Id.* at 1256 (White, J., dissenting). *See also* W. LAFAVE & J. ISRAEL, *supra* note 16, § 26.6(d).

125. Estes v. Texas, 381 U.S. 532, 540 (1965). Much of a fair trial is not involved with truth determination. The prosecution's burden of proof, constitutional protections against unreasonable search and seizure and self-incrimination sometimes actually hinder this search for truth. These are instead safeguards against state coercion. Blumenson, *supra* note 104, at 133-34 & n.39.

126. Stein v. New York, 346 U.S. 156, 192 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368 (1964). The *Jackson* Court ruled that a jury cannot reliably find a confession voluntary where it also determines its truthfulness, as had been allowed by New York procedure. *Id.* at 391. The *Jackson* Court also distinguished the *Stein* Court's exclusion of coerced confessions solely on the basis of reliability. *Id.* at 383. The exclusion is to be based on improper police conduct as well. *Id.* at 386.

127. Jackson v. Denno, 378 U.S. 368, 388 (1964).

128. Watts v. Indiana, 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring) (The Court referred to physical coercion as unreliable. Later cases recognized mental duress as coercion as well, e.g., Blackburn v. Alabama, 361 U.S. 199, 206 (1960)). This is well illustrated by Brown v. Mississippi, 297 U.S. 278 (1936), where the Court found that "as the whippings progressed and were repeated [the defendants] changed or adjusted their confession in all particulars of detail so as to conform to the demand of their torturers." *Id.* at 282.

129. *See* LAFAVE & ISRAEL, *supra* note 16, § 26.6(d). The test of voluntariness as a test for a confession's admissability had long been an "alternative statement" that it was reliable. Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 742-43 (1963).

130. *Fulminante*, 111 S. Ct. at 1256 (White, J., dissenting).

131. *E.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944) (the otherwise reliable confession was excluded because of police misconduct). Coerced confessions "are inadmissable under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." Rochin v. California, 342 U.S. 165, 173 (1952). The *Rochin* Court used but a *comparison* with coerced confessions to reverse a conviction based on evidence obtained through a forced stomach pumping. Such "conduct that shocks the conscience" is "too close to the rack and the screw" to pass constitutional muster. *Id.* at 172.

erced confession alone would not make any fundamental difference.[132] The fundamental difference is not the unreliability of coerced confessions but the official misbehavior by which these confessions arrive into court.[133]

Police Methods

The rule of automatic reversal of coerced confessions was a reaction to illegal police methods. More immediate and practical than concerns about systemic integrity, this response also protects fundamental values.[134] Fear of unacceptable police methods is the fundamental difference between coerced confessions and other erroneously admitted evidence. Since our criminal law is enforced through an accusatorial, not inquisitorial system, the police cannot wring out confessions and otherwise disregard the law.[135] The integrity of the accusatorial system is obviously not the foremost value protected by automatic reversal, though. Even were our system inquisitorial, letting police "wring out confessions" would still be unacceptable. The coerced confession cases[136] and their historical setting[137] suggest outrageous police

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132. *E.g.*, Malinski v. New York, 324 U.S. 401, 402 (1944) (the defendant made three separate prior confessions that were voluntary).

133. It "does not turn alone on their inherent untrustworthiness" but also that "the police must obey the law while enforcing the law". Spano v. New York, 360 U.S. 315, 320 (1959).

134. LAFAVE & ISRAEL, *supra* note 16, § 26.6(d).

135. *Fulminante*, 111 S. Ct. at 1256 (White, J., dissenting). Professor Kamisar argues that merely shifting the interrogation from the judge to the police has effected not only a *de facto* inquisitorial system but also increased the incentive to coerce the defendant, since "legal" compulsion is prohibited in court. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIME, 1, 19-30 (A.E. Dick Howard ed., 1965) (general argument for having defense counsel present for police interrogation). *See supra* note 104.

136. The cases that Justice Whittaker relied on for support of his holding in Payne v. Arkansas, 356 U.S. 560 (1958), (Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1944); and Lyons v. Oklahoma, 322 U.S. 596 (1944)) all dealt with improper police methods. *Payne*, 356 U.S. at 568 n.15. *Cf.* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (all Fourth Amendment exclusion of illegal evidence since 1949 based on police deterrence).

137. In 1930, in the first of the national commissions, a major investigation and report by the Wickersham Commission, NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931), concluded that torture was widespread in criminal law enforcement. Stein v. New York, 346 U.S. 156, 201 (1953) (Frankfurter, J., dissenting); *see also* Kamisar, *supra* note 129, at 733 (in the Chicago of 1932, using rubber hoses, clubs, and telephone books were the prevailing "interrogation methods"). These abuses were especially striking to Justice Hugo Black, who wrote the opinion both in *Chapman* and in Ashcraft v. Tennessee, 322 U.S. 143 (1944), where the conviction was overturned in order to deter improper police conduct. This opinion, written during the Second World War, clearly reflected a national intolerance of the sort of police state power against which we were struggling. *Cf.* Chambers v. Florida, 309 U.S. 227, 236-38 (1940). Black himself, as a young county prosecutor, discovered that police were obtaining confessions through use of their own private torture chamber. John P. Frank, *The New Court, Forgetting Old Values*, LEGAL TIMES, July 1, 1991 at 25 (Frank was co-counsel to petitioner in Miranda v. Arizona, 384 U.S. 436 (1966)). Impressions formed during World War Two shaped much of this attitude. *See* Goldstein, *supra* note 104, at 1011-12. Justice Black wrote in 1943:

misconduct is what has really set these confessions apart as fundamentally different. Due process forbids police from using interrogation techniques "offensive to a civilized system of justice,"[138] and it is such conduct that makes involuntary confessions still inadmissible.[139] It is the forbidden methods used to extract the confessions which the automatic reversal protected against, not some transcendent accusatorial truth-finding function that harmless error analysis could as easily resolve.[140] The distinction is subtle: "Men are not hanged for stealing horses but that horses may not be stolen."[141] Although this "police methods" argument was the dissent's most persuasive, the Court rejected this automatic reversal rationale, as well, by reference to inconsistent treatment of similarly reprehensible government misconduct resulting in violations of the Fourth and Sixth Amendments.[142] An illegal police methods rationale is an infirm basis, anyway. This reduces the constitutional significance of the automatic reversal to merely a judicially-created remedy. Under a deterrence rationale, an automatic reversal's deterrent efficacy is at best an assumption,[143] and should be open to a harmless error cost-benefit analysis.[144] This Court is more

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> The Constitution . . . stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There has been and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes . . . and wring from them confessions by physical or mental torture . . . [but] America will not have that kind of government.

Ashcraft, 322 U.S. at 155.

138. Miller v. Fenton, 474 U.S. 104, 109 (1985) (voluntariness of confession is a question of law, not fact).

139. Colorado v. Connelly, 479 U.S. 157 (1986) (absent police conduct causally related to the coerced confession there is no due process violation).

140. *Contra* Rose v. Clark, 478 U.S. 570, 587 (1986) (Stevens, J., concurring). Justice Harlan also argued against a police deterrence rationale. Mapp v. Ohio, 367 U.S. 643, 684-85 (1961) (Harlan, J., dissenting). Harlan asserted that the use of an involuntary confession violated a defendant's *procedural* right not to have his trial defense rendered an "empty formality." The violation occurs when the confession is admitted into evidence. *Id. But see* Stacy & Dayton, *supra* note 58, at 102-04. "The only good reason for overturning a conviction wherever a coerced confession is introduced . . . is to be found in the "police methods" rationale which now underlies the constitutional ban against coerced confessions." Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219, 240 (1962).

141. THE COMPLETE WORKS OF GEORGE SAVILE, FIRST MARQUESS OF HALIFAX 229 (Walter A. Raleigh ed., 1912).

142. *Fulminante*, 111 S. Ct. at 1265-66. Again the Court cited *Milton* as an example, adding that this conclusion was justified "especially" where "there are no allegations of physical violence on behalf of police." *Id. But see supra* notes 16, 128.

143. There is a similar problem with basing the Fourth Amendment exclusionary rule on preventing police illegality. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 416-18 (1971) (Burger, J., dissenting) (exclusion is not effective deterrence); Meltzer, *supra* note 108, at 267 n.98 (solid empirical proof or disproof of the rule's efficacy does not exist and is unlikely ever to be found).

144. *Cf.* United States v. Calandra, 414 U.S. 338, 348 (1974) (As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.) The deterrence rationale divorced the exclusionary rule from the Fourth Amendment, allowing cost benefit analysis. *See* United States v. Leon, 468 U.S. 897, 939-40 (1984) (Brennan, J.,

concerned with deterring the criminal than deterring the police.

Limitation of Due Process

The Court's holding assumes that the benefits of excluding coerced confessions from trial are limited to deterrence,[145] something subject to cost-benefit harmless error treatment. However, the *Payne* rule of automatic exclusion was not a mere remedy but part and parcel of the Fourteenth Amendment, since the due process violation *vitiated* the conviction.[146] The *Fulminante* Court determined that fundamental unfairness in coercing confessions may be harmless.[147] Admission of the illegal evidence does not violate due process since "trial errors," unlike "structural defects," do not bear on the fundamental fairness of the trial[148] and so further use of the confession is harmless unless it contributes to the verdict.[149] Reversal is no longer a due process concern and any "fundamental differences" are no longer relevant. The *Fulminante* case suggests that the Court is not limiting due process with fine legal points but with much broader strokes.

The arguments of the majority and dissent collapse into a basic difference in fundamental criminal justice philosophy which falls between due process and "tough on crime."[150] It is therefore less a question of *what* fundamental values than of *whose* fundamental values.[151]

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dissenting). Justice *White* wrote the Court's opinion in *Leon* that allowed a "good faith" exception to the erstwhile constitutionally compelled exclusion. *Id.* at 926.

145. *See supra* note 142.

146. *Fulminante*, 111 S. Ct. at 1253 (White, J., dissenting) (citing Payne v. Arkansas, 356 U.S. 560, 568 (1958)).

147. *See Fulminante*, 111 S. Ct. at 1265. Harmless error analysis has previously been applied to a violation of the Due Process Clause in Hopper v. Evans, 456 U.S. 605 (1982), a capital case.

148. *See supra* text accompanying note 77.

149. *Cf.* Arnold H. Loewy, *Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 939 (1989) (If the only constitutional wrong inheres in using the evidence, the Court has no business considering concepts of deterrence. Conversely, when obtaining evidence is the constitutional wrong, exclusion should be subject to a cost-benefit analysis.). *But see supra* note 140.

150. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964) (tension between two mutually exclusive competing value systems: Due Process Model and Crime Control Model); *see also* Goldstein, *supra* note 104, at 1012. Until *Fulminante* "constitutional safeguards against police tactics such as [coerced confessions were] . . . a check upon government—to guarantee that government shall remain the servant and not the master of us all." William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U.L.Q. 279, 280 (1963). Today it seems, as it was once before,

> [o]ur dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.

U.S. v. Garrson 291 F. 646, 649 (S.D.N.Y. 1923) (Learned Hand, J., writing for the majority). Learned Hand was a leader in the movement that established harmless error doctrine in America. Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting).

151. Ogletree argues that Chief Justice Rehnquist "looks only to effective law en-

The Chief Justice has been making speeches for years calling for limits to the rights of defendants to escape conviction on technicalities.[152] For decades Rehnquist has championed this harmless error rule.[153] During the past year, virtually every criminal case of any significance was decided in favor of the government.[154] The Supreme Court has long operated under the principle that it will decide constitutional questions only when essential to deciding the case before it.[155] In *Fulminante*, there was no need for the Court to address the harmless error issue at all. The Court went out of its way to reach the question.[156] Whether for judicial efficiency or for better state court effectiveness in controlling crime, the result of this procedural ruling is a restriction on federal jurisdiction with the consequent reduction of a criminal defendant's substantive rights.[157] The trend, which this

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forcement and crime control." Ogletree, *supra* note 29, at 170 & nn.113-14. *See also* Charles H. Whitebread, *The Burger Court's Counter-revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 473 (1985) (Burger Court's "fixation" on affirming guilt through fact-specific review). In a "spirited dissent" and his last hurrah on the Court, Justice Marshall berated the present majority: "Power, not reason, is the new currency of this Court's decisionmaking . . . the majority's radical reconstruction of the rules for overturning this Court's decisions . . . [is but a] campaign to resurrect yesterday's 'spirited dissents.' " Payne v. Tennessee, 111 S. Ct. 2597, 2619, 2625 (1991).

152. *The Loud Majority*, THE ECONOMIST, July 6, 1991 at 15, 15. The Chief Justice seems to be addressing a real erosion in public confidence in the system that exclusionary rules engender. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 182 (3rd ed. 1984). "Violent crime often generates . . . a sense of fear, frustration, and outrage . . . it is clear that a pervasive feeling of fear and outrage has been building in this country, almost without interruption, *since the mid-1960s*." YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 23-24 (7th ed. 1990) (emphasis added).

153. *High Court's Crime Offensive: In the End Who Will Be Hurt?*, L.A. TIMES, Aug. 5, 1991, at B4 [hereinafter *Crime Offensive*]. In 1952 William Rehnquist was a Supreme Court law clerk to Justice Jackson, who wrote for the Court in Stein v. New York, 346 U.S. 156 (1953). A researcher recently found a memorandum from Rehnquist among Justice Jackson's papers in the Library of Congress about that case. The clerk urged the Court to adopt a "harmless error" rule that would permit use of the defendant's confessions since the three were "guilty as sin." Linda Greenhouse, *Washington Talk: Of Rehnquist's Mission, And Patience to Match*, N.Y. TIMES, May 1, 1991, at A18. Justice Jackson finished the opinion: "We are not willing to discredit constitutional doctrines for protection of the innocent by making them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein*, 346 U.S. at 197. This decision was based, not on the ground of harmless error, but on the grounds that there was no constitutional error. *Id.* at 193-94. The Court affirmed the conviction and sentence to death. *Id.* at 197.

154. Ira Mickenberg, *Criminal Rulings Granted the State Broad New Power*, THE NAT'L L.J., Aug. 19, 1991 at 510.

155. Three Affiliated Tribes of Fort Berthold v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984).

156. *See supra* note 29. The Court could have first determined, for instance, that the confession was involuntary and would not be harmless if harmless error analysis were to be applied. This would avoid the question of its application vel non.

157. The federal district courts receive roughly nine thousand state prisoner post-conviction applications each year. Relief is granted on less than four percent of these petitions. State proceedings already account for ninety-nine percent of all criminal prosecutions and ninety-five percent of the felony prosecutions. YALE KAMISAR ET AL., *supra* note 152, at 2, 20. The state courts, however, often provide *greater* protection to the criminal defendant. *Id.* at 48 & n.*b*.

Court continues, is to insulate state criminal convictions from the federal courts through harmless error use and thereby leave it to the state judges to vindicate a defendant's federal rights.[158]

Repercussions

Police

Some argue that *Fulminante* may provide greater protection against police extraction of involuntary confessions than before. Police tactics would be subject to closer scrutiny since finding a confession involuntary, no longer at the high cost of an automatic reversal, would not "prevent" such a finding from ever being made.[159] The police still cannot count on the admission of illegal evidence nor its later harmlessness.[160] One deterrent is restitutionary—it works to prevent a state from profiting from its own wrong. The state does not profit from its wrong when erroneously admitted evidence does not affect the result of the trial.[161] The deterrent impact is on the prosecutor, trying to obtain a conviction, who rarely has control over the police who are responsible.[162] The automatic reversal would be inefficient.[163] Of course, others strongly disagree, fearing the police will resort to the "third degree"[164] and take a gamble later in court.[165] They would not have to worry about due process, only harmlessness. The greater the

158. *See* Whitebread, *supra* note 151, at 473-74. *See also* Michigan v. Long, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) ("the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard").

159. Daniel J. Capra, *Involuntary Confession and Harmless Error*, N.Y. L.J., May 10, 1991 at 3.

160. *See* Fein, *supra* note 119. If anything, trial court judges' handling of coerced confessions determines police behavior, not a belated appellate court ruling of harmlessness. Bybee, *supra* note 50, at 150-51; *see also* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 182 (3rd ed. 1984); Robert Weisberg, *Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 838 & n.20

161. People v. Parham, 384 P.2d 1001, 1005 (Cal. 1963) (Traynor, J., writing for the majority), *cert. denied*, 377 U.S. 945 (1964).

162. Cameron & Lustiger, *supra* note 57, at 127.

163. Stacy & Dayton, *supra* note 58.

164. "[I]f law officers learn they can coerce without risk . . . provided only that other evidence has been procured on which a conviction can be sustained, police . . . will take the . . . path of the third degree." Stein v. New York, 346 U.S. 156, 203 (1953) (Frankfurter, J., dissenting). "The Court has sent police a message . . . that coercing confessions may sometimes pay, at least if you are not too obvious about it. The message to trial judges is that admitting an arguably involuntary confession will not automatically blow the whole case." Stuart Taylor, Jr., *Devaluing Liberty*, MANHATTAN LAW., July/Aug., 1991 at 15. "The Court's ruling will encourage the more brutal propensities of the police . . . they have almost nothing to loose and everything to gain by beating a confession out of a suspect." *Harmless Error*, 252 THE NATION 471 (1991).

165. *Crime Offensive*, *supra* note 153. A common example of such a gamble is the allowable use of statements obtained in violation of *Miranda* for purposes other than against the accused in the prosecution's case, such as to impeach a defendant's direct testimony at trial. Harris v. New York, 401 U.S. 222, 224 (1971). Another incentive to omit the *Miranda* warnings would be to fish for leads to admissible evidence. However, with coerced confessions, "*any* criminal trial use against a defendant of his *involuntary* statement" is prohibited. Mincey v. Arizona, 437 U.S. 385, 398 (1978).

defendant's apparent guilt and his consequent need for protection, the greater benefit and efficiency to save his tainted conviction.

Prosecution

Prosecutorial misconduct is also affected by this new harmless error application. Some argue that harmless error treatment generally encourages violations, thereby affecting the integrity of the system.[166] Ironically, prosecutorial misconduct was one evil that harmless error rules were originally meant to correct.[167] The prosecution may not worry about using coerced confessions, but just further substantiation by separate evidence. The prosecution could be encouraged to fortify other evidence by introducing a coerced confession in order to guarantee a conviction. The conviction would then be defended on review by the independent or overwhelming evidence.[168] This argues strongly for automatic reversal: since the prejudice is so clear, there is no necessity for case-by-case evaluation, and since the prosecution is directly responsible, an automatic reversal would be both efficient and warranted.[169]

On the other hand, an automatic reversal rule does nothing to undo the harm of coerced confessions where the harm is this sort of prosecutorial abuse,[170] since a reversal for prosecutorial misconduct is of no practical benefit to the defendant when the error has not influenced the result. Though *Chapman* was in itself a federal "supervision" of prosecutorial misconduct,[171] "the Due Process Clause is not a code of ethics for prosecutors."[172] "The touchstone of due process

166. Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 475 (1983). "Harmless error is swarming around the 7th Circuit like bees . . . . [T]he courts may have to act to correct a presently alarming situation." U.S. v. Jackson, 429 F.2d 1368, 1373 (7th Cir. 1970) ([Retired Justice] Clark, J., writing for the majority). "[R]ebuking prosecutors repeatedly [for violating defendants' constitutional rights] has little effect, no doubt because of the harmless error rule, which . . . precludes an effective remedy for prosecutorial misconduct." U.S. v. Pallais, 921 F.2d 684 (7th Cir. 1990) (Posner, J., writing for the majority).

167. *See supra* text accompanying note 40.

168. Bernard D. Meltzer, *Involuntary Confessions: The Allocation of Responsibility between Judge and Jury*, 21 U. CHI. L. REV. 317, 354 (1954). *See also infra* note 179, *supra* notes 25, 56 and accompanying texts.

169. *Cf.* Strickland v. Washington, 466 U.S. 668, 692 (1984) (actual or constructive denial of Sixth Amendment right to assistance of counsel altogether is legally presumed to result in prejudice).

170. *See* Stacy & Dayton, *supra* note 58, at 103. Neither can other harms to the defendant wrought by the coercion be undone: loss of privacy; abusive police conduct; nor the defendant's humiliation at the time of the coercion. *Id.*

171. A California state constitutional provision allowing the prosecution to comment on the failure of a defendant to testify was subsequently invalidated by Griffin v. California, 380 U.S. 609 (1965). The Court held that this was not harmless error in Chapman v. California, 386 U.S. 18 (1967). *Chapman* is also important for its broad exertion of federal judicial power over state courts. Saltzburg, *supra* note 50, at 1014.

172. Mabry v. Johnson, 467 U.S. 504, 511 (1984) (prosecutor's proposed plea bargain does not create constitutional right to specific enforcement). The Court has held that the courts of appeals cannot require reversal in order to discipline prosecutors, if

analysis of prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[173]

Courts

The *Fulminante* ruling could also corrupt the courts. Sordid cases like *Fulminante* suggest that even if the appellate judges think the coerced confession should have been excluded, they will rule the admission harmless if they think the defendant is really guilty.[174] On the other hand, courts denied harmless error analysis use may undermine the constitutional rules themselves when faced with convictions they want to preserve.[175] The problem is that although the Court in *Fulminante* did apply the *Chapman* standard of harmless error analysis,[176] the Court does not always do so.[177] The Court often uses an "overwhelming evidence"[178] test instead of the *Chapman* "contribution to the verdict" test.[179] The danger is that where the violation of the rule is harmless, such as where the coerced confession is admitted for "good measure," this "overwhelming evidence" standard will not result in reversal. The constitutional rule against admitting coerced con-

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doing so avoids harmless error application. United States v. Hasting, 461 U.S. 499 (1983).

173. Smith v. Phillips, 455 U.S. 209, 219 (1982) (requiring new trial for prosecutorial misconduct alone is error). Former Chief Justice Burger felt prosecutorial misconduct might be dealt with best by professional disciplinary action. United States v. Hasting, 461 U.S. 499, 506 n.5 (1983).

174. *Harmless Error*, 252 THE NATION 471 (1991). "The one factor common to a great number of opinions affirming criminal convictions on harmless error grounds is the staunch belief of the reviewing courts in the guilt of the appellants . . . ." Francis A. Allen, *A Serendipitous Trek Through the Advance Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 332 (1985); *see also* Cameron & Lustiger, *supra* note 57, at 139.

175. Field, *supra* note 56, at 61 n.126. "To require automatic reversal for such harmless error could not help but generate pressure to find that the unreasonable police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial." People v. Parham, 384 P.2d 1001, 1005 (Cal. 1963) (Traynor, J., writing for the majority), *cert. denied*, 377 U.S. 945 (1964).

176. *Fulminante*, 111 S. Ct. at 1257.

177. *E.g.*, Milton v. Wainwright, 407 U.S. 371, 372-73 (1972). *See also* Field, *supra* note 56, at 21-23.

178. The Court can be expected to use this test in the future. *See supra* note 25.

179. *See, e.g.*, Yates v. Evatt, 111 S. Ct. 1884 (1991):

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Id. at 1893; *see also Review*, *supra* note 60, at 1200 & n. 2694 (1979). The Seventh Circuit, for example, typically requires "other evidence of guilt to be 'overwhelming' before concluding a constitutional error was harmless . . . . Nevertheless, even when the evidence was not overwhelming, [the Seventh Circuit has] found the error harmless beyond a reasonable doubt when convinced that the impact of the objectionable material was negligible." United States v. Hernandez, 1991 U.S. App. LEXIS 26932 at 26 (1991). For cases holding that harmless error analysis is appropriate in light of overwhelming evidence of the defendant's guilt, see State v. Fulminante, 778 P.2d 602, 633 n.4 (Ariz. 1988), *aff'd*, 111 S. Ct. 1246 (1991).

fessions is effectively overridden and the jury's function is trumped.[180] However, if the judges are not lax, harmless error treatment of an illegally admitted confession with an otherwise airtight conviction might be the least socially expensive alternative.[181]

CONCLUSION

The bottom line is that the conviction was reversed and Oreste Fulminante will get a new trial. Justice White summed up: "[One should not] overreact to that decision . . . [which] after all was . . . simply an extension of the *Chapman* rule . . . . I don't think this portends any great trend."[182] At least one trend is an increase in harmless error analysis, the overall effects of which are to diminish the rights of an individual in proportion to the strength of the government's case. Another constitutional right is now weighed against efficiency and a federal court "loophole"[183] is closed.

The real fundamental difference of harmless constitutional error treatment of coerced confessions was actually fear of the police. Today it is fear of the criminal. The harmless error equation is that automatic reversal of child murderer convictions are a substantial cost to society and the infringement on the petitioner's constitutional rights are less important than affirming the conviction.

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180. *See* Field, *supra* note 56, at 20. *See also* Monaghan, *supra* note 104, at 204. The "overwhelming evidence" test also has the effect of denying the defendant or appellant the right to a trial by jury. Goldberg, *supra* note 38, at 431. Protection of the jury's function was the rationale for automatic reversal before the harmless error reforms. *See supra* text accompanying note 39.

181. *See* U.S. v. Mechanik, 475 U.S. 66, 72 (1986) (automatic reversal is substantial cost to society).

182. Justice Byron White, Remarks at the Tenth Circuit Judicial Conference (July 18, 1991) (available through the *Federal News Service* on LEXIS). Congress has already reacted to this decision. A bill in the House Judiciary Committee would bar harmless error treatment of a coerced confession admitted into evidence. H.R. 3371, 102nd Cong., 1st Sess. § 901 (1991).

183. *See supra* note 153.