University of Arkansas at Little Rock Law Review

Volume 14 | Issue 3 Article 6

1992

Criminal Procedure—Harmless Error—Coerced Confession Is No Longer Grounds for Automatic Reversal of a Trial. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

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NOTES

CRIMINAL PROCEDURE—HARMLESS ERROR—COERCED CONFESSION IS NO LONGER GROUNDS FOR AUTOMATIC REVERSAL OF A TRIAL. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

On September 14, 1982, Oreste Fulminante reported to the Mesa (Arizona) Police Department that his 11-year-old stepdaughter, Jeneane Hunt, was missing.[1] Jeneane was under his care while her mother, Fulminante's wife, was in the hospital.[2] Jeneane's body was found two days later in the desert east of Mesa.[3] She had two close-range, large caliber gunshot wounds on each side of her head and an unidentifiable strip of cloth or rope tied loosely around her neck.[4] Her body had decomposed to the point that it was impossible to determine whether she had been sexually molested.[5]

Fulminante became a suspect in Jeneane's murder because his statements concerning Jeneane's disappearance and his relationship with her were inconsistent.[6] He left Arizona for New Jersey after investigations failed to produce sufficient evidence to charge him with the crime.[7] He was then convicted in New Jersey of an unrelated federal

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1. Arizona v. Fulminate, 111 S. Ct. 1246, 1250 (1991).
2. *Id.*
3. *Id.*
4. *Id.* Jeneane's mother testified at trial that the ligature looked like a piece of towel material. Crime lab reports indicated that it could have been used for nonfatal choking. State v. Fulminante, 778 P.2d 602, 620 (Ariz. 1988).
5. 111 S. Ct. at 1250. Crime lab tests performed for sperm and semen were negative. This finding was not unexpected considering how long the victim had been dead. 778 P.2d at 605.
6. 111 S. Ct. at 1250. Fulminante claimed that he had taught Jeneane how to use firearms and that he had a good relationship with her. Jeneane's mother said that the two got along poorly and that Fulminante had never taught Jeneane to use firearms. 778 P.2d at 606.
7. 111 S. Ct. at 1250. Circumstantial evidence included the fact that Fulminante was caring for Jeneane when she disappeared, that motorcycle tracks were detected at the scene, and that she was shot with a large caliber gun. It was undisputed that Fulminante owned a motorcycle. Police discovered that Fulminante had purchased an extra barrel for his .357 revolver from a gun shop in

crime and was incarcerated at the Ray Brook Federal Correctional Institute in New York.[8]

While at Ray Brook, Fulminante met Anthony Sarivola, an inmate with an organized crime background who had become a paid informant for the Federal Bureau of Investigation (FBI).[9] After the two became friends, Sarivola heard a rumor that Fulminante was suspected of killing Jeneane.[10] Sarivola confronted him and the two discussed the incident several times.[11] Fulminante repeatedly denied any involvement, but he told conflicting stories.[12] Sarivola told an FBI agent about the rumor and about Fulminante's inconsistent accounts.[13] The agent told Sarivola to find out more.[14]

The other prisoners began to treat Fulminante roughly after the rumor that he was a child killer became widespread.[15] Sarivola offered to use his organized crime connections to put a stop to this activity, but on one condition: that Fulminante tell him the truth about the murder.[16] This time Fulminante said that he did kill Jeneane.[17] He did not stop with a bare admission; he gave vivid details, expressing dislike for the girl.[18] He told Sarivola that he took Jeneane to the desert; where he had sexually molested her, choked her, made her get down on her knees

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Mesa the day before Jeneane disappeared. 778 P.2d at 606.

8. 111 S. Ct. at 1250. After the police learned of the gun purchase in Mesa, they discovered that Fulminante had a prior criminal record, including the felony of impairing the morals of a child. On October 28, 1982, he was arrested in New Jersey for possession of firearms by a felon. He was convicted and served a sentence in the federal prison in Springfield, Missouri. After he was released from Springfield, he was arrested on yet another firearms charge for which he was convicted and sent to Ray Brook. 778 P.2d at 606.

9. *Id.*

10. *Id.*

11. *Id.*

12. 111 S. Ct. at 1250. For example, once he said that Jeneane had been killed by bikers looking for drugs, and later he said he did not know what had happened to her. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Sarivola testified at trial that he believed Fulminante's life was in danger; stating that Fulminante would "have went out of prison horizontally." 111 S. Ct. at 1262 (quoting App. 28).

16. 111 S. Ct. at 1250. The conversation took place one evening in October 1983, as Sarivola and Fulminante walked around the prison track. Sarivola told Fulminante that he knew Fulminante was getting some rough treatment from the other prisoners. He volunteered his protection but told Fulminante, "You have to tell me about it, you know, for me to give you any help." *Id.* (quoting App. 83).

17. *Id.*

18. State v. Fulminante, 778 P.2d at 621-22. Fulminante told Sarivola he "hated" Jeneane, calling her a "little fucking bitch." He described making her perform oral sex, torturing her, choking her, and making her beg. *Id.*

and beg for her life, and then shot her twice in the head.[19]

After his release from Ray Brook in May 1984, Fulminante made a second confession to Sarivola's fiance, Donna.[20] He again described the crime in graphic detail, making lewd and obscene references to Jeneane and expressing hatred and disgust for her.[21]

On September 4, 1984, Fulminante was indicted in Arizona for Jeneane's murder.[22] Before trial, he moved to suppress both confessions, alleging that his confession to Sarivola was coerced and that his confession to Donna was "fruit of the poisonous tree."[23] The trial court found both confessions voluntary and denied the motion.[24] Both confessions were introduced at trial. Fulminante was convicted and sentenced to death.[25]

Fulminante's appeal alleged that the confessions were coerced,[26] and that their admission at trial violated his Fourteenth Amendment right to due process of law[27] and his Fifth Amendment right against self-incrimination.[28] The Arizona Supreme Court agreed that the first confession was coerced, but originally held that its admission at trial was harmless error.[29] Upon motion for reconsideration, the court deter-

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19. 111 S. Ct. at 1250.

20. *Id.* Donna and Sarivola picked up Fulminante at the bus terminal after he was released from prison. When Donna asked him if he had friends or relatives he wished to see, he told her that he could not go back to his home in Arizona because he had killed his stepdaughter there. 778 P.2d at 606.

21. 778 P.2d at 621-22. His statements to Donna were similar to those made to Sarivola. He made another pronouncement of ill will toward the girl, and told Donna, "I want to go piss on [Jeneane's] grave." *Id.*

22. 111 S. Ct. at 1250.

23. *Id.* at 1250-51. Otherwise admissible evidence can be "fruit of the poisonous tree" if illegally obtained evidence led to its discovery. If the evidence is directly attributable to the illegal information, then it is inadmissible. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

24. 111 S. Ct. at 1251.

25. *Id.*

26. *Id.*

27. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28. U.S. CONST. amend. V provides: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself."

29. 778 P.2d at 609-11. Confessions are considered prima facie involuntary in Arizona. The state bears the burden of proof that the confession was voluntarily given. For the findings of the trial court to withstand appellate review, the trial record must contain sufficient evidence that the state carried its burden of proof. At Fulminante's trial, the state argued that Fulminante's confession was voluntary for the following reasons: (1) that he did not express fear of the other prisoners; (2) that he did not seek Sarivola's protection; and (3) that he made the statement in the course of a casual conversation. The Arizona Supreme Court ruled that this was "insufficient to create a prima facie establishment of voluntariness by a preponderance of the evidence." It held

mined that United States Supreme Court precedent precluded harmless error analysis for coerced confessions.[30] The Arizona Supreme Court then ordered that Fulminante be retried without the use of the first confession.[31]

The Supreme Court granted certiorari "because of differing views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless-error analysis."[32] The Court

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that the trial court erred in allowing the confession to be presented to the jury. *Id.* at 609.

The court upheld the conviction, however, because it determined that the error was harmless. It held that the confession to Donna—which *was* admissible—established Fulminante's guilt. It found that circumstantial evidence corroborated the confession to Donna; therefore, the jury would have had the same evidence to convict Fulminante without the confession to Sarivola. *Id.* at 610-11. *See also supra* notes 7, 20, 21 and accompanying text.

30. 111 S. Ct. at 1251. Fulminante asserted in his motion for reconsideration that the court's harmless error analysis erroneously relied upon cases that involved violation of *Miranda* rights. 778 P.2d at 626. These rights include those that come under the Fifth Amendment right to counsel. Fifth Amendment protections have been defined as the right of the accused to be informed that he has the right to remain silent, that any statement he makes may be used against him in court, and that he has a right to counsel. *See* U.S. CONST. amend. VI, Miranda v. Arizona, 384 U.S. 436 (1966).

Fulminante argued that the court should have looked to cases involving violations of the Fifth Amendment right against self-incrimination by physical or mental coercion. He contended that while harmless error may apply to confessions obtained in the absence of counsel, it clearly did not apply to those that were obtained by physical or mental coercion.

Upon motion for reconsideration, the Arizona Supreme Court agreed that "there is an unbroken line of authority supporting the rule that although a receipt of a confession obtained in violation of *Miranda* may be harmless, the harmless error doctrine does not apply to *coerced* confessions." 161, 778 P.2d at 626 (emphasis added).

Of the precedents cited in the supplemental opinion, three plainly stated that the harmless error analysis does not apply to coerced confessions. They are Mincey v. Arizona, 437 U.S. 385, 398 (1978); Jackson v. Denno, 378 U.S. 368, 376 (1964); and Payne v. Arkansas, 356 U.S. 560, 568 (1954). 778 P.2d at 627.

31. 111 S. Ct. at 1251. Having determined that the confession to Donna was not "fruit of the poisonous tree," the Arizona Supreme Court concluded that it could be introduced at retrial. The court made this determination because of the length of time between the two statements, because it happened during casual conversation, and because it took place when Fulminante no longer needed Sarivola's protection. 778 P.2d at 611. The court adhered to this decision upon motion for reconsideration. 778 P.2d at 627. This determination was not challenged upon appeal to the United States Supreme Court. 111 S. Ct. 1251, n.1.

32. 111 S. Ct. at 1251. *See supra* note 30 and accompanying text for cases holding that a coerced confession can never be harmless error. *But see* United States v. Carter, 804 F.2d 487 (8th Cir. 1986) (harmless error to admit defendant's statement that was made when he was misled into thinking he was being questioned for assault when he was actually being questioned for murder); Meade v. Cox, 438 F.2d 323, 325 (4th Cir. 1971) (voluntariness of confession was disputed in the record, but its admission was harmless error); Moore v. Follette, 425 F.2d 925, 928 (2d Cir. 1970) (confession taken while the defendant was experiencing withdrawal symptoms involuntary, but its admission at trial was harmless error because he made a second confession that was corroborated by evidence and covered every element of the crime). For state court decisions in

held that the confession was coerced,[33] that coerced confessions were subject to harmless error analysis,[34] and that, in this case, the error was not harmless.[35] Oreste Fulminante will be retried in Arizona for Jeneane Hunt's murder without the use of his confession to Anthony Sarivola.[36] *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

At early English common law, confessions were admitted at trial no matter how they were obtained.[37] Voluntariness was never an issue; even confessions extracted by torture were presented without question.[38] The law began to change late in the eighteenth century.[39] The principle emerged that confessions prompted by "improper inducements," whether threat or promise, were unreliable and should be excluded from trial.[40]

The early American Supreme Court followed this lead, basing its rules of evidence on this English inducement doctrine.[41] In the late nineteenth century the Court forged a new direction, establishing a

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accord, see State v. Castaneda, 724 P.2d 1, 6 (Ariz. 1986); People v. Gibson, 440 N.E.2d 339 (Ill. App. Ct. 1982); People v. Ferkins, 497 N.Y.S.2d 159 (N.Y. App. Div. 1986); (all holding that admission of involuntary confessions harmless error because of the cumulative nature of the statements).

See also Stauffer v. United States, 474 U.S. 1063 (1986) ("The Supreme Court has not squarely addressed the issue of whether admission of an involuntary confession may be harmless error since its landmark decision in [*Chapman v. California*] that a federal constitutional error can be held harmless.").

33. 111 S. Ct. at 1252.

34. *Id.* at 1265.

35. *Id.* at 1258.

36. *Id.* at 1261.

37. 3 JOHN H. WIGMORE, EVIDENCE § 818 at 292 (Chadbourn rev. 1970). *See also* Note, *Developments in the Law: Confessions*, 79 HARV L. REV. 935, 954 (1966) [hereinafter Note].

38. *See* E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 14-16, 18 (1949).

39. *Id.*

40. 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2(a), at 439-40 (Criminal Practice Series 1984) [hereinafter LAFAVE]. For an overview of the development of the law of confessions from early England to modern America see WIGMORE, *supra* note 37, §§ 817-26.

41. *E.g.*, Hopt v. Utah, 110 U.S. 574, 585 (1884). The Court said the presumption that a statement is reliable is removed

> [w]hen the confession appears to have been made either in consequence of inducements . . . held out by one in authority . . . because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. at 585.

constitutional standard for admitting confessions in the federal courts.[42] This new standard was based on the Fifth Amendment privilege against self-incrimination.[43] The determinative question was whether the confession had been voluntarily made.[44] "Improper inducement" was a factor in this determination rather than the test itself.[45]

The Supreme Court's first review of a confession used in a state court was the 1936 case *Brown v. Mississippi*.[46] Because stare decisis at that time prohibited application of the Fifth Amendment to the states,[47] the Court adopted a different standard. The Court in *Brown* declared that confessions made as a result of physical torture were inadmissible under the Due Process Clause of the Fourteenth Amendment.[48] Physically forcing a confession was viewed as a violation of the basic standards of fairness implied by the Due Process Clause.[49] In subsequent cases, the Court expanded its definition of due process violations, including such variables as psychological coercion[50] and fear of harm from outside sources.[51]

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42. Bram v. United States, 168 U.S. 532 (1897).

43. *Id.* at 542.

44. *See* Ziang Sun Wan v. United States, 266 U.S. 1, 3 (1924).

45. OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT at 10-30 (1973). *See also* LAFAVE, *supra* note 41, § 6.2, at 441.

46. 297 U.S. 278 (1936).

47. *See* Twining v. New Jersey, 211 U.S. 78 (1908). The Court in *Twining* rejected applying the Fifth Amendment privilege against self-incrimination to the states through the Fourteenth Amendment Due Process Clause. *Id.* at 99-100. *Twining* was overruled in Malloy v. Hogan, 378 U.S. 1 (1964). The Fifth Amendment is now a basis for excluding coerced confessions in state courts. 378 U.S. at 3. *See also* DAVID M. NISSMAN ET AL., LAW OF CONFESSIONS § 2:13, at 55-56 (1985) [hereinafter NISSMAN].

48. 297 U.S. at 285-86. The Court distinguished compulsion by torture from compulsion to testify as a witness. It held that the state was limited in its freedom to establish its criminal procedure policies by the federal constitutional requirement of due process of law. *Id.* at 285.

49. *Id.* at 286-87. The defendants in *Brown* were repeatedly hung to a tree until they became choked, then stripped and beaten with a belt buckle. *Id.* at 281-82. The Court noted that "the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." *Id.* at 282. It stated that "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286.

50. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition."); Chambers v. Florida, 309 U.S. 227 (1940) (confession coerced when obtained after persistent interrogation during a week of incommunicado detention, ending with an all-night examination producing the incriminating statements).

51. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (confession coerced when police offered to protect the defendant from an angry mob outside the jailhouse door if he would confess).

Today the issue of voluntariness is a question of federal law, requiring the Supreme Court to make an independent evaluation of the record.[52] The admissibility of the confession is judged by the "totality of the circumstances."[53] The conduct of the state official, the circumstances of the interrogation, and the effect on the particular person are weighed together.[54] Determination is on a case-by-case basis.[55]

Modern cases reflect shifting emphases.[56] Some opinions have focused on whether or not the government official acted improperly in obtaining the confession.[57] Others have focused almost exclusively on whether or not the accused had the requisite state of mind to freely confess.[58] The 1986 Supreme Court decision, *Colorado v. Connelly*,[59] seems to have put to rest any question that a lack of free will *alone* can render a confession involuntary. While free will is a "significant fac-

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52. Haynes v. Washington, 373 U.S. 503, 515 (1963).

53. 111 S. Ct. at 1251-52. *See also* Culombe v. Connecticut, 367 U.S. 568, 603 (1961); NISSMAN, *supra* note 47, § 1:9, at 17-18.

54. *See* LAFAVE, *supra* note 40, § 6.2(c), at 444-49.

55. *Id.*

56. *See* Note, *supra* note 37, at 962-63 "[T]he Court has encountered great difficulties in deciding just what process is due at interrogation . . . . The vacuum has been filled by a great variety of attempts by lower federal courts, state supreme courts, and commentators to state the requirement of due process in this context."). *See also* Michael E. Gehring, Note, Colorado v. Connelly: *The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary*, 33 VILL. L. REV. 895 (1988), concluding that the confusion resulted from ambiguous language in Blackburn v. Alabama, 361 U.S. 199 (1960). In *Blackburn* the Court held that an insane person's confession was inadmissible. It concluded that our law enforcement system should not operate so as to take advantage of a person in this condition. It did not specify whether a lack of rational volition alone could render a confession inadmissible, or if the existence of police brutality is necessary. Subsequent decisions interpreted *Blackburn* to mean that the mere absence of free will could render a confession inadmissible. *See infra* note 58.

57. *See, e.g.*, Stein v. New York, 346 U.S. 156, 182 (1953) (When such outrageous conduct is present, "there is no need to weigh or measure its effects on the will of the victim."); Crooker v. California, 357 U.S. 433 (1958) (police did not use or threaten violence and provided prisoner with basic comforts which were factors considered in finding the confession voluntary). *See also* Gehring, *supra* note 56, at 905 nn. 52-53; NISSMAN, *supra* note 47, § 1:10, at 18-20 (collecting cases).

58. *See* Townsend v. Sain, 372 U.S. 293, 309 (1963) ("[I]n *Blackburn* . . . we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers."). *See* Gehring, *supra* note 56, at 905 n.51. *See* NISSMAN, *supra* note 47, § 1:10.

59. 479 U.S. 157 (1986). The defendant in *Connelly* approached a police officer, waived his *Miranda* rights, and confessed to a murder. While in custody, the defendant became confused and told police that "voices" had told him to come to Denver and confess. It was later discovered that he was a chronic schizophrenic and was in a psychotic episode at the time of the confession. The Colorado Supreme Court, relying on *Townsend v. Sain*, ruled the confession involuntary because it was not a produce of unfettered free will. *Id.* at 160-61. The Supreme Court reversed, holding that a lack of free will alone does not render a confession involuntary. Police misconduct must be present. *Id.* at 164, 167.

tor," the Court declared in *Connelly* that police misconduct is a "necessary predicate" for a finding of coercion.[60]

The early English courts that were so lenient in admitting coerced confessions were extremely strict in excluding anything that was considered an error.[61] These courts followed the Exchequer rule of appellate review which presumed that any erroneously admitted evidence was prejudicial and required automatic reversal if error was found.[62] Not even the smallest errors escaped scrutiny.[63] Retrials were the rule rather than the exception, and litigation "seemed to survive until the parties expired."[64]

The early American courts adopted the Exchequer rule and adhered to it even after the English courts abolished it.[65] The Americans applied the Exchequer rule to an even broader range of errors than did their English ancestors.[66] Retrials were ordered for extremely trivial matters; for example, one case was reversed because the word "the" was omitted before the words "peace and dignity" in an indictment.[67] Cases were often tried several times over technical errors.[68] Thus, American appellate courts were criticized as "impregnable citadels of technicality."[69] Reform began early in the twentieth century as states enacted harmless error legislation.[70] Today every state in the Union has its own harmless error statute or rule.[71]

Two lines of error analysis have developed from these statutes.[72] These lines evolved to address the type of right violated by the error.[73]

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60. *Id.*

61. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980); LAFAVE, *supra* note 40, § 26.6(a), at 257.

62. LAFAVE, *supra* note 40, § 26.6(a), at 257. *See also* WIGMORE, *supra* note 37, § 21, at 367; ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 5-12 (1970).

63. *See* Goldberg, *supra* note 61, at 422; LAFAVE, *supra* note 40, § 26.6(a), at 257.

64. Goldberg, *supra* note 61, at 422.

65. *See* LAFAVE, *supra* note 40, § 26.6(a), at 257. *See also* WIGMORE, *supra* note 37, § 21, at 888.

66. *See* LAFAVE, *supra* note 40, § 26.6(a), at 257. *See also* Goldberg, *supra* note 61, at 422.

67. State v. Campbell, 109 S.W. 706 (Mo. 1908).

68. Goldberg, *supra* note 61, at 422; TRAYNOR, *supra* note 62, at 13-17.

69. Hon. Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925).

70. LAFAVE, *supra* note 40, § 26.6(a), at 257-58.

71. *See* Goldberg, *supra* note 61, at 422. *See also* LAFAVE, *supra* note 40, § 26.6(a), at 258; *Chapman v. California*, 386 U.S. 18, 22 (1967).

72. LAFAVE, *supra* note 40, § 26.6(a), at 259-60.

73. *Id.*

If the error is committed within the judicial process itself, the error is analyzed according to the substance of the right.[74] The question is whether the error deprived the defendant of the protection inherent in the substantive right.[75] If the answer is "no," the error is considered a mere technicality.[76] These "structure of the proceeding" errors, sometimes called structural defects, include such errors as improper venue,[77] a biased judge,[78] and the deprivation of right to counsel.[79] These errors are usually not framed as harmless error issues.[80]

The second category of errors occurs during the presentation of evidence to the jury.[81] The development of harmless error tests for evidence-related errors has been described as a "wayward course,"[82] marked by "twisting and turning,"[83] "innovation and regression, instability and uncertainty."[84] Its history is probably most easily traced by looking at the evolution of the tests used, rather than at the cases.

The most prevalent test early in this century was the "correct result" test.[85] This test asks whether, after considering the admissible evidence, the jury's verdict is clearly correct.[86] The rationale of the "correct result" test is that there is no harm done if the defendant would have been convicted anyway.[87] Critics complained that the test supplanted the role of the jury.[88] The Supreme Court eventually agreed,

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74. *See, e.g.*, Long v. State, 141 N.E. 691, 692 (Ohio 1923) (applying a state statute providing that "[a] new trial, after a verdict of conviction, may be granted on the application of the defendant for . . . causes affecting materially his substantial rights").

75. *See* Reynolds v. Commonwealth, 112 S.E. 707 (Va. 1922) (unnecessary resummoning of the same jurors on a new venire after motion to quash for irregularities in the writs is harmless error. The court stated that the defendant might have been prejudiced if venire had been quashed for grounds affecting the competency of the jurors). *Id.* at 709-10. *See also Traynor*, *supra* note 62, at 57.

76. *See* People v. Moore, 221 P. 225 (Cal. Dist. Ct. App. 1923) (excusing juror without grounds did not affect defendant's right to a fair trial).

77. *See, e.g.*, Stapleton v. State, 565 S.W.2d 532 (Tex. Crim. App. 1978); Commonwealth v. Taylor, 393 A.2d. 929 (Pa. Super. Ct. 1928).

78. LAFAVE, *supra* note 40, § 26.6 at 88-89 (Supp. 1991).

79. LAFAVE, *supra* note 40, § 26.6(a), at 259-60.

80. *Id.*

81. *Id.* at 260.

82. TRAYNOR, *supra* note 62, at 13.

83. LAFAVE, *supra* note 40, § 26.6(a), at 261.

84. Stephen A. Saltzberg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 998 (1973).

85. LAFAVE, *supra* note 40, § 26.6(b), at 262; TRAYNOR, *supra* note 62, at 18-22.

86. TRAYNOR, *supra* note 62, at 18-22; LAFAVE, *supra* note 40, § 26.6(b), at 262.

87. LAFAVE, *supra* note 40, § 26.6(b), at 262.

88. *Id.*

rejecting this test in *Kotteakos v. United States*.[89] The Court stated "it is not the appellate court's function to determine guilt or innocence . . . . Those judgments are exclusively for the jury . . . ."[90] Therefore, the Court opted for an "effect on the judgment test."[91] The proper question would not be whether the jury was

> right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong in the minds of other men, not in one's own mind, in the total setting.[92]

Until the 1960's, there was only one certainty in the harmless error doctrine. It did not apply to constitutional violations.[93] A constitutional violation carried a presumption of prejudice and mandated automatic reversal.[94] In 1963 *Fahy v. Connecticut*[95] foreshadowed a change that was to come four years later. *Fahy* involved an unconstitutional search.[96] Though the Court did not reach the harmless error issue, in dicta it indicated a possible future application.[97] The dissenters went a step further and declared that the doctrine should apply.[98]

The landmark decision of *Chapman v. California*[99] expanded the reasoning of *Fahy* and removed the traditional exemption from constitutional violations.[100] The Court applied a test which was an extended

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89. 328 U.S. 750 (1946).

90. *Id.* at 763.

91. *Id.* at 766. *See also* LAFAVE, *supra* note 40, § 26.6(b), at 262.

92. 328 U.S. at 764.

93. *See* Robert W. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in Federal Courts*, 3 VILL. L. REV. 48, 67 (1957). *See also* Goldberg, *supra* note 61, at 423; TRAYNOR, *supra* note 62, at 55; LAFAVE, *supra* note 40, § 26.6(c), at 270.

94. LAFAVE, *supra* note 41, § 26.6(c), at 270. *See generally* Goldberg, *supra* note 61.

95. 375 U.S. 85 (1963).

96. *Id.* at 86.

97. *Id. See also* LAFAVE, *supra* note 40, § 26.6(e), at 278-79.

98. 375 U.S. at 94 (Harlan, J., dissenting).

99. 386 U.S. 18 (1967).

100. *Compare Chapman*, 386 U.S. at 23-24 *with* Fahy v. Connecticut, 375 U.S. at 86-87. The *Chapman* case generated strong criticism. Critics said that the application of harmless error to constitutional violations insidiously usurped basic constitutional guarantees. *See* Goldberg, *supra* note 61, at 433. Goldberg called the test a "constitutional sneak thief." *Id.* at 421. He contended that "[t]he doctrine has created appellate factfinding which denies the constitutionally guaranteed right to trial by jury [and] erodes constitutional principles at all levels of the criminal justice system from prosecution to Supreme Court review without ever affording an opportunity for a hearing on the merits of the principle eroded." *Id.* at 427. He maintained that we pay a "terrible symbolic price" by allowing the courts, traditionally guardians of constitutional rights, to declare such violations harmless. *Id.* at 442.

version of the *Kotteakos* "effect on the judgment" test.[101] The *Chapman* analysis divided constitutional violations into two categories—those that can be analyzed for harmless error and those that cannot.[102] If the violation falls into the second category, reversal is automatic.[103] If not, the question is whether, beyond a reasonable doubt, the error influenced the verdict.[104]

Chapman did not provide a bright-line rule or an exhaustive list for the automatic reversal category. Three errors were cited as examples of those that could never be harmless.[105] They were deprivation of counsel throughout a trial,[106] impartial judge,[107] and coerced confessions.[108] The first two errors fell within the "structural defect" category[109] but a coerced confession constituted an evidential error.[110] Though evidential errors are usually considered conducive to harmless error analysis, it is generally assumed that the Court in *Chapman* put coerced confessions in the automatic reversal category because of the extraordinary impact a confession has on the outcome of a trial.[111]

In *Milton v. Wainwright*[112] the Court declared a confession obtained in violation of the Sixth Amendment right to counsel was harmless error. Seeds of uncertainty grew as judges debated whether all confessions could now be analyzed for harmless error or whether the constitutional right violated provided a distinction.[113]

It was in response to this uncertainty that the Supreme Court granted certiorari for *Arizona v. Fulminante*.[114] The Court took a novel approach in deciding this case. Rather than ruling on the single issue of whether Fulminante's conviction should be reversed, the Court approached the decision as the resolution of three issues. These issues

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101. LAFAVE, *supra* note 40, § 26.6(b)(c), at 263-72.

102. 386 U.S. at 22-23. *See also* WIGMORE, *supra* note 37, § 863 n.1; Goldberg, *supra* note 61, at 425.

103. 386 U.S. at 22-23.

104. *Id.* at 24. *See also* LAFAVE, *supra* note 41, § 26.6(b), at 262.

105. 386 U.S. at 23 n.8.

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

107. *See* Tumey v. Ohio, 273 U.S. 510 (1927).

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

109. 111 S. Ct. at 1260.

110. *See* LAFAVE, *supra* note 40, § 26.6(d), at 276-77.

111. *Id. See generally* WIGMORE, *supra* note 37, § 863.

112. 407 U.S. 371 (1972).

113. LAFAVE, *supra* note 40, § 26.6(e), at 280-81; *see also* WIGMORE, *supra* note 37, § 863, at 632-34 n.1. *Compare Fulminante* 778 P.2d at 626-27 *with* 778 P.2d at 628-29. *See supra* note 30 and accompanying text.

114. 111 S. Ct. at 1251.

were: (1) whether Fulminante's confession was coerced; (2) whether harmless error applies to coerced confessions; and if so (3) whether the admission of Fulminante's confession at trial was harmless error. The issues were considered separately, with different coalitions forming a majority for each.[115] The Court ultimately held that Fulminante's confession was coerced,[116] that harmless error does apply to coerced confessions,[117] and that the error in this case was not harmless.[118]

Justice White delivered the opinion of the Court on the coercion issue.[119] Applying the "totality of the circumstances" test, the Court focused on the following facts: (1) Fulminante was in danger of physical harm from the other inmates; (2) Sarivola was aware of the rough treatment Fulminante was getting; (3) Sarivola used this knowledge when he offered to protect Fulminante if he would tell the truth; and (4) Fulminante confessed in response to this offer.[120] The Court determined that "a credible threat of violence is sufficient" and that "coercion can be mental as well as physical."[121] Drawing an analogy to *Payne v. Arkansas*,[122] the Court illustrated how coercion is found when this threat comes from outside sources and the government agent uses it to prompt a confession.[123] The Supreme Court reversed the conviction in *Payne*, finding that the defendant had confessed because he

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115. *Id.* at 1249. Justices White, Blackmun, Stevens, Marshall, and Scalia formed the majority on the issue of coercion. Chief Justice Rehnquist, joined by Justices O'Connor, Souter, Kennedy, and Scalia, were the majority on the application of harmless error to coerced confessions. The Justices who found coercion, joined by Justice Kennedy, applied the *Chapman* harmless error test to the case, and found the error not harmless. *Id.* Though they were ultimately put to the task of applying the *Chapman* test, four of these Justices (Justices White, Marshall, Blackmun, and Stevens) actually voted against the application of harmless error to coerced confession. They filed a vigorous dissent on this issue. *Id.* at 1253-57.

Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy dissented on the issue of coercion. Joined by Justice Scalia, the Chief Justice and Justice O'Connor further asserted that even if the confession were coerced, its admission was harmless error. *Id.* at 1261-63, 1266.

Justice Souter voted only on the application of harmless error to coerced confessions. He did not join either opinion on coercion or on the application of harmless error to this case. *Id.* at 1249, 1261.

116. 111 S. Ct. at 1252.

117. *Id.* at 1266.

118. *Id.* at 1261.

119. *Id.* at 1250.

120. *Id.* at 1252-53.

121. *Id.* at 1253.

122. 356 U.S. 560 (1958).

123. 111 S. Ct. at 1253. In *Payne*, a policeman told the murder suspect (Payne) that there were 30 or 40 folks outside the jailhouse door. If Payne would confess, the policeman said, he might be able to help. Payne confessed and the confession was admitted at trial. He was convicted and sentenced to death. 356 U.S. 560, 565 n.10.

feared that he would be harmed by the mob without a conditional offer of police protection.[124] Though the policeman himself had not threatened the defendant, he had nevertheless forced the confession by using a threatening situation to prompt the statement.[125] Therefore, the defendant's confession was coerced and should not have been admitted at trial.[126] Like the policeman in *Payne*, the Court said, Sarivola manipulated the confession from Fulminante, playing upon Fulminante's fear of the other prisoners.[127] Sarivola used his offer of protection to prompt Fulminante to confess.[128] Therefore, Fulminante's will was overborne in a way similar to coercion in *Payne*.[129]

Chief Justice Rehnquist pronounced for the Court that harmless error analysis applies to coerced confessions.[130] The Court emphasized that a coerced confession is an evidential error.[131] It stressed the traditional distinction between evidential errors and the structural defect errors—that evidential errors can be weighed with the other evidence to determine harmlessness while structural defect errors cannot.[132] Further, the Court pointed out that the test had already been used in earlier cases for confessions violating the Sixth Amendment.[133] Therefore, it saw no reason for treating a Fifth or Fourteenth Amendment violation differently from a Sixth Amendment violation.[134] It stated that all of these carry potential for equally serious government misconduct, and all have the same evidentiary impact.[135] The Court concluded that "[i]t is thus impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment."[136]

The Court dismissed *Chapman*'s reference to *Payne* as dicta, call-

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124. 356 U.S. at 567-69.
125. *Id.* at 566.
126. *Id.* at 568.
127. 111 S. Ct. at 1253.
128. *Id.*
129. *Id.*
130. *Id.* at 1263.
131. *Id.* at 1265.
132. *Id.*
133. *Id.* The case relied on by the Court, Milton v. Wainwright, 407 U.S. 371 (1972), contained facts very similar to *Fulminante*. The defendant made one confession to an undercover policeman in the absence of counsel after his Sixth Amendment right to counsel had attached, and the confession was admitted at trial. He also made three other confessions, however, before the right had attached. 407 U.S. at 373-75.
134. 111 S. Ct. at 1266.
135. *Id.*
136. *Id.*

ing it an historical reference in a footnote.[137] It further emphasized that *Payne* was a pre-*Chapman* decision, rejecting a more lenient test than that in *Chapman*.[138] Thus, the Court did not view *Fulminante* as a reversal of precedent.[139] It acknowledged the potential evidentiary impact of confessions but rejected this as a reason for eschewing the harmless error test.[140] The Court asserted that the test could be self-regulating; if a confession proved "devastating to a defendant . . . a reviewing court will conclude in such a case that its admission was not harmless error."[141]

Justice White wrote the opinion of the Court determining that the admission of Fulminante's confession was not harmless error.[142] Using the *Chapman* test, the Court examined the evidence against Fulminante without the confession to Sarivola.[143] It found that the circumstantial evidence available would not have enabled the State to prosecute Fulminate.[144] Examining the confession to Donna, it discovered elements that could render the confession less credible if presented alone.[145] The Court concluded that admission of the first confession could have led to the admission of other evidence prejudicial to Fulminante and that the confession affected the sentencing phase of the trial.[146] Therefore, the error was not harmless and Fulminante should

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137. *Id.* at 1264-65.
138. *Id.* at 1264.
139. *Id.* at 1264-65.
140. *Id.* at 1266.
141. *Id.*
142. *Id.* at 1257.
143. *Id.* at 1257-58.
144. *Id.* at 1258.
145. *Id.* at 1258-59. These elements included: (1) Donna and Fulminante had just met when he confessed to her; the jury might find this fact questionable without knowing of the prior confession to Sarivola; (2) Donna did not report the confession to authorities; in fact, Sarivola did not report it until over a year later; (3) Donna said that Fulminante "disgusted" her, yet she took a second trip with him; (4) some of the details of the second confession were not corroborated by evidence; (5) other details were only corroborated by the first confession; and (6) the jury might think that Donna had a motive to lie, since Sarivola received government benefits for this information and because both she and Sarivola were eventually placed in the federal Witness Protection Program. *Id.*
146. *Id.* at 1260. The admissibility of aggravating circumstances was governed by the rules of evidence applicable to criminal trials. The judge's finding that the murder was heinous, cruel, and depraved beyond a reasonable doubt was based on evidence that could only be found in the two confessions. He relied heavily on Fulminante's statement that Fulminante had made Jeneane beg for her life. He stated that Fulminante's vulgar references to Jeneane and his vivid description of the murder depicted "a man who was bragging and relishing the crime." The Court concluded that the trial judge could not have reached these conclusions without the confession, therefore the confession affected the sentencing phase of the trial. *Id.*

be retried without the confession to Sarivola.[147]

Chief Justice Rehnquist wrote for the dissenters on the coercion issue.[148] In this dissent, "totality of the circumstances" test found a different focus. The Chief Justice stressed the following facts: (1) Fulminante stipulated that he was not afraid of the other inmates and he did not seek Sarivola's protection; (2) Fulminante did not know that Sarivola was an FBI agent; thus there was no intimidating official interrogation; (3) Fulminante was free at all times to leave Sarivola's company; (4) Sarivola only asked for the truth; he did not threaten Fulminante or demand a confession; and (5) Fulminante had been in prison before and could presumably protect himself.[149] The Chief Justice found no fault in Sarivola's conduct; he did not believe that Sarivola intimidated Fulminante.[150] Therefore, the confession was not coerced.[151] The Chief Justice also stated in his dissent that even if the confession was coerced, its admission at trial was harmless error.[152] He agreed with the harmless error analysis of the Arizona Supreme Court in its first opinion.[153]

Justice White wrote for the dissenters on the application of harmless error.[154] He argued that the majority's decision to apply the doctrine reversed well-established precedent and subverted basic constitutional protections.[155] He adhered to the traditional view that the potential impact of a confession on the outcome of a trial should keep a confession that is erroneously obtained in the automatic reversal category.[156]

The way *Fulminante* was decided may provoke as much debate as

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147. *Id.* at 1261.
148. *Id.*
149. *Id.* at 1262-63.
150. *Id.* at 1262.
151. *Id.* at 1261-63.
152. *Id.* at 1261.
153. *Id.* at 1266.
154. *Id.* at 1253.
155. *Id.* at 1257.
156. *Id.* at 1255. Justice White strongly disagreed with the Chief Justice that there is no meaningful distinction between confessions violating the Sixth Amendment and those violating the Fifth or Fourteenth Amendments. He pointed out that a confession violating the Sixth Amendment is not necessarily a *coerced* confession in the same sense as one violating the Fifth or Fourteenth Amendment. He contended that there is a difference between a confession from a person who has been physically or mentally forced or intimidated into admitting guilt; and one from a person who is merely deprived of counsel. He asserted that the underlying values of the constitutional protections inherent in the Fifth and Fourteenth Amendment are compromised when the penalty for violating them is lowered to the level of a harmless error. *Id.* at 1256.

its result. The issue-focused approach[157] the Court used could be perceived as judicial activism or overreaching.[158] This approach may well be a trend. Two other recent cases decided before *Fulminante* also departed from traditional structure in order to reach issues. In 1989 the Court in *Pennsylvania v. Union Gas*[159] asked a question of statutory interpretation which if answered in the affirmative would lead to a broader constitutional question.[160] The Court decided both issues,[161] with those Justices who answered the statutory question in the negative nevertheless reaching the broad constitutional question.[162] The significance of *Union Gas* as stare decisis cannot be overlooked. Justice White cited that case as authority for his coalition to reach the issue of the application of harmless error to Fulminante's conviction even though they had voted *against* applying the doctrine to coerced confessions.[163]

In 1988 *Honig v. Doe*[164] illustrated another slant on the Court's willingness to reach for issues. In *Honig* the Justices hotly debated whether they could pass the threshold issue of mootness to reach the merits of the case.[165] The Court did reach the merits, with the dissent accusing the majority of relaxing the traditional mootness doctrine.[166] In his concurring opinion, Chief Justice Rehnquist boldly declared that the doctrine *should* be relaxed or even abandoned, to enable the Court to reach more issues and to provide clearer guidelines to lower courts.[167]

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157. *See supra* note 115 and accompanying text.

158. A former clerk for Justice Stevens labelled the issue-focused process used to decide *Fulminante* as "vote cycling." He argued that it has a "peculiar abstract quality" that leads to "perverse results." Liman, *'Fulminante': Vote Cycling and the Court*, 205 N.Y.L.J. 2, col. 2 (April 3, 1991). Liman asserted that Fulminante's conviction would not have been reversed had the case been framed merely as whether his conviction should be reversed. *Id.* at col. 1.

159. 491 U.S. 1 (1989).

160. *Id.* at 5. The questions presented were: (1) whether the purpose of the statute was to abrogate the state's Eleventh Amendment immunity and (2) whether Congress had the power to do so under the Commerce Clause.

161. *Id.*

162. *Id.* at 45, 57.

163. 111 S. Ct. at 1257. *See supra* note 115 and accompanying text.

164. 484 U.S. 305 (1988).

165. *Id.* at 317-23, 338-42.

166. *Id.* at 336.

167. *Id.* at 330. The Chief Justice stated that he wrote separately to express his desire to reconsider the doctrine of mootness. He said,

> [t]o me the unique and valuable ability of this Court to decide a case—we are, at present, the only Article III court which can decide a question in such a way to bind all other courts—is a sufficient reason either to abandon the doctrine of mootness alto-

The Court used a similar rationale in framing *Fulminante* as the resolution of issues. It sought to resolve uncertainties in the state and federal courts concerning the harmless error doctrine and coerced confessions.[168]

Fulminante does provide answers, both implicitly and explicitly. First, the definition of coercion has probably been construed as liberally as the current Court will construe it. Justice White prefaced his opinion with "the question is a close one."[169] Chief Justice Rehnquist complained bitterly in dissent that "[i]n concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases."[170] As *Colorado v. Connelly*[171] marked the end of free will as an independent determination for coercion, so *Fulminante* marks the minimum standard for finding coercive government conduct.

Furthermore, *Connelly* did not inject as much objectivity into the "totality of the circumstances" test as many had hoped. Though *Connelly* requires that government misconduct be present to find coercion, *Fulminante* illustrates that the test is still highly subjective. The differences are subtle, but close examination reveals that the majority's main concern was Fulminante's weakness,[172] and the dissent's main concern was Sarivola's conduct.[173] The shifting emphasis which was observed among courts before *Connelly*[174] still remains, even within one court on one case. The "totality of the circumstances" test, being fact-based, will probably always carry the potential of producing as many viewpoints per case as there are judges deciding the case. An objective focus within this type of test may be an elusive goal.

Nevertheless, *Fulminante* did accomplish its main goal. It settles

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gether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a way as the dissent has accused the majority of doing here.

Id. at 332.

168. 111 S. Ct. at 1251.

169. *Id.* at 1252.

170. *Id.* at 1263.

171. 479 U.S. 157 (1986). *See supra* notes 59-63 and accompanying text.

172. 111 S. Ct. at 1252-53. The majority emphasized the elements of mental coercion, citing several cases that had found confessions involuntary on these grounds. In addition to their heavy reliance on an analogy to *Payne*, they quoted *Blackburn v. Alabama* and cited several famous cases on mental coercion. *Id.* at 1253.

173. *Id.* at 1261. The dissent's only references to Fulminante's state of mind were that he had stipulated that he was not afraid and that he had been in prison before. *Id.* at 1262-63 (Rehnquist, C.J., dissenting).

174. *See supra* notes 59-61 and accompanying text.

uncertainties about the application of harmless error to coerced confessions. It provides further guidance with a clear illustration of the *Chapman* test. This test, if properly applied, does not stop at the existence of untainted evidence against a defendant. The majority did not stop there in *Fulminante*. They considered how this evidence would look to the jury without the tainted confession.[175] This portion of the case should provide practical guidance for future decisions.

The troubling aspects of this case are the questions that it raises. Will police now feel free to force information out of suspects since coercion is no longer grounds for automatic reversal? *Fulminate* is already being regarded as a dangerous deregulation of police power.[176] This fear may have a foundation. Because of the way the Court structured the tests for coercion and for harmless error, it appears that a confession extracted by police brutality could nevertheless be "harmless" if the other evidence could pass the *Chapman* test. Once the determination of coercion has been made, the existence of brutality is removed from consideration. The determination of harmless error has nothing to do with how the confession is obtained. The *Chapman* test examines the *untainted* evidence to see if it can stand on its own. Therefore, it is the strength of other evidence, not the egregiousness of government conduct, that determines whether or not the defendant will be retried. This structure does seem, at least in theory, to remove a deterrent to police misconduct by making automatic reversal of a trial more difficult.

Another prevalent view is that making automatic reversal more difficult will result in justice being better served, with fewer of the guilty being freed on technicalities.[177] However, *Fulminante* illustrates

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175. 111 S. Ct. at 1258-61.

176. For the argument that this decision will seriously impede due process for the criminally accused, see *A Supreme Court Retreat*, THE WASH. POST, March 29, 1991, at A20, col. ___; *The Supreme Court's Harmful Error*, THE N.Y. TIMES, March 29, 1991, at A22, col. 1; *Justices Open Pandora's Box; Out Comes the 'Harmless' Forced Confession*, L.A. TIMES, March 28, 1991, at B6, col. 1. *See also* Samuel Pillsbury, *Perspective on the Supreme Court: The Fifth Amendment Takes Another Blow*, L.A. TIMES, March 29, 1991, at B7, col. 1. (Samuel Pillsbury is a professor at Loyola Law School).

177. Two prominent proponents of the justice argument are Chief Justice Rehnquist and Arizona's Supreme Court Justice Cameron. They argue that harmless error analysis can bring fairness to cases where coercion is minimal. In *Fulminante* Chief Justice Rehnquist emphasized that he could see no reason for treating a confession violating the Fifth or Fourteenth Amendment differently than one violating the Sixth Amendment, *especially when the coercion did not involve police violence*. 111 S. Ct. at 1266 (emphasis added). Justice Cameron expressed the same view when he dissented in the Arizona Supreme Court's second opinion. 778 P.2d at 633.

that a person who is guilty of a heinous crime and succumbs to minimal "coercion" could nevertheless escape through the harmless error loophole if the untainted evidence were impeachable. Therefore, the question arises: Could luck rather than justice prevail under an analysis based on *Fulminante*?

The final question is whether *Fulminante* opens the door for other constitutional violations to be considered "harmless." The majority opinion put great emphasis on the types of errors that could be harmless and seemed to leave violations that it deemed basic to a fair trial in the automatic reversal category.[178] Great stress was placed on the strength of the other evidence against a defendant.[179] Using this emphasis, one could rationalize the adoption of harmless error to other constitutional violations.[180] One could conclude that the strength of evidence against a defendant makes an error harmless regardless of the nature of the error. Thus, although the door is probably not wide open to the adoption of harmless error to all violations, it may indeed be "cracked." The possibility of "structural defects" slipping through such a crack could logically exist with such a heavy emphasis being placed on evidence. After *Fulminante*, the "constitutional sneak thief"[181] could conceivably strike again.

Lynne Trulock Ravellette

Justice Cameron would like to eliminate automatic reversal altogether and replace it with a test similar to the familiar "Hand formula" for negligence. 'For the "Hand formula" see United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). In determining whether a case should be reversed, Justice Cameron would balance the gravity of the government misconduct with the gravity of the crime in a particular case. His thesis is that automatic reversal's alleged benefits (deterrence of police misconduct and preservation of judicial integrity) have been outweighed by its costs to society (freeing the guilty, diversion of the fact-finding process from the truth, and damaging the law). *See generally J. Cameron & R. Lustiger*, 101 F.R.D. 109 (1984). Justice Cameron stated in *State v. Fulminante* that the harmless error rule was a good alternative to the balancing approach. He argued that it would accomplish the same result—keeping guilty defendants from being freed on technicalities. 778 P.2d at 634 (Cameron, J., dissenting).

178. 111 S. Ct. at 1264-66.

179. *Id.* at 1265.

180. The dissent in *Fulminante* pointed out that these constitutional violations are presently immune to harmless error, regardless of the strength of evidence against a defendant—directed verdict, absence of counsel at trial, and denial of a public trial. *Id.* at 1256-57. It could be argued that the ability of the evidence to stand alone renders any of these errors "harmless." As Justice White stated, "[the value of these guarantees] may be intangible and unprovable in any case." *Id.* at 1257. The step from rationalizing the "harmlessness" of a coerced confession to rendering these violations harmless does not appear to be a big one if the truth-seeking function is allowed to eclipse the underlying constitutional protection.

181. Goldberg, *supra* note 61, at 442. *See supra* note 100.