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# People v. Cahill, California and Coerced Confessions—Harmless Evidentiary Bombshells

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BOMBSHELLS**

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**I. INTRODUCTION**

The United States Supreme Court's decision in *Chapman v. California*<sup>1</sup> held that certain constitutional errors may be harmless beyond a reasonable doubt—"harmless errors"—thus not requiring an automatic reversal of a criminal conviction.<sup>2</sup> *Chapman* spawned an enormous progeny of cases,<sup>3</sup> including the recent decision in *Arizona v. Fulmi-*

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1. 386 U.S. 18 (1967).

2. *Id.* at 22. See *infra* part IV.D.2.a for a thorough discussion of the analytical framework employed in harmless-error review. Basically, an appellate court must examine all of the evidence, including the coerced confession, and determine whether a guilty verdict would have been rendered absent the coerced confession. In other words, a coerced confession was harmless if the guilty verdict was "surely unattributable" to the improperly admitted coerced confession. See *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 (1993).

3. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), Chief Justice Rehnquist's opinion listed a wide variety of cases involving harmless constitutional errors:

*Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118, and n. 2 (1983) (denial of a defendant's right to be present at trial); *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); *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Confrontation Clause); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Confrontation Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

*Fulminante*, 499 U.S. at 306-07.

nante.<sup>4</sup> In *Fulminante* the Court held that coerced or involuntary confessions<sup>5</sup> are now subject to the *Chapman* harmless-error standard.<sup>6</sup>

The decision represented a doctrinal departure from a "vast body of precedent . . . [and] dislodge[d] one of the fundamental tenets of our criminal justice system."<sup>7</sup> *Fulminante* "came out of nowhere, went against hundreds of years of historical and legal analysis on the effect of coerced confessions, and opened the door to major abuses in the criminal justice system."<sup>8</sup> The decision "send[s] us back to the Inquisition and the Star Chamber straightaway."<sup>9</sup> These graphic descriptions underscore the *Fulminante* holding's devastating impact: A criminal defendant's improperly admitted, coerced confession warrants merely harmless-

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4. 499 U.S. 279. *Fulminante* was decided by a narrow five-to-four vote. *Id.* at 281. Justice White delivered the lead opinion with respect to the primary issue, concluding that the defendant's confession was both coerced and not harmless beyond a reasonable doubt. *Id.* at 302. However, the portion of Chief Justice Rehnquist's opinion that subjected coerced confessions to the harmless-error rule commanded a majority of the Court. *Id.* at 302-03. Joining the Chief Justice were Justices Kennedy, O'Connor, Scalia, and Souter. *Id.* For a discussion of *Fulminante* and its effects, see Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991); Dale W. Aronson, Note, *Constitutional Law—Harmless Constitutional Error Analysis—Are Coerced Confessions Fundamentally Different from Other Erroneously Admitted Evidence?*, *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), 27 LAND & WATER L. REV. 581 (1992); Amy B. Bloom, Comment, *Constitutional Law—Harmless-Error Analysis Applies to Erroneously Admitted Coerced Confessions—Arizona v. Fulminante*, 26 SUFFOLK U. L. REV. 269 (1992); Robert J. Fratianne, Note, *California and the Coerced Confession: The Effect of Arizona v. Fulminante—Did the Supreme Court Go Far Enough?*, 22 SW. U. L. REV. 285 (1991); and Joan M. Galli, Note, *Arizona v. Fulminante: Paving the Way for the 'Harmless' Coerced Confession*, 36 ST. LOUIS U. L.J. 409 (1991).

5. These terms are used interchangeably and refer to "confessions obtained by physical or psychological coercion, by promises of leniency or benefit, or when the 'totality of circumstances' indicate[s] the confession was not a product of the defendant's 'free and rational choice.'" *People v. Cahill*, 5 Cal. 4th 478, 482 n.1, 853 P.2d 1037, 1040 n.1, 20 Cal. Rptr. 2d 582, 585 n.1 (1993) (citing 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2, at 439-51 (1984); 1 B.E. WITKIN, CALIFORNIA EVIDENCE §§ 614-623, at 588-604 (3d ed. 1986)).

6. *Fulminante*, 499 U.S. at 303.

7. *Id.* at 289 (White, J., dissenting). One of the underpinnings of the American—adversarial—criminal justice system is that the accused cannot be forced to testify against him or herself. See 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6(b), at 42-43 (1984). Indeed this principle is memorialized in the Fifth Amendment to the United States Constitution, which states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

8. Richard Barbieri, *Argument May Be Last Gasp for Automatic Reversal Rule*, THE RECORDER, Apr. 1, 1993, at 1, 7 (quoting Los Angeles deputy public defenders Laurence Sarnoff and Douglas Goldstein).

9. *Cahill*, 5 Cal. 4th at 512, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605 (Mosk, J., dissenting). Justice Mosk was referring to the California Supreme Court's adoption of the *Fulminante* holding. See *id.* (Mosk, J., dissenting).

error treatment, instead of an automatic reversal of the resulting conviction.<sup>10</sup> Automatic reversal, one of the legal system's most potent weapons to counter police abuse and ensure judicial fairness, effectively has been replaced by a penetrable shield, one that is easily pierced by "harmlessness." Interestingly, in *Chapman* itself, the Court held "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."<sup>11</sup> Coerced confessions were specifically mentioned in this category.<sup>12</sup> Thus, *Fulminante* was an unwarranted and indefensible departure from a litany of principled jurisprudence.

Notwithstanding minimum federal constitutional standards, however, states are free to adopt more stringent safeguards in protecting defendants' rights.<sup>13</sup> California's recent decision in *People v. Cahill*<sup>14</sup> represents the state high court's decision to follow the United States Supreme Court's treatment of coerced confessions.<sup>15</sup> *Cahill* also embodies an unprecedented and unwarranted departure from prior jurisprudence: Previously, California had steadfastly adhered to a reversible-per-

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10. *Fulminante*, 499 U.S. at 309-10.

11. *Chapman v. California*, 386 U.S. 18, 23 (1967).

12. *See id.* at 23 n.8 (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)). The notion that improperly admitted coerced confessions mandate a new trial dates back to 1897. *See Bram v. United States*, 168 U.S. 532, 565 (1897).

The *Chapman* Court cited *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Tumey v. Ohio*, 273 U.S. 510 (1927) as examples of the types of errors for which the *Chapman* harmless-error analysis is never appropriate. *Chapman*, 386 U.S. at 23 n.8. *Gideon* held that each criminal defendant is entitled to counsel, 372 U.S. at 342, and *Tumey* held that a criminal defendant is entitled to an impartial judge, 273 U.S. at 535.

13. *See, e.g., Baltimore & O.R.R. v. Baugh*, 149 U.S. 368 (1893), where Justice Field's dissent stated that

the Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States.

*Id.* at 401 (Field, J., dissenting); *see also State v. Hamm*, 423 N.W.2d 379 (Minn. 1988) (invalidating six-member juries under state constitution). The *Hamm* court stated that "the conclusion of the United States Supreme Court . . . that the Sixth Amendment to the federal constitution does not mandate 12-person juries, is of little relevance here today." *Id.* at 382.

The Tenth Amendment to the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provision has been interpreted as an explicit affirmation of states' police power. *See generally* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 1.01 (1993) (discussing State courts' power to grant greater protections under state constitutions than those afforded under U.S. Constitution).

14. 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

15. *Id.* at 509-10, 853 P.2d at 1059, 20 Cal. Rptr. 2d at 604.

se rule<sup>16</sup> that automatically mandated a new trial when coerced confessions had been improperly admitted into evidence.<sup>17</sup>

This Note begins by summarizing the historical treatment, in both federal<sup>18</sup> and California cases, of coerced confessions. Then it reviews the majority and dissenting opinions in *Cahill*. The ensuing analysis demonstrates that the majority's opinion is founded in neither precedent nor persuasive reasoning; instead, hundreds of years of sound, fair precedent have been needlessly disemboweled. Finally, this Note recommends that if a coerced confession is admitted into evidence, the resulting conviction must be automatically overturned and a new trial granted.

## II. FEDERAL AND STATE PRECEDENT REGARDING COERCED CONFESSIONS

### A. Federal Historical Development

Since 1897 the Supreme Court had adhered to a reversible-per-se rule regarding coerced confessions.<sup>19</sup> In *Fulminante*, however, the Court abandoned the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law, [thus requiring an automatic reversal], if his conviction is founded . . . upon an involuntary confession, without regard for the truth or falsity of the confession."<sup>20</sup>

Ironically, the *Chapman* Court categorically excluded involuntary confessions from harmless-error treatment<sup>21</sup> because they "affect [the] substantial rights' of a party."<sup>22</sup> However, in *Fulminante* Chief Justice Rehnquist mustered enough support<sup>23</sup> to sustain the proposition that "[t]he admission of an involuntary confession . . . [is] a classic 'trial er-

16. See *infra* part IV.A.

17. See *infra* part IV.A.

18. This Note will primarily focus on the California Supreme Court's treatment of coerced confessions. However, a basic understanding of the United States Supreme Court's doctrine in this area is necessary to fully understand *Cahill*'s significance. Although the *Cahill* majority professes otherwise, see *Cahill*, 5 Cal. 4th at 486-87, 853 P.2d at 1042-43, 20 Cal. Rptr. 2d at 587-88, its holding is inextricably bound up in federal law.

19. *Bram v. United States*, 168 U.S. 532 (1897) is generally regarded as the seminal decision. See *Cahill*, 5 Cal. 4th at 518-19, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 610 (Mosk, J., dissenting) (listing United States Supreme Court cases that held admission of coerced confession at trial required automatic reversal).

20. *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (citing *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961)).

21. *Chapman v. California*, 386 U.S. 19, 23 (1967) (citing *Payne v. Arkansas*, 356 U.S. 560 (1958)).

22. *Id.*

23. See *supra* note 4.

ror,' " subject merely to harmless-error analysis.<sup>24</sup> Although the Chief Justice recognized the potentially devastating effect of an improperly admitted involuntary confession,<sup>25</sup> he no doubt assuaged potential defendants' fears by stating that a reviewing court could still find certain errors harmful.<sup>26</sup>

## B. California Historical Development

### 1. *People v. O'Bryan*

Unlike the United States Constitution, the California Constitution explicitly sets forth a standard for reviewing reversible errors.<sup>27</sup> Basically, an error will not be grounds for reversing a conviction unless it is so egregious that it can be characterized as a "miscarriage of justice."<sup>28</sup> Soon after enactment, the California Supreme Court interpreted this provision in *People v. O'Bryan*.<sup>29</sup>

In *O'Bryan* the defendant was a union member striking against various employers.<sup>30</sup> Early one morning, the defendant encountered two nonunion employees of the Llewellyn Iron Works.<sup>31</sup> O'Bryan, who had a gun, and two companions eventually overtook the nonunion workers, one of whom began to flee.<sup>32</sup> After he unsuccessfully ordered the worker to stop running, O'Bryan shot and killed him.<sup>33</sup>

The facts before the court were uncontroverted.<sup>34</sup> The only issue was whether O'Bryan's statements before the grand jury should have been admitted at his trial.<sup>35</sup> The majority explained that "[h]e was not

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24. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

25. *See id.* at 312.

26. *Id.*

27. Reversible errors are those errors that prejudice the defendant to such a great degree as to constitute a "miscarriage of justice." *See* CAL. CONST. art. VI, § 13. More simply, reversible errors deny a criminal defendant fairness in the proceedings against him or her.

28. CAL. CONST. art. VI, § 4 1/2 was added in 1911, amended in 1914 to apply to civil as well as criminal cases, and later moved to its current location. It states that

[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

CAL. CONST. art. VI, § 13.

29. 165 Cal. 55, 130 P. 1042 (1913).

30. *Id.* at 58, 130 P. at 1043.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.* at 61, 130 P. at 1044.



informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him."<sup>36</sup> Although the court concluded that O'Bryan's statements were declarations against interest and not confessions,<sup>37</sup> it nevertheless held that the statements should not have been admitted.<sup>38</sup>

The court then had to consider whether a "miscarriage of justice" had resulted from the error. In attempting to define this standard, Justice Sloss, writing for the court, stated that "[i]t is . . . difficult to frame a definition . . . which shall be 'at once perspicuous, comprehensive and satisfactory.'"<sup>39</sup> Ultimately, the court declined to formulate an exacting test, instead directing judges to use their best judgment in determining whether the error had caused any injury.<sup>40</sup> Justice Sloss then drafted a general guideline to be employed in reviewing coerced confessions:

When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.<sup>41</sup>

36. *Id.*

37. *Id.*

38. The court stated that the testimony violated the "constitutional right of every person not to 'be compelled, in any criminal case, to be a witness against himself.'" *Id.* (quoting CAL. CONST. art. I, § 13 (repealed 1974)).

Like an admission, a declaration against interest does not result in the same level of incriminating impact as does a confession. *See People v. Ferdinand*, 194 Cal. 555, 568-69, 229 P. 341, 346 (1924). It is merely one piece of evidence used in conjunction with other incriminating evidence to identify and convict the accused. *See id.* More simply, a declaration against interest is a statement by the accused—or another witness—that does not admit guilt, but rather tends to prove an element of the crime charged. *Id.* The California Evidence Code defines a declaration against interest as a statement that

was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

CAL. EVID. CODE § 1230 (West 1966).

39. *O'Bryan*, 165 Cal. at 65, 130 P. at 1046.

40. *See id.* In *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), *cert. denied*, 355 U.S. 846 (1957), the court attempted to define "miscarriage of justice": "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 836, 299 P.2d at 254.

41. *O'Bryan*, 165 Cal. at 65, 130 P. at 1046.

In reaching its conclusion that there was no miscarriage of justice, and thus no need for a new trial, the court focused its analysis on whether a guilty verdict would have been reached had the error not been committed.<sup>42</sup> In other words, a reviewing court must assume an "intellectual omniscience" and determine what decision a reasonable cross-section of the community would have rendered without the error.

*O'Bryan* represents the *Cahill* majority's starting point for California's reversible-error jurisprudence.<sup>43</sup> However, it is important to remember that *O'Bryan* did not concern coerced confessions, but rather admissions against interest.<sup>44</sup> Also, Justice Mosk's dissent points out several other deficiencies in the majority's reliance on *O'Bryan* as precedential authority.<sup>45</sup>

## 2. *O'Bryan's* progeny

The *Cahill* majority asserted that prior to 1958, California had expressly adopted a harmless-error approach to coerced confessions.<sup>46</sup> However, Justice Mosk's dissent discredited the line of cases the majority cited to support its reasoning and insisted that California has followed a reversible-per-se rule for over 100 years.<sup>47</sup> In any event, all justices agreed that since 1958, California had strictly adhered to a rule of automatic reversal.<sup>48</sup>

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42. *Id.* at 66, 130 P. at 1046-47.

43. *Cahill*, 5 Cal. 4th at 488, 853 P.2d at 1044, 20 Cal. Rptr. 2d at 589. However, Justice Mosk noted that the reversible-error standard was employed prior to 1911. *See id.* at 524, 853 P.2d at 1069, 20 Cal. Rptr. 2d at 614 (Mosk, J., dissenting). *See infra* part IV.A.2.b.i for a complete discussion of pre-1911 reversible-error jurisprudence.

44. In dissent Justice Mosk defined a confession as a "declaration of [the] defendant's intentional participation in a criminal act." *Cahill*, 5 Cal. 4th at 541 n.8, 853 P.2d at 1080 n.8, 20 Cal. Rptr. 2d at 625 n.8 (Mosk, J., dissenting). He contrasted that with an admission, which is a "recital of facts tending to establish guilt when considered with the remaining evidence in the case." *Id.* (Mosk, J., dissenting).

45. *See infra* part IV.A.2.b.i-ii.

46. *See infra* part IV.A.2 for a chronological analysis of California's treatment of coerced confessions.

47. *Cahill*, 5 Cal. 4th at 542, 853 P.2d at 1080, 20 Cal. Rptr. 2d at 625 (Mosk, J., dissenting). *See infra* part IV.A.2.b.i for a detailed discussion of California's treatment of coerced confessions prior to 1911.

48. *Cahill*, 5 Cal. 4th at 542, 853 P.2d at 1080, 20 Cal. Rptr. 2d at 625 (Mosk, J., dissenting).

a. *People v. Berve*

In 1958 the court dealt with the issue of coerced confessions admitted at trial in *People v. Berve*.<sup>49</sup> In *Berve* the defendant had allegedly performed an abortion using unsterilized instruments, proximately causing the death of Mrs. Pettit.<sup>50</sup> Thereafter, the decedent's husband kidnapped Mr. Berve and tortured him.<sup>51</sup> Shortly after he was beaten, a police officer "rescued" Mr. Berve; the officer arrested him and took him to the police station.<sup>52</sup> About one-half hour later, the officer began interrogating the defendant.<sup>53</sup> Mr. Berve received neither medical attention nor the opportunity to clean himself; in fact, during the entire interrogation, the defendant "was so confused that he showed complete temporal disorientation."<sup>54</sup> The defendant eventually confessed to having performed the abortion and was found guilty of second degree murder at trial.<sup>55</sup>

The California Supreme Court held that the defendant's confession was coerced and thus should not have been admitted into evidence at the trial.<sup>56</sup> Noting the exhausting and terrifying circumstances leading up to the confession, the court found that Mr. Berve's due process rights had been flagrantly violated.<sup>57</sup> By analogy, the court stated that if threatening to arrest one's mother is sufficient to constitutionally invalidate a confession, there is no doubt that Mr. Berve's confession was likewise inadmissible.<sup>58</sup> Accordingly, the court ordered a new trial.<sup>59</sup>

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49. 51 Cal. 2d 286, 332 P.2d 97 (1958), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

50. *Id.* at 288, 332 P.2d at 98.

51. The court stated that

[Mr.] Pettit showed the defendant a bullet from the rifle and told him that it was "his" bullet if he did not confess to killing Mrs. Pettit. [Mr. Pettit] commanded the defendant to stare at the bullet for long periods while Pettit threatened his life. Pettit drummed it into the defendant's mind that he must confess or die. . . . Then while Pettit pointed his rifle at the defendant, another man beat him with his fists. For almost two hours defendant was kicked and slugged with shoes, fists and furniture. . . . The kidnapers pushed his head through a window, cutting him.

*Id.* at 289, 332 P.2d at 98.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 288, 332 P.2d at 98.

56. *Id.* at 293, 332 P.2d at 101.

57. *Id.* The only person involved with the trial who believed otherwise was the interrogating officer who stated "that the confession was free and voluntary 'as far as he could observe.'" *Id.* at 290, 332 P.2d at 99.

58. *See id.* at 291, 332 P.2d at 100 (citing *People v. Mellus*, 134 Cal. App. 219, 223-26, 25 P.2d 237, 240 (1933)).

59. *Id.* at 293, 332 P.2d at 101.

b. *People v. Brommel*

Three years after *Berve*, the California Supreme Court decided *People v. Brommel*.<sup>60</sup> Unlike *Berve*, *Brommel* did not involve an involuntary confession obtained through physical coercion, but instead entailed explicit promises of leniency from governmental officials.<sup>61</sup> The defendant was convicted of second degree murder for the death of his twenty-three-month-old daughter.<sup>62</sup> On appeal the defendant argued that his multiple confessions were the result of police threats emanating from the officers' disbelief of his statements during questioning.<sup>63</sup>

The court ruled that the police threats amounted to coercion, and "however strong the case otherwise [is,] the admission of involuntary confessions compels a reversal, and section 4 1/2, article VI, of the [California] Constitution can under no circumstances save the judgment."<sup>64</sup>

c. *People v. Parham*

*People v. Parham*<sup>65</sup> diverged from the *Berve-Brommel* path because it involved not a coerced confession, but illegally obtained evidence.<sup>66</sup>

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60. 56 Cal. 2d 629, 364 P.2d 845, 15 Cal. Rptr. 909 (1961), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

61. *Id.* at 632-34, 364 P.2d at 846-48, 15 Cal. Rptr. at 910-12.

62. *Id.* at 631, 364 P.2d at 846, 15 Cal. Rptr. at 910.

63. The court recorded the officers' statements as follows:

"We have a little paper down here that wants to know how your ability is to tell the truth, whether you sit down and told the truth about it, or whether you lied about it, and if we write across there that this person would not tell the truth, on many opportunities, we gave him the chance to tell the truth, but he absolutely refused to tell any truth about it at all—in other words, if we just wrote one word across there, Liar, that would—you can go up before that judge and you can ask him for all the breaks in the world, and he is not going to believe you because when a man tells a lie, then even the truth becomes a lie because he is branded as a liar.

"Now if you want to meet that judge that way, if you want to meet your maker that way, well, brother, that is up to you."

*Id.* at 633, 364 P.2d at 847-48, 15 Cal. Rptr. at 911-12 (quoting officer interrogating defendant).

64. *Id.* at 634, 364 P.2d at 848, 15 Cal. Rptr. at 912 (citing *People v. Trout*, 54 Cal. 2d 576, 354 P.2d 231, 6 Cal. Rptr. 759 (1960), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993)). The court referred to other examples of similar police conduct that had likewise invalidated confessions. *Id.* at 632, 364 P.2d at 846-47, 15 Cal. Rptr. at 910-11 (citing *People v. Gonzales*, 136 Cal. 666, 668, 69 P. 487, 488 (1902) ("[T]he sheriff would do whatever he could for him, and . . . 'he had better come out and tell the truth.'"); *People v. Johnson*, 41 Cal. 452, 454 (1871) ("[I]f they would come in and confess th[en] it would be lighter with them.")).

65. 60 Cal. 2d 378, 384 P.2d 1001, 33 Cal. Rptr. 497 (1963), *cert. denied*, 377 U.S. 945 (1964).

66. *Id.* at 384, 384 P.2d at 1004, 33 Cal. Rptr. at 500.

*Parham*'s import lies not in its actual holding,<sup>67</sup> but rather in its discussion of coerced confessions.<sup>68</sup> In *Parham*, the police clubbed and choked the defendant in order to extract physical evidence—a check he was attempting to swallow—from his mouth.<sup>69</sup> The court held that it would be improvident to reverse a conviction where erroneously admitted evidence had no bearing on the outcome of a trial.<sup>70</sup> Harmless-error analysis precluded overturning the conviction.<sup>71</sup>

Regardless of the ultimate holding concerning the illegally obtained evidence, the unanimous court declared, in dicta, that involuntary confessions must be treated “as a class by themselves and [judges cannot] . . . inquire whether in rare cases their admission in evidence had no bearing on the result.”<sup>72</sup> The court’s classification of coerced confessions as “*sui generis*” evidence was extremely important and has since been espoused by numerous legal scholars and judges.<sup>73</sup>

#### d. *People v. Schader*

The California Supreme Court’s next major decision in this area, *People v. Schader*,<sup>74</sup> concerned an erroneously admitted involuntary confession.<sup>75</sup> The two defendants were both found guilty of first degree murder for killing a police officer.<sup>76</sup> At trial, Schader argued that he asked for but was denied counsel before his confession.<sup>77</sup> An investigating officer testified that the defendant never made such a request.<sup>78</sup> The judge

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67. The defendant’s conviction on three counts of first degree robbery was affirmed by the California Supreme Court. *Id.* at 386, 384 P.2d at 1006, 33 Cal. Rptr. at 502.

68. *Id.* at 385, 384 P.2d at 1005, 33 Cal. Rptr. at 501.

69. The police were attempting to obtain a check in the defendant’s possession because in each of three previous bank robberies, the robber had used either a pink piece of paper or a check to demand money. *Id.* at 384, 384 P.2d at 1004, 33 Cal. Rptr. at 500.

70. *See id.* at 386, 384 P.2d at 1005, 33 Cal. Rptr. at 501.

71. *Id.*

72. *Id.* at 385, 384 P.2d at 1005, 33 Cal. Rptr. at 501.

73. *See infra* part IV.D.

74. 62 Cal. 2d 716, 401 P.2d 665, 44 Cal. Rptr. 193 (1965), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

75. The court explicitly stated that “[a]s to its impact upon the jury and the prejudicial effect, the confession obtained in violation of defendant’s right to counsel cannot be distinguished from the confession obtained in violation of defendant’s right to be free of coercion.” *Id.* at 729, 401 P.2d at 673, 44 Cal. Rptr. at 201. Accordingly, the defendant’s conviction in this case was overturned since he was denied counsel before his confession. *Id.* at 733, 401 P.2d at 675, 44 Cal. Rptr. at 203.

76. *Id.* at 719, 401 P.2d at 666, 44 Cal. Rptr. at 194.

77. *Id.* at 727, 401 P.2d at 671, 44 Cal. Rptr. at 199.

78. *Id.*

issued a limiting instruction to the jury that it must not consider the confession if Schader had requested but been denied counsel.<sup>79</sup>

On appeal, the California Supreme Court held that the defendant's confession had been improperly admitted into evidence.<sup>80</sup> The court noted that if Schader had in fact asked for counsel and was denied, the confession was inadmissible.<sup>81</sup> Alternatively, even if Schader had not requested counsel, his confession was nevertheless involuntary—and hence inadmissible—since the record did not indicate that he confessed knowing that he was entitled to counsel.<sup>82</sup>

Writing for the court, Justice Tobriner stated that the defendant was entitled to a new trial since "the erroneous admission of a confession is prejudicial per se and therefore compels reversal."<sup>83</sup> Even if there was other corroborating evidence supporting the conviction, "the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."<sup>84</sup>

The prosecution offered a last-ditch argument to maintain the conviction: Since Schader's confession was voluntarily obtained, it was likely to be more trustworthy than an involuntarily obtained confession—thereby diminishing the prejudicial effect upon the jury.<sup>85</sup> The court rejected this argument, concluding that the "confession operate[d] as a kind of *evidentiary bombshell* which shatter[ed] the defense."<sup>86</sup>

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79. *Id.*

80. *Id.*

81. *See Escobedo v. Illinois*, 378 U.S. 478, 485 (1964) (finding error when trial court admitted evidence elicited from suspect where suspect had requested and been denied counsel prior to making statement).

82. *Schader*, 62 Cal. 2d at 727, 401 P.2d at 671, 44 Cal. Rptr. at 199 (citing *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937 (1965), and *overruled by People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993)). In *Dorado*, the court ruled that a confession was inadmissible because authorities had informed the defendant of neither his right to counsel nor his right to remain silent, and no evidence established that the defendant had waived these rights. *People v. Dorado*, 62 Cal. 2d 338, 353-54, 398 P.2d 361, 371, 42 Cal. Rptr. 169, 179, *cert. denied*, 381 U.S. 937 (1965), and *overruled by People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

83. *Schader*, 62 Cal. 2d at 728, 401 P.2d at 672, 44 Cal. Rptr. at 200.

84. *Id.* at 729, 401 P.2d at 673, 44 Cal. Rptr. at 201 (quoting *Payne v. Arkansas*, 356 U.S. 560, 568 (1958)).

85. *Id.* at 730, 401 P.2d at 674, 44 Cal. Rptr. at 202.

86. *Id.* at 731, 401 P.2d at 674, 44 Cal. Rptr. at 202 (emphasis added).

e. *People v. Jacobson*

Like *Schader*, *People v. Jacobson*<sup>87</sup> dealt with confessions obtained in violation of a defendant's right to counsel.<sup>88</sup> The defendant was sentenced to death after being convicted of first degree murder for the death of his twenty-one-month-old daughter.<sup>89</sup> The court first noted that the defendant made approximately ten separate confessions or admissions.<sup>90</sup> Two of these statements were deemed inadmissible because they were made while the defendant was in custody and without the aid of counsel.<sup>91</sup>

Writing for the court, Justice Mosk<sup>92</sup> declared that the underlying rationale for treating inadmissible confessions as grounds for a new trial is different in California than under federal law.<sup>93</sup> The federal view maintains that a conviction based on an improperly obtained confession must be overturned in order to penalize law enforcement officials—it “is the only means by which illegal police activity can be successfully checked.”<sup>94</sup> Conversely, California law has observed a reversible-per-se rule founded on “the fairness of the trial,” which prevents courts from “inquir[ing] into the prejudicial nature of the introduction of an illegally obtained confession.”<sup>95</sup>

Nonetheless, the majority found that *Jacobson* was a “rare case” in which inquiry into the prejudicial impact of the illegal confessions was necessary to comport with article VI, section 4 1/2 of the California Constitution.<sup>96</sup> Focusing on the vast number of independent, incriminating statements—only two of which were inadmissible—the court distinguished the typical involuntary confession situation in which the only confession has been coerced.<sup>97</sup> Since none of the statements carried a

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87. 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965), *cert. denied*, 384 U.S. 1015 (1966).

88. *See supra* note 75.

89. *Jacobson*, 63 Cal. 2d at 322, 405 P.2d at 557, 46 Cal. Rptr. at 517.

90. *Id.* at 331, 405 P.2d at 563, 46 Cal. Rptr. at 523.

91. *Id.* at 328-29, 405 P.2d at 561-62, 46 Cal. Rptr. at 521-22.

92. Justice Mosk authored a vigorous dissent in *Cahill* in which he asserted that the majority had improperly interpreted his holding in *Jacobson*. *Cahill*, 5 Cal. 4th at 539-40, 853 P.2d at 1079, 20 Cal. Rptr. 2d at 624 (Mosk, J., dissenting).

93. *Jacobson*, 63 Cal. 2d at 330, 405 P.2d at 562, 46 Cal. Rptr. at 522.

94. *Id.* at 329, 405 P.2d at 562, 46 Cal. Rptr. at 522.

95. *Id.* at 330, 405 P.2d at 562, 46 Cal. Rptr. at 522. *See infra* part IV.D for a discussion of the rationale underlying the court's treatment of coerced confessions as *sui generis*.

96. *Jacobson*, 63 Cal. 2d at 330, 405 P.2d at 562, 46 Cal. Rptr. at 522. *See supra* note 28 for a discussion of this provision.

97. *Jacobson*, 63 Cal. 2d at 330, 405 P.2d at 562, 46 Cal. Rptr. at 522. In *Stroble v. California*, 343 U.S. 181 (1952), the defendant had also repeatedly confessed, but had done so voluntarily. *Id.* at 190-91. While upholding the conviction, the Court remarked, in dicta, that

significantly stronger incriminatory weight, the court concluded that "the evidence complained of [did not] contribute[] to the conviction." <sup>98</sup>

Significantly, both *Schader* and *Jacobson* involved confessions obtained in violation of a defendant's Sixth Amendment right to counsel, and not coerced confessions per se. While these decisions are important in illustrating the foundation upon which the *Cahill* decision rests, this axiomatic distinction is relevant throughout the remainder of this Note.

### III. *PEOPLE V. CAHILL*

#### A. *Statement of the Case*

Mark Steven Cahill was convicted of one count of first degree murder with special circumstances, one count of robbery, one count of rape, and several lesser offenses.<sup>99</sup> The prosecution declined to seek the death penalty, however, and the defendant was sentenced to life imprisonment without the possibility of parole.<sup>100</sup>

On appeal, the court of appeal reversed all of Cahill's murder-related convictions.<sup>101</sup> The court determined that the defendant's confession had been elicited by the police officers' "implied promise of benefit or leniency," thus rendering the confession involuntary and inadmissible at trial.<sup>102</sup> The court held that admitting the confession during the trial required an automatic reversal of the murder-related convictions.<sup>103</sup>

While the Attorney General's petition for review to the California Supreme Court was pending, the United States Supreme Court decided

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had the confessions been involuntary, a reversal would have been ordered because "the confession was a prominent feature of the trial." *Id.* at 190.

98. *Jacobson*, 63 Cal. 2d at 331, 405 P.2d at 563, 46 Cal. Rptr. at 523 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). The court stated that "[i]t is not plausible . . . to conclude that 10 statements were sufficiently more persuasive than only eight and that the elimination of two would have altered the outcome." *Id.* Thus, the majority seemed to apply a "totality of the circumstances" approach in which the court evaluated the two inadmissible statements in relation to all of the evidence. *See id.* at 333, 405 P.2d at 564, 46 Cal. Rptr. at 524.

99. *People v. Cahill*, 5 Cal. 4th 478, 483, 853 P.2d 1037, 1040, 20 Cal. Rptr. 2d 582, 585 (1993).

100. *Id.*

101. *Id.*

102. *Id.* The court specifically found that the interrogating officers' factually inaccurate statements concerning the legal definition of first degree murder—specifically felony murder—had improperly prejudiced the defendant. *Id.* at 483 & n.4, 853 P.2d at 1040-41 & n.4, 20 Cal. Rptr. 2d at 585-86 & n.4.

103. *Id.* at 484, 853 P.2d at 1041, 20 Cal. Rptr. 2d at 586.



*Fulminante*.<sup>104</sup> The state high court granted review and then remanded the matter back to the court of appeal for reconsideration in light of *Fulminante*.<sup>105</sup> After reconsideration, the court of appeal again held that the murder-related convictions required automatic reversal because the trial court erroneously admitted the coerced confession.<sup>106</sup> The court grounded its decision in "the independent provisions of the California Constitution and not solely on the federal constitutional decisions overruled in *Fulminante*."<sup>107</sup> Accordingly, the court reversed the murder-related convictions without considering whether the involuntary confession was "harmless."<sup>108</sup>

The California Supreme Court again granted review, but limited it to the issue of whether the California Constitution independently requires an automatic reversal when a trial court has improperly admitted a defendant's coerced confession.<sup>109</sup>

### B. Majority Opinion

Writing for the majority, Justice George declared that the *Fulminante* decision provided the court with "an appropriate opportunity to reconsider the validity of the reversible-per-se rule as a matter of California law."<sup>110</sup> The court believed that previous California cases applying the reversible-per-se rule were consistent with the then-existing federal standard.<sup>111</sup> The court acknowledged that, although California had ini-

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 484-85, 853 P.2d at 1041, 20 Cal. Rptr. 2d at 586. Interestingly, the *Cahill* court did not consider California's liberal Truth-in-Evidence provision, which states that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d). The court expressly declared that

[b]y its terms, the Truth-in-Evidence provision affects only the *admissibility* of evidence[.] . . . [t]here is nothing in the Truth-in-Evidence provision that purports to affect the standard for determining *the prejudicial effect*, under state law, of the introduction at trial of evidence that remains inadmissible under California law.

*Cahill*, 5 Cal. 4th at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597 (citations omitted).

110. *People v. Cahill*, 5 Cal. 4th 478, 500, 853 P.2d 1037, 1052, 20 Cal. Rptr. 2d 582, 597 (1993).

111. *Id.* The Supreme Court held in *Payne v. Arkansas*, 356 U.S. 560, 568 (1958), that involuntary confessions require automatic reversal. It is interesting to note that *People v. Berve*, 51 Cal. 2d 286, 332 P.2d 97 (1958), *overruled* by *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993), was decided shortly thereafter. Thus, if the majority is correct in assuming that California doctrine involving coerced confessions changed with *Berve*, arguably the California high court abdicated its independence in the area of coerced confessions long ago.

tially followed a reversible error standard of review after the enactment of article VI, section 13 of the California Constitution,<sup>112</sup> since 1958 the court had strictly adhered to a reversible-per-se rule.<sup>113</sup>

Justice George explained that neither the language nor the background of the constitutional provision supports treating coerced confessions "uniquely, among evidentiary errors[,] as reversible per se."<sup>114</sup> The majority then reasoned, in complete deference to Chief Justice Rehnquist's opinion in *Fulminante*, that a "miscarriage of justice" exists solely within the realm of fundamental "structural defects,"<sup>115</sup> and *never* arises in the context of "trial errors"<sup>116</sup>—such as coerced confessions.<sup>117</sup> Thus, the court noted that if the error does not deny a criminal defendant the constitutionally required "orderly legal process,"<sup>118</sup> there is no need to "automatically and monolithically" overturn the defendant's conviction.<sup>119</sup>

The majority then examined the *Jacobson* case, concluding that the *Jacobson* court's reasoning was not limited to its specific facts.<sup>120</sup> Justice George provided several examples in which he believed an erroneously admitted confession would be harmless.<sup>121</sup> The underlying rationale for his conclusion was that there are certain cases in which a reviewing court can examine the totality of the record and confidently hold that "[was] no reasonable probability that the exclusion of the confession would have affected the result."<sup>122</sup>

Next, the court addressed the issue of "official misconduct," concluding that in this context it is often less egregious than in the case of

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112. See *supra* part II.B.1.

113. *Cahill*, 5 Cal. 4th at 502, 853 P.2d at 1053-54, 20 Cal. Rptr. 2d at 598-99; see *People v. Berve*, 51 Cal. 2d 286, 332 P.2d 97. For a discussion of *Berve*, see *supra* part II.B.2.a.

114. *Cahill*, 5 Cal. 4th at 501, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598.

115. See *infra* part IV.B for a discussion of structural errors.

116. See *infra* part IV.B for a discussion of trial errors.

117. *Cahill*, 5 Cal. 4th at 501-02, 853 P.2d at 1053, 20 Cal. Rptr. 2d at 598.

118. *Id.* at 502, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599.

119. *Id.* at 503, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599.

120. *Id.* at 505, 853 P.2d at 1056, 20 Cal. Rptr. 2d at 601. For a discussion of *Jacobson*, see *supra* part II.B.2.e.

121. *Cahill*, 5 Cal. 4th at 505, 853 P.2d at 1056, 20 Cal. Rptr. 2d at 601 (citing *Arizona v. Fulminante*, 499 U.S. 279, 313-14 (1991) (Kennedy, J., concurring)). Justice George gave three examples:

(1) when the defendant was apprehended by the police in the course of committing the crime, (2) when there are numerous, disinterested reliable eyewitnesses to the crime whose testimony is confirmed by a wealth of uncontroverted physical evidence, or (3) in a case in which the prosecution introduced, in addition to the confession, a videotape of the commission of the crime.

*Id.*

122. *Id.*

other constitutional violations.<sup>123</sup> Additionally, the majority reiterated its position that unlike the "old" federal reversible-per-se rule, which was based on deterring illegal police conduct, California's automatic reversal rule was founded on a fairness rationale.<sup>124</sup> As Justice Cardozo said fairness does not require "the criminal . . . to go free because the constable has blundered."<sup>125</sup> Furthermore, the majority reasoned that confessions obtained through outrageously improper means will either not be offered into evidence by the state, or will be ruled inadmissible by the trial court.<sup>126</sup>

In addressing the reliability of coerced confessions, Justice George stated that "a confession, although inadmissible because obtained by unconstitutional means, is in fact reliable."<sup>127</sup> He noted that an appellate court can properly evaluate the reliability of an involuntary confession under the "traditional prejudicial-error analysis" and rule accordingly, thus obviating the need for an automatic reversal.<sup>128</sup> Furthermore, a defendant can usually offer evidence of the coercive circumstances surrounding the confession in an attempt to rebut the confession's reliability.<sup>129</sup>

The majority subsequently held that *stare decisis* was inconclusive.<sup>130</sup> The court stated that prior to *Fulminante*, federal supremacy commanded California to maintain a reversible-per-se rule; accordingly, there was no occasion to review the California standard independently of the federal minimum standard.<sup>131</sup> Also, the majority believed that there was no reason for the doctrinal departure that the court forged in 1958 in *People v. Berve*<sup>132</sup>—the previously followed prejudicial-error standard was quite sufficient.<sup>133</sup> Finally, Justice George stated that strict adherence to a reversible-per-se rule would "have the detrimental effect of

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123. *Id.* at 506, 853 P.2d at 1056, 20 Cal. Rptr. 2d at 601. For example, evidence obtained in violation of the Fourth Amendment and improperly admitted at trial does not mandate overturning a conviction. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970).

124. *See Cahill*, 5 Cal. 4th at 506, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

125. *People v. Defore*, 150 N.E. 585, 587 (N.Y.) (containing Justice Cardozo's disparaging characterization of exclusionary rule), *cert. denied*, 270 U.S. 657 (1926).

126. *Cahill*, 5 Cal. 4th at 506, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

127. *Id.* at 507, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

128. *See id.*

129. *Id.*

130. *Id.* at 508, 853 P.2d at 1058, 20 Cal. Rptr. 2d at 603.

131. *Id.* The court noted that it understood pre-*Fulminante* federal jurisprudence as requiring an automatic reversal where coerced confessions were improperly admitted at trial. *Id.*

132. 51 Cal. 2d 286, 332 P.2d 97 (1958), *overruled by People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

133. *Cahill*, 5 Cal. 4th at 508, 853 P.2d at 1058, 20 Cal. Rptr. 2d at 603.

eroding the public's confidence in the criminal justice system."<sup>134</sup> If there was overwhelming evidence of guilt, reversal would simply result in a "superfluous" second trial reaffirming guilt, or "even more unfortunately, in a [second] trial whose result is [negatively affected] by the loss of essential witnesses or testimony."<sup>135</sup>

Finally, the majority posited that a reversible-per-se rule would necessarily diminish other constitutional rights. An automatic reversal without regard to other incriminating evidence would "generate pressure to find that the [improper] police conduct was lawful after all and thereby to undermine constitutional standards of police conduct to avoid needless retrial."<sup>136</sup>

The court then explicitly adopted the *People v. Watson*<sup>137</sup> "reasonable-probability" test,<sup>138</sup> but stated that since this standard was less demanding than the federal harmless-beyond-a-reasonable-doubt standard, California would necessarily adopt the federal constitutional minimum promulgated in *Chapman*.<sup>139</sup>

### C. Dissenting Opinions

#### 1. Justice Mosk

Welcome to the "Inquisition and the Star Chamber."<sup>140</sup> Justice Mosk's startling references to two unseemly historical practices underscored his sentiment concerning the majority opinion. He believed that "there is no reason to abandon or even reconsider the well- and long-settled California rule . . . requir[ing] automatic reversal of any ensuing judgment of conviction" for an improperly admitted involuntary confession.<sup>141</sup> In essence, "a fundamental principle of justice has become a casualty of the synthetic war on crime."<sup>142</sup>

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134. *Id.* at 509, 853 P.2d at 1058, 20 Cal. Rptr. 2d at 603.

135. *Id.*

136. *Id.*, 853 P.2d at 1059, 20 Cal. Rptr. 2d at 604 (alteration in original) (citations omitted in original).

137. 46 Cal. 2d 818, 299 P.2d 243 (1956).

138. *Id.* at 836, 299 P.2d at 254; see *supra* note 40 for a discussion of this test.

139. See *infra* part IV.D.2.a for a discussion of this test.

140. *Cahill*, 5 Cal. 4th at 512, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605 (Mosk, J., dissenting).

141. *Id.* at 511, 853 P.2d at 1060, 20 Cal. Rptr. 2d at 605 (Mosk, J., dissenting).

142. *Id.* (Mosk, J., dissenting).

a. *underlying rationale for excluding coerced confessions at trial*

Justice Mosk's lengthy dissent began by enumerating several policies that militate against admitting coerced confessions into evidence.<sup>143</sup> One such policy involves preventing governmental overreaching.<sup>144</sup> Second, coerced confessions are unreliable evidence and thus should not be admissible at trial.<sup>145</sup> Third, and most importantly, the legal system must ensure fairness in the adversarial contest between the sovereign and the individual.<sup>146</sup> Justice Mosk reasoned that the legitimacy of the criminal justice system is more important than the outcome of any individual criminal trial.<sup>147</sup> As such, these three policies mandate a new trial where a criminal defendant's conviction has been obtained by an improperly admitted coerced confession; otherwise, the system's "legitimacy" is irreparably tainted.<sup>148</sup>

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143. Justice Mosk first examined the underlying rationales for excluding coerced confessions at trial. *Id.* at 514-18, 853 P.2d at 1062-65, 20 Cal. Rptr. 2d at 607-10 (Mosk, J., dissenting). He then applied these rationales to support his contention that admission of a coerced confession at trial necessitates automatic reversal of a conviction. *Id.* at 518, 523, 853 P.2d at 1065, 1068, 20 Cal. Rptr. 2d at 610, 613 (Mosk, J., dissenting).

144. *Id.* at 517, 853 P.2d at 1063, 20 Cal. Rptr. 2d at 608 (Mosk, J., dissenting); *see also* *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (holding rule's purpose is to deter police conduct "revolting to the sense of justice"); *People v. Atchley*, 53 Cal. 2d 160, 170, 346 P.2d 764, 769 (1959) (noting that "exclusion serves to discourage the use of physical brutality"), *cert. granted*, 362 U.S. 987 (1960), and *cert. dismissed*, 366 U.S. 207 (1961).

145. *Cahill*, 5 Cal. 4th at 517, 853 P.2d at 1064, 20 Cal. Rptr. 2d at 609 (Mosk, J., dissenting); *see also Atchley*, 53 Cal. 2d at 170, 346 P.2d at 769 (stating involuntary confessions are inadmissible because "they are untrustworthy"); 1 LAFAVE & ISRAEL, *supra* note 7, § 6.2(b), at 440-41 (asserting defendants reach point whereby they wrongly confess to avoid further harm).

146. *Cahill*, 5 Cal. 4th at 517, 853 P.2d at 1064, 20 Cal. Rptr. 2d at 609 (Mosk, J., dissenting); *see also* *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the [government's] use of evidence [against the individual,] whether true or false."); *Atchley*, 53 Cal. 2d at 170, 346 P.2d at 769 ("[I]t offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him.") (citing *People v. Berve*, 51 Cal. 2d 286, 290, 332 P.2d 97, 99 (1958) (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952))).

147. *Cahill*, 5 Cal. 4th at 518, 853 P.2d at 1064, 20 Cal. Rptr. 2d at 609 (Mosk, J., dissenting).

148. *See id.* (Mosk, J., dissenting). Justice Mosk concluded that both the Fifth and Fourteenth Amendments of the United States Constitution would be violated by admitting coerced confessions into evidence. *Id.* (Mosk, J., dissenting). California Constitutional due process provisions would also be violated. *See* CAL. CONST. art. I, §§ 7, 15.

b. *introduction of a coerced confession into evidence automatically requires a new trial*

i. the United States Constitution

Justice Mosk first analyzed United States Supreme Court decisions prior to *Fulminante*, which held that admission of a defendant's involuntary confession at trial required automatic reversal.<sup>149</sup> He concluded that this rule was based on maintaining fairness between the government and the defendant.<sup>150</sup> Thus, he wrote, "[t]he harm caused by the violation—the skewed balance between the state and the accused—[can] be cured [only] by a new trial at which the confession and its fruits are excluded."<sup>151</sup>

Second, the justice opined that a coerced confession is fundamentally distinguishable from any other type of evidence—it is *sui generis* evidence:<sup>152</sup> Such a confession represents an "extrajudicial plea of guilty."<sup>153</sup> Thus, if a coerced guilty plea cannot sustain a conviction because it denies the defendant the due process rights guaranteed by the Fifth Amendment,<sup>154</sup> then neither can a coerced confession support a conviction.<sup>155</sup> This conclusion is conceptually divorced from reliability concerns. Justice Mosk stated that

"[i]t is . . . axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession [citation], and even though there is ample evidence aside from the confession to support the conviction."<sup>156</sup>

149. *Cahill*, 5 Cal. 4th at 518, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 610 (Mosk, J., dissenting); see, e.g., *Rose v. Clark*, 478 U.S. 570, 578 n.6 (1986); *United States v. Hasting*, 461 U.S. 499, 508 n.6 (1983); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Chapman v. California*, 386 U.S. 18, 23 (1967); *Spano v. New York*, 360 U.S. 315, 324 (1959); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Malinski v. New York*, 324 U.S. 401, 404 (1945); *Bram v. United States*, 168 U.S. 532, 541 (1897).

150. *Cahill*, 5 Cal. 4th at 519, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 610 (Mosk, J., dissenting).

151. *Id.* at 519, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 610 (Mosk, J., dissenting) (quoting Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 104 (1988)).

152. *Id.* (Mosk, J., dissenting).

153. *Id.* (Mosk, J., dissenting).

154. See *supra* note 7.

155. *Cahill*, 5 Cal. 4th at 519-20, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 610 (Mosk, J., dissenting) (citing *Waley v. Johnston*, 316 U.S. 101, 104 (1942)).

156. *Id.* at 520, 853 P.2d at 1065-66, 20 Cal. Rptr. 2d at 610-11 (Mosk, J., dissenting) (quoting *Jackson v. Denno*, 378 U.S. 368, 376 (1964)).

Justice Mosk then discussed the fundamental unfairness of not applying a reversible-per-se rule to coerced confessions.<sup>157</sup> In reference to coerced confessions, *Chapman* itself held that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."<sup>158</sup> The justice further explained that a criminal trial's truth-seeking function should not impinge upon the United States Constitution's implicit safeguards guaranteeing fairness to criminal defendants.<sup>159</sup>

In addressing *Fulminante*, Justice Mosk accorded the decision little precedential weight for two main reasons.<sup>160</sup> First, it was decided by the narrowest of margins.<sup>161</sup> Second, he believed that the underlying distinction between trial errors and structural defects is untenable.<sup>162</sup>

## ii. the California Constitution

In the second part of his dissent, Justice Mosk began by stating that coerced confessions "'constitute[] a denial of due process of law . . . under the . . . [California] Constitution [] . . . [and] offend the community's sense of fair play and decency.'" <sup>163</sup>

157. *Id.* at 519, 853 P.2d at 1065, 20 Cal. Rptr. 2d at 609 (Mosk, J., dissenting).

158. *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967). *Chapman* cites *Payne v. Arkansas*, 356 U.S. 560 (1958), for the proposition that the use of a coerced confession at trial is grounds for a new trial. *Chapman*, 386 U.S. at 23 n.8 (citing *Payne*, 356 U.S. at 568). In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court criticized *Payne*.

159. *Cahill*, 5 Cal. 4th at 522, 853 P.2d at 1067, 20 Cal. Rptr. 2d at 612 (Mosk, J., dissenting). Such constitutional safeguards include the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

160. *Id.* at 545-46, 853 P.2d at 1083, 20 Cal. Rptr. 2d at 628 (Mosk, J., dissenting).

161. *See supra* note 4. Justice Mosk noted that Chief Justice Rehnquist's opinion was "manifestly unnecessary to the court's judgment, [and therefore] dictum." *Cahill*, 5 Cal. 4th at 546, 853 P.2d at 1083, 20 Cal. Rptr. 2d at 628 (Mosk, J., dissenting). Further, Chief Justice Rehnquist later conceded as much. *See* Chief Justice William Rehnquist, Remarks at the Fourth Circuit Judicial Conference 11 (June 28, 1991) (transcript available in Harvard Law School Library).

162. *Cahill*, 5 Cal. 4th at 547, 853 P.2d at 1084, 20 Cal. Rptr. 2d at 629 (Mosk, J., dissenting). This distinction is discussed further *infra* part IV.B.

163. *Cahill*, 5 Cal. 4th at 523, 853 P.2d at 1068, 20 Cal. Rptr. 2d at 613 (Mosk, J., dissenting) (citing *People v. Berve*, 51 Cal. 2d 286, 290, 332 P.2d 97, 99 (1958) (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952))). Justice Mosk also briefly discussed applicable California Penal Code provisions, stating that they supported a reversible-per-se rule in regard to coerced confessions. *Id.* at 528, 853 P.2d at 1071, 20 Cal. Rptr. 2d at 616 (Mosk, J., dissenting). He stated that

[i]t is undisputed, and indeed indisputable, that the privilege against self-incrimination, under both the United States and California Constitutions, is one of the most "substantial" of "rights." Similarly, it is settled beyond peradventure that the admission of a coerced confession must at the very least "tend[] to [the defendant's] prejudice" in respect to this most "substantial right."

The justice then examined the original purpose of article VI, section 13 of the California Constitution,<sup>164</sup> concluding that it was aimed at wealthy defendants.<sup>165</sup> He arrived at this conclusion by analyzing legislative arguments surrounding section 13's adoption:

"The trial of a criminal is so hedged about with technicalities that it has grown almost impossible to convict one whose wealth is sufficient to enable him to employ counsel skilled in the technique of criminal law. Thus there has grown up two systems of law—one for the poor, the other for the rich. The pauper prisoner is subjected to the iniquities of the 'third degree' to secure from him incriminating evidence, while the wealthy one is surrounded by a corps of defenders, whose skill in barricading their client behind technicalities is usually commensurate with the fees secured."<sup>166</sup>

Justice Mosk concluded that since Steven Mark Cahill was a "pauper prisoner," he did not fit under the provision's targeted class of criminal defendants—the wealthy.<sup>167</sup>

Finally, Justice Mosk stated that principles of stare decisis controlled this case and no principled reason existed to blatantly disregard the "long-settled California rule of automatic reversal for the admission of a coerced confession."<sup>168</sup>

## 2. Justice Kennard

Justice Kennard's relatively short dissent focused on both doctrinal as well as practical reasons for disavowing the harmless-error standard. She stated that coerced confessions are inherently "irreconcilable with the Anglo-American system of justice."<sup>169</sup> Accordingly, their improper admission automatically necessitates a new trial.<sup>170</sup>

The justice propounded several rationales to support her position. First, the doctrine of stare decisis commanded the court to adhere to the

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*Id.* (Mosk, J., dissenting) (citing CAL. PENAL CODE §§ 1258, 1404 (West 1982)). Since this Note is primarily concerned with constitutional as opposed to statutory issues, no further references will be made to applicable statutory provisions.

164. *See supra* note 28 (discussing CAL. CONST. art. VI, § 13).

165. *Cahill*, 5 Cal. 4th at 532-33, 853 P.2d at 1074, 20 Cal. Rptr. 2d at 619 (Mosk, J., dissenting).

166. *Id.* at 532, 853 P.2d at 1074, 20 Cal. Rptr. 2d at 619 (Mosk, J., dissenting) (quoting A.E. BOYNTON, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE STATE OF CALIFORNIA (1911)).

167. *Id.* at 533, 853 P.2d at 1074, 20 Cal. Rptr. 2d at 619 (Mosk, J., dissenting).

168. *Id.* at 554, 853 P.2d at 1089, 20 Cal. Rptr. 2d at 634 (Mosk, J., dissenting).

169. *Id.* (Kennard, J., dissenting).

170. *Id.* (Kennard, J., dissenting).



existing reversible-per-se rule.<sup>171</sup> Second, automatic reversal “[wa]s a simple bright-line rule that conserve[d] appellate resources.”<sup>172</sup> Third, a reversible-per-se rule sent a clear message to law enforcement personnel that constitutional violations in this area were indefensible.<sup>173</sup> Finally, an automatic reversal standard was the only standard that “g[ave] sufficient weight to the primal constitutional interest at stake.”<sup>174</sup> In short, Justice Kennard believed that fundamental notions of fairness and “respect for the individual” mandated a reversible-per-se rule.<sup>175</sup>

#### IV. ANALYSIS

##### A. *Stare Decisis*

###### 1. Introduction

[I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law.<sup>176</sup>

*Stare decisis* serves several important functions including “promot[ing] the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process.”<sup>177</sup> Accordingly, departures from precedent are warranted where there is a subsequent change in the law, new facts and experiences warrant the change, or precedent has become an impediment to consistent adjudication.<sup>178</sup> Absent these or other compelling rationales, precedent

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171. *Id.* at 557, 853 P.2d at 1091, 20 Cal. Rptr. 2d at 636 (Kennard, J., dissenting).

172. *Id.* at 558, 853 P.2d at 1092, 20 Cal. Rptr. 2d at 637 (Kennard, J., dissenting).

173. *See id.* at 559, 853 P.2d at 1092, 20 Cal. Rptr. 2d at 637 (Kennard, J., dissenting). Thus, the harmless-error “safety net” cannot save convictions grounded in coerced confessions.

174. *Id.* (Kennard, J., dissenting).

175. *See id.* (Kennard, J., dissenting).

176. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 19-20 (1921). This Note will present a brief overview of *stare decisis* to illustrate the principle’s great importance in Anglo-American jurisprudence. An in-depth analysis of *stare decisis* is beyond the scope of this Note; however, for a thorough discussion of *stare decisis*, see HONORABLE EDWARD D. RE, *FEDERAL JUDICIAL CENTER, STARE DECISIS* (1975); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

177. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).

178. *See id.* at 2621-22 (Marshall, J., dissenting).

must be followed if the judicial system is to maintain its sense of legitimacy.<sup>179</sup>

## 2. Stare decisis abandoned in *Cahill*

### a. *inadequate grounds even to reconsider existing California law*

The *Cahill* decision represents an unprincipled departure from precedent. The majority stated that "the *Fulminante* decision . . . provide[s] us with an appropriate opportunity to reconsider the validity of the reversible-per-se rule as a matter of California law."<sup>180</sup> Why? If California law is independent of federal law as the majority professed,<sup>181</sup> a change in the latter cannot rationally be considered a proper justification for reconsidering California doctrine.<sup>182</sup> In other words, the California Supreme Court "should disabuse itself of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire—always following, never leading."<sup>183</sup>

The majority anticipated this argument, but offered an unconvincing rebuttal. The court contended that while previous California decisions were independently grounded in California law, they were not decided "in the face of a contrary federal harmless error rule, but rather embraced that rule on the understanding that such a rule was consistent with the governing federal rule."<sup>184</sup>

The majority's proffered rationale suffers from two major flaws. First, states are free to enact legislation that affords criminal defendants greater protections than the minimum guaranteed by the United States Constitution.<sup>185</sup> Thus, even if federal law subjected coerced confessions to the less stringent harmless-error standard, states could still afford

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179. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2815-17 (1992) (maintaining central holding of *Roe v. Wade*, 410 U.S. 113 (1971), which constitutionally protected women's right to choose to have abortion).

180. *Cahill*, 5 Cal. 4th at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597.

181. See *id.*

182. This is especially true if, as the majority maintains, federal law and California law had differing purposes for the old reversible-per-se rule—the federal rule was grounded in deterring police abuse, while the California rule was based on fairness. *Id.* at 497, 853 P.2d at 1050, 20 Cal. Rptr. 2d at 595.

183. *Id.* at 557-58, 853 P.2d at 1091, 20 Cal. Rptr. 2d at 636 (Kennard, J., dissenting). In support of this premise, see FRIESEN, *supra* note 13.

184. *Cahill*, 5 Cal. 4th at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597.

185. See *supra* note 13. In *Chapman* Justice Harlan noted that "[t]he [United States Supreme] Court has no power . . . to declare which of many admittedly constitutional alternatives a State may choose" in fashioning safeguards for criminal defendants. *Chapman v. California*, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting).

criminal defendants the more protective reversible-per-se rule. Second, unlike the United States Constitution, the California Constitution has an express provision, the "miscarriage of justice" standard, which addresses reversible errors.<sup>186</sup> In *People v. Brommel*,<sup>187</sup> the California Supreme Court held this provision automatically invalidated a conviction where a coerced confession was improperly introduced into evidence.<sup>188</sup> Thus, there was no principled reason to even reconsider existing California law.

*b. over 100 years of precedent extinguished*

*i. decisions prior to 1911*

The majority begins its analysis of relevant precedent by examining the 1911 enactment of article VI, section 13—the miscarriage of justice standard.<sup>189</sup> The court believes that decisions predating the provision are wholly inconsequential in determining whether a coerced confession justifies automatic reversal.<sup>190</sup>

The court's reasoning in refusing to take notice of decisions prior to 1911 is flawed. The miscarriage of justice standard, and its "cousin," harmless-error, are both founded on the premise that other, overwhelming evidence of guilt can render an improperly admitted coerced confession nonprejudicial or harmless.<sup>191</sup> Justice Mosk correctly noted that pre-1911 decisions involving coerced confessions adhered to a reversible-per-se rule<sup>192</sup> and "came to full stature [ ] within a jurisprudence requiring harmless-error analysis" for other types of errors.<sup>193</sup> Specifically, in *People v. Brotherton*,<sup>194</sup> the court declared that "[o]ur judgment . . . is to be given 'without regard to technical error or defect which does not affect

186. See *supra* note 28; *supra* part II.B.1.

187. 56 Cal. 2d 629, 364 P.2d 845, 15 Cal. Rptr. 909 (1961).

188. *Id.* at 634, 364 P.2d at 848, 15 Cal. Rptr. at 912.

189. *Cahill*, 5 Cal. 4th at 494, 853 P.2d at 1047-48, 20 Cal. Rptr. 2d at 592-93.

190. See *id.* The court states that

[decisions] prior to the enactment of the California constitutional provision presently governing reversible error—shed no light upon the question whether the admission of an involuntary confession amounts to a "miscarriage of justice" under article VI, section 13, so as to compel reversal without regard to the other evidence received at trial.

*Id.* at 494 n.10, 853 P.2d at 1047-48 n.10, 20 Cal. Rptr. 2d at 592-93 n.10.

191. *Id.* at 509-10, 853 P.2d at 1058-59, 20 Cal. Rptr. 2d at 603-04.

192. See *id.* at 524, 853 P.2d at 1069, 20 Cal. Rptr. 2d at 614 (Mosk, J., dissenting). The justice cited several cases supporting his assertion: *People v. Barric*, 49 Cal. 342, 345 (1874); *People v. Johnson*, 41 Cal. 452, 455 (1871); and *People v. Ah How*, 34 Cal. 218, 223-24 (1867). *Cahill*, 5 Cal. 4th at 524, 853 P.2d at 1069, 20 Cal. Rptr. 2d at 614 (Mosk, J., dissenting).

193. *Cahill*, 5 Cal. 4th at 524, 853 P.2d at 1069, 20 Cal. Rptr. 2d at 614 (Mosk, J., dissenting).

194. 47 Cal. 388 (1874).

the *substantial* rights of the parties.' . . . The prisoners must go further, and affirmatively show in some way that their *substantial* rights have been injuriously affected by the error complained of."<sup>195</sup>

Also, prior to 1911, the court had employed a harmless-error rule in numerous contexts including pleading errors,<sup>196</sup> procedural errors,<sup>197</sup> instruction errors,<sup>198</sup> and evidentiary errors.<sup>199</sup>

Pre-1911 cases are important because they illustrate that while most errors were subjected to harmless-error analysis, coerced confessions were considered *sui generis* evidence—their improper admission automatically warranted overturning a conviction. Thus, the majority's fervent insistence upon looking solely at post-1911 decisions ignores *stare decisis* principles.

## ii. decisions from 1911 to 1958

Article VI, section 13 was interpreted soon after enactment in *People v. O'Bryan*.<sup>200</sup> The *O'Bryan* court held that

[s]ection 4 1/2 of article VI of our constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from *any* error of law. Where error is shown it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a *prima facie* case for reversal which must be overcome by a clear showing that no injury could have resulted.<sup>201</sup>

The *Cahill* majority seized upon this language and rooted its holding in *O'Bryan*.<sup>202</sup> One "slight" problem arises with the majority's passionate adherence to *O'Bryan*—*O'Bryan* did not involve a coerced confession!<sup>203</sup> Instead, *O'Bryan* dealt with an improperly admitted dec-

195. *Id.* at 404 (emphasis added).

196. *See, e.g.*, *People v. Mead*, 145 Cal. 500, 502-04, 78 P. 1047, 1049 (1904); *People v. Haagen*, 139 Cal. 115, 116-17, 72 P. 836, 837 (1903); *People v. Wynn*, 133 Cal. 72, 73, 65 P. 126, 126-27 (1901).

197. *See, e.g.*, *People v. Dolan*, 96 Cal. 315, 318-19, 31 P. 107, 108-09 (1892); *People v. Smalling*, 94 Cal. 112, 119-20, 29 P. 421, 423 (1892); *People v. O'Brien*, 88 Cal. 483, 488-89, 26 P. 362, 364 (1891).

198. *See, e.g.*, *People v. Burns*, 63 Cal. 614, 615 (1883); *People v. Nelson*, 56 Cal. 77, 81-83 (1880).

199. *See, e.g.*, *People v. Greening*, 102 Cal. 384, 386-87, 36 P. 665, 666 (1894); *People v. Nelson*, 85 Cal. 421, 425-29, 24 P. 1006, 1007-08 (1890).

200. 165 Cal. 55, 130 P. 1042 (1913). For a discussion of *O'Bryan*, see *supra* part II.B.1.

201. *O'Bryan*, 165 Cal. at 65, 130 P. at 1046 (first emphasis added).

202. *Cahill*, 5 Cal. 4th at 488-92, 853 P.2d at 1043-47, 20 Cal. Rptr. 2d at 588-92.

203. *O'Bryan*, 165 Cal. at 61, 130 P. at 1044.

laration against interest.<sup>204</sup> Further, there was no majority opinion;<sup>205</sup> as Justice Mosk correctly points out, the case was decided by a lead opinion and a concurring opinion.<sup>206</sup> Accordingly, the precedential value accorded *O'Bryan* must necessarily be diminished.

Notwithstanding these minor obstacles, the majority used *O'Bryan* as a starting point to offer ten cases purportedly validating a harmless-error analysis for involuntary confessions.<sup>207</sup> However, Justice Mosk pointed out that four of the cases cited do not directly address the issue whether an improperly admitted coerced confession mandates an automatic reversal.<sup>208</sup>

For example, three of the cases "did not even consider whether to apply [the] rule of automatic reversal because [the court] did not find any confession to have been coerced."<sup>209</sup> In the fourth case, the court simply applied the Federal Constitution's rule of automatic reversal; it did not consider the California constitutional provision.<sup>210</sup> In another case cited by the majority, the United States Supreme Court expressly overturned the court's assertion that a coerced confession "could not have affected

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204. *Id.* See *supra* note 38 discussing the distinction between coerced confessions and declarations against interest.

205. *O'Bryan*, 165 Cal. at 68, 130 P. at 1047.

206. *Cahill*, 5 Cal. 4th at 528, 853 P.2d at 1071, 20 Cal. Rptr. 2d at 616 (Mosk, J., dissenting). Justice Sloss authored the lead opinion, in which Justices Angellotti and Shaw joined. *O'Bryan*, 165 Cal. at 68, 130 P. at 1047. Justice Lorigan authored an opinion concurring in the judgment, in which Justices Melvin and Henshaw joined. *Id.* at 70, 130 P. at 1048.

207. The ten cases cited are *People v. Stroble*, 36 Cal. 2d 615, 623-24, 226 P.2d 330, 336 (1951), *aff'd sub nom. Stroble v. California*, 343 U.S. 181 (1952); *People v. Gonzales*, 24 Cal. 2d 870, 877-78, 151 P.2d 251, 254 (1944); *People v. Jones*, 24 Cal. 2d 601, 604, 150 P.2d 801, 804-05 (1944); *People v. Rogers*, 22 Cal. 2d 787, 803-07, 141 P.2d 722, 730-32 (1943); *People v. Ferdinand*, 194 Cal. 555, 565-70, 229 P. 341, 345-46 (1924); *People v. Sourisseau*, 62 Cal. App. 2d 917, 930-31, 145 P.2d 916, 923 (1944); *People v. Mellus*, 134 Cal. App. 219, 220-26, 25 P.2d 237, 238-40 (1933); *People v. Day*, 125 Cal. App. 106, 110-11, 13 P.2d 855, 856-57 (1932); *People v. Dye*, 119 Cal. App. 262, 271-73, 6 P.2d 313, 316-17 (1931); and *People v. Reed*, 68 Cal. App. 19, 20, 228 P. 361, 361-62 (1924). *Cahill*, 5 Cal. 4th at 494, 853 P.2d at 1048, 20 Cal. Rptr. 2d at 593.

208. *Cahill*, 5 Cal. 4th at 542, 853 P.2d at 1081, 20 Cal. Rptr. 2d at 626 (Mosk, J., dissenting).

209. *Id.* (Mosk, J., dissenting). Justice Mosk is referring to *Gonzales*, 24 Cal. 2d at 877-78, 151 P.2d at 254-55 (holding harmless erroneous refusal of instruction that jury should determine voluntariness of confession); *Rogers*, 22 Cal. 2d at 806-08, 141 P.2d at 731-32 (noting defendant did not challenge admissibility of confessions on grounds requiring determination of voluntariness); and *Ferdinand*, 194 Cal. at 565-70, 229 P. at 345-46 (holding harmless erroneous refusal to permit defense counsel to voir dire witness regarding circumstances of confession).

210. *Cahill*, 5 Cal. 4th at 542, 853 P.2d at 1081, 20 Cal. Rptr. 2d at 626 (Mosk, J., dissenting). Justice Mosk is referring to *Jones*, 24 Cal. 2d at 611, 150 P.2d at 806 (holding United States Constitution bars conviction based on coerced confession).

the fairness of defendant's trial."<sup>211</sup> Thus, while the majority's view regarding the treatment of coerced confessions during this time frame is not meritless, it is by no means absolutely convincing.<sup>212</sup>

iii. decisions from 1958 to *Cahill*

The *Cahill* majority acknowledged that California had followed a reversible-per-se rule since 1958,<sup>213</sup> when the court decided *People v. Berve*.<sup>214</sup> Further, the *Cahill* court specifically pointed out that "a reversible-per-se rule applied to the erroneous admission of confessions *as a matter of state law* [is] independent of any federal compulsion."<sup>215</sup> This statement severely undermines the majority's proffered impetus for initially reconsidering its treatment of coerced confessions—the United States Supreme Court's *Fulminante* decision.<sup>216</sup> If the *Cahill* majority truly believed California law is independent of the United States Supreme Court in this area, it would not have so prominently focused and relied upon *Fulminante* as the "torch-bearer" that illuminated a more enlightened pathway to justice.

One final point must be reiterated concerning the majority's complete disregard for stare decisis. The late Supreme Court Justice Thurgood Marshall pronounced three rationales for a principled departure from precedent: (1) where there is a subsequent change in the law; (2) when new facts and experiences warrant the change; or (3) when precedent has become an impediment to consistent adjudication.<sup>217</sup> Absent these or any other compelling reasons, a major change in jurisprudence arguably cannot be considered principled.

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211. *Cahill*, 5 Cal. 4th at 543, 853 P.2d at 1081, 20 Cal. Rptr. 2d at 626 (Mosk, J., dissenting) (citing *People v. Stroble*, 36 Cal. 2d 615, 623, 226 P.2d 330, 336 (1951), *aff'd sub nom. Stroble v. California*, 343 U.S. 181 (1952)).

212. In fairness to the majority, five of the cited cases applied harmless-error review. See *People v. Sourisseau*, 62 Cal. App. 2d 917, 930-31, 145 P.2d 916, 923 (1944); *People v. Mellus*, 134 Cal. App. 219, 220-26, 25 P.2d 237, 238-40 (1933); *People v. Day*, 125 Cal. App. 106, 110-11, 13 P.2d 855, 856-57 (1932); *People v. Dye*, 119 Cal. App. 262, 271-73, 6 P.2d 313, 316-17 (1931); *People v. Reed*, 68 Cal. App. 19, 20, 228 P. 361, 361-62 (1924).

213. *Cahill*, 5 Cal. 4th at 502, 853 P.2d at 1053-54, 20 Cal. Rptr. 2d at 598-99. See *supra* part II.B.2 for a discussion of post-1958 cases.

214. 51 Cal. 2d 286, 332 P.2d 97 (1958), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993). See *supra* part II.B.2.a for a full discussion of this case.

215. *Cahill*, 5 Cal. 4th at 496, 853 P.2d at 1049, 20 Cal. Rptr. 2d at 594.

216. *Id.* at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597. See *supra* part IV.A.2.a for a discussion of this paradox.

217. *Payne v. Tennessee*, 111 S. Ct. 2597, 2621-22 (1991) (Marshall, J., dissenting). This federal "generic" test is equally applicable to state law since it is not founded on federal law principles.

In support of the majority's holding, there was a subsequent change in the law—the *Fulminante* decision.<sup>218</sup> However, there is a problem with the *Cahill* court's reliance on this change: It occurred in a separate and independent judicial system from which the majority has declared independence!<sup>219</sup> Since the majority failed to mention any subsequent changes in California law warranting a doctrinal departure from precedent, the majority did not meet this first criterion.

The majority also failed to mention any new facts or experiences in support of their doctrinal change. Rather, the court merely mentioned long-standing arguments according harmless-error treatment to coerced confessions.<sup>220</sup>

Finally, precedent has not become an impediment to consistent adjudication in this area. Nothing could be more consistent than a bright-line rule granting an *automatic* new trial for an improperly admitted involuntary confession.<sup>221</sup> In sum, using Justice Marshall's criteria as a framework for analysis, *Cahill* represents an unprincipled departure from *stare decisis*.

## B. Trial Versus Structural Errors

### 1. Introduction

The *Cahill* majority adopted *Fulminante*'s fundamental distinction between trial and structural errors.<sup>222</sup> Trial errors are those that occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."<sup>223</sup> In *Fulminante*, coerced confessions were lumped into the morass of existing trial errors.<sup>224</sup> It is important to note that Chief

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218. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

219. *See Cahill*, 5 Cal. 4th at 496, 853 P.2d at 1049, 20 Cal. Rptr. 2d at 594.

220. *See supra* part III.B.

221. *See Ogletree, supra* note 4, at 167 (arguing bright-line rule of automatic reversal preferable where coerced confession improperly admitted at trial).

222. *See Cahill*, 5 Cal. 4th at 502, 853 P.2d at 1053-54, 20 Cal. Rptr. 2d at 598-99.

223. *Fulminante*, 499 U.S. at 307-08.

224. *Id.* at 310. *See supra* note 3 for a listing of trial errors. Interestingly, at least one post-*Fulminante* court has treated a coerced confession as structural error. *See Iowa v. Quintero*, No. 90-44, 1991 WL 207111, at \*7 (Iowa Ct. App. Aug. 27, 1991), *aff'd on other grounds*, 480 N.W.2d 50, 51 (Iowa 1992). The court specifically mentioned it was "unable to make the distinction under the Iowa Constitution and case law between a coerced confession and other 'structural errors.'" *Id.* Accordingly, the court held that use of involuntary confessions warranted the automatic reversal of a conviction. *Id.* The court cited several cases supporting its holding. *Id.* (citing, for example, *State v. Rhiner*, 352 N.W.2d 258, 263 (Iowa 1984); *State v. Hrbek*, 336 N.W.2d 431, 436 (Iowa 1983)). However, all of them were pre-*Fulminante*. *See*

Justice Rehnquist is primarily concerned with factual accuracy, and thus allowing supposedly reliable, "harmless," involuntary confessions into evidence achieves his goal.<sup>225</sup>

Structural errors, on the other hand, occur when the "entire conduct of the trial from beginning to end is obviously affected."<sup>226</sup> Because of their all-encompassing effect on the trial, structural errors, which are rare, are not accorded harmless-error treatment.<sup>227</sup>

## 2. Trial versus structural distinction is specious

Various scholars and jurists have attacked the trial versus structural distinction as specious. For example, Professor Ogletree denounced the distinction as unpersuasive<sup>228</sup> and wholly lacking in precedential support.<sup>229</sup> Former United States Supreme Court Justice Byron White termed the distinction a "meaningless dichotomy."<sup>230</sup> California Supreme Court Justice Mosk noted the distinction "simply does not work" because Chief Justice Rehnquist never fully articulated the "structure" of structural errors.<sup>231</sup> Finally, one writer has suggested that the dichotomy "has no historical justification except to widen the reach of the harmless error analysis to even more constitutional errors."<sup>232</sup>

In *Fulminante*, Chief Justice Rehnquist enumerated several examples of structural errors:<sup>233</sup> denial of the accused's right to counsel at

*id.* In any event, it remains to be seen which states, if any, will follow Iowa's lead and conclude that coerced confessions are structural errors.

225. *Fulminante*, 499 U.S. at 308. Justice Rehnquist states "that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). But see *infra* part IV.C for a discussion that fairness to criminal defendants may sometimes outweigh the quest for truth.

226. *Fulminante*, 499 U.S. at 309-10. See *infra* notes 234-38 for examples of structural errors.

227. See *Fulminante*, 499 U.S. at 310.

228. Ogletree, *supra* note 4, at 161-62.

229. *Id.* at 164 (citing *Fulminante*, 499 U.S. at 288-90 (White, J., dissenting)).

230. *Fulminante*, 499 U.S. at 290 (White, J., dissenting).

231. *Cahill*, 5 Cal. 4th at 548, 853 P.2d at 1084-85, 20 Cal. Rptr. 2d at 629-30 (Mosk, J., dissenting).

232. John M. McCarthy, Note, *For the Sake of Judicial Economy—Supreme Court Rules Coerced Confession Can Be Harmless Error*. *Fulminante v. Arizona*, 111 S. Ct. 1246 (1991), 17 S. ILL. U. L.J. 621, 635 (1993); see also Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 427 (1980) (maintaining harmless error doctrine "has no substantive doctrinal base"); Stacy & Dayton, *supra* note 151, at 80-81 (arguing Supreme Court's promotion of factual accuracy "denigrates important constitutional protections accorded criminal suspects").

233. *Fulminante*, 499 U.S. at 309-10.



trial,<sup>234</sup> trial before a judge who is not impartial,<sup>235</sup> unlawful exclusion of members of the defendant's race from a grand jury,<sup>236</sup> denial of the right to self-representation at trial,<sup>237</sup> and denial of the right to public trial.<sup>238</sup>

A comparison of the aforementioned structural errors with both current case law and common sense proves the distinction between trial and structural errors is untenable. In *Rushen v. Spain*,<sup>239</sup> the United States Supreme Court held that denial of the defendant's right to be present at trial warranted harmless-error review.<sup>240</sup> Professor Ogletree forcefully stated that "[i]t strains credulity to assert that the denial of a defendant's right to be present at all stages of the trial is a mere trial error, whereas the denial of a defendant's right to self-representation at trial is 'structural.'"<sup>241</sup>

In *Sullivan v. Louisiana*,<sup>242</sup> the Court held a deficient reasonable-doubt instruction to be a structural error requiring automatic reversal.<sup>243</sup> Such an error appears to be a "classic" trial error, and should probably have been classified as such if the Court were truly consistent in its classification scheme.<sup>244</sup> In this same vein, a failure to instruct the jury on the prosecution's burden to establish guilt beyond a reasonable doubt would also appear to be a trial-type error.<sup>245</sup> However, it too is considered a structural error.<sup>246</sup>

Finally, there appears to be no specific reason to classify a violation of the right to a public trial as a structural error. Justice White stated as much when he wrote that a "violation of the guarantee of a public trial require[s] reversal without *any* showing of prejudice . . . even though the values of a public trial may be intangible and unprovable in any particular case."<sup>247</sup> In other words, the factual accuracy of a trial will usually

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

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

236. See *Vasquez v. Hillery*, 474 U.S. 254 (1986).

237. See *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

238. See *Waller v. Georgia*, 467 U.S. 39 (1984).

239. 464 U.S. 114 (1983).

240. *Id.* at 117-18 & n.2.

241. Ogletree, *supra* note 4, at 164 (citation omitted).

242. 113 S. Ct. 2078 (1993).

243. *Id.* at 2083. Chief Justice Rehnquist wrote a separate concurrence attempting to justify his classification of this error as structural. See *id.* at 2083-84 (Rehnquist, C.J., concurring). His attempt was not persuasive.

244. See *supra* part IV.B.1 for a discussion of the trial-structural error distinction.

245. See Ogletree, *supra* note 4, at 163.

246. See *Jackson v. Virginia*, 443 U.S. 307, 320 & n.14 (1979).

247. *Fulminante*, 499 U.S. at 294-95 (White, J., dissenting) (emphasis added).

not be impaired by this type of violation. As such, there appears to be no reason to apply a "prophylactic" approach<sup>248</sup> to such an error.

### C. Fairness Issues

The *Cahill* majority presented a somewhat novel approach to buttress its argument subjecting coerced confessions to the harmless-error standard—fairness to the public.<sup>249</sup> The majority contended that public confidence as well as respect for "the law" would erode if overwhelming evidence of guilt is ignored because of a potentially immaterial involuntary confession.<sup>250</sup> Further, the *Cahill* court posited that the public is unfairly burdened by the increased costs of "a superfluous retrial in which the outcome is a foregone conclusion."<sup>251</sup> Those two arguments are reasonable and thoughtful, especially in light of the ever-increasing demands placed upon our judicial system.

However, fairness is a two-way street and constitutional guarantees are designed to protect the rights of the defendant, not the government.<sup>252</sup> Additionally, the accused's resources for his or her defense seem inconsequential when compared to the government's vast array of resources. Consequently, our criminal justice system is accusatorial, not inquisitorial,<sup>253</sup> which means the government must use its largesse to gather enough independent evidence to convict the accused<sup>254</sup>—it may not force an accused to assist in his or her own prosecution.<sup>255</sup>

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248. See *Cahill*, 5 Cal. 4th at 503, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599 (discussing former prophylactic treatment of coerced confessions).

249. *Id.* at 509, 853 P.2d at 1058, 20 Cal. Rptr. 2d at 603.

250. *Id.* The majority also notes that a reversal could unfairly burden the public's interest in seeing the "guilty" properly punished because of the unavailability of key witnesses or other evidence at the second trial. *Id.*

251. *Id.* But see Ogletree, *supra* note 4, at 167 (suggesting that costs of harmless-error review may actually exceed costs of new trial).

252. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970). In criminal prosecutions the government represents the public's interest; accordingly, this Note uses the terms "public" and "government" interchangeably.

253. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

254. *Cahill*, 5 Cal. 4th at 516, 853 P.2d at 1063, 20 Cal. Rptr. 2d at 608 (Mosk, J., dissenting); see also 1 LAFAVE & ISRAEL, *supra* note 7, § 1.6(b) (stating accusatorial system is underlying principle of criminal justice system).

255. See U.S. CONST. amend. V; *Griffin v. California*, 380 U.S. 609, 613-14 (1965); 1 LAFAVE & ISRAEL, *supra* note 7, § 1.6(b); Aronson, *supra* note 4, at 591. See generally Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part 1)*, 53 OHIO ST. L.J. 101 (1992) (analyzing historical interrelationship between coerced confessions and right against self-incrimination).

The *Cahill* court further reasoned that coerced confessions may often be reliable.<sup>256</sup> Even if this were true,<sup>257</sup> the value in protecting an individual's constitutional procedural rights may outweigh the truth-seeking function.<sup>258</sup> As Justice Frankfurter said nearly fifty years ago, "[t]he history of American freedom is, in no small measure, the history of procedure."<sup>259</sup> The automatic reversal rule for involuntary confessions originally stemmed from a necessity to curb abusive police procedures.<sup>260</sup> Although the police are entrusted with preserving peace and protecting the citizenry, they must always be cognizant of their duty to obey the law in their official pursuits.<sup>261</sup> They cannot "wring out confessions" in the pursuit of criminal justice.<sup>262</sup> Otherwise, our system of ascertaining truth and meting out justice would be predicated on a barbaric, quasi-Darwinian system in which brute force determined our personal freedom.<sup>263</sup> In sum, the two countervailing forces—fairness to the public and fairness to the accused—continue to produce conflicting views.<sup>264</sup>

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256. See *Cahill*, 5 Cal. 4th at 507, 853 P.2d at 1057, 20 Cal. Rptr. 2d at 602.

257. This contention has been attacked by several authorities. See, e.g., 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 118, at 432 (John William Strong ed., 4th ed. 1992); 1 LAFAVE & ISRAEL, *supra* note 7, § 6.2(b), at 442-44; Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 414 (1954).

258. See Ogletree, *supra* note 4, at 170. In *Fulminante*, Justice White articulated this premise as follows: "The search for truth is indeed central to our system of justice, but 'certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.'" *Fulminante*, 499 U.S. at 295 (White, J., dissenting) (quoting *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)).

259. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

260. See, e.g., Yale Kamisar, *What is an "Involuntary" Confession?*, 17 RUTGERS L. REV. 728, 739-41 (1963) (maintaining reversible-per-se rule deters improper police conduct); Ogletree, *supra* note 4, at 168-69 (declaring some constitutional errors so extreme that society cannot tolerate conviction based on them).

261. See Aronson, *supra* note 4, at 596.

262. *Id.*

263. In his sardonic essay, Professor Freedman suggests that by the year 2050, "[t]he tone and the essence of professionalism . . . will be set by Rambo judges." Monroe Freedman, *Law in the 21st Century*, 60 FORDHAM L. REV. 503, 503 (1991). Further, he postulates that "[c]oerced confessions will be well regarded by prosecuting authorities." *Id.* at 505. He concludes his essay by stating, "[i]n short, nothing is going to change in the next 59 years." *Id.*

264. See Aronson, *supra* note 4, at 603 (suggesting *Fulminante* adversely tilted scale in favor of affirming convictions rather than safeguarding petitioners' constitutional rights).

#### D. Coerced Confessions as Sui Generis Evidence

##### 1. Traditional legal analysis

Writing for the *Cahill* majority, Justice George followed Chief Justice Rehnquist's analysis in *Fulminante*<sup>265</sup> and stated that a coerced confession's devastating impact does not justify a reversible-per-se rule.<sup>266</sup> Rather, the improper admission of an involuntary confession into evidence is simply more likely to be deemed prejudicial than are other errors.<sup>267</sup> The court believed traditional harmless-error analysis was sufficient to safeguard the accused's constitutional rights; accordingly, the monolithic, prophylactic, reversible-per-se rule was unnecessary.<sup>268</sup> In sum, the majority believed there was no reason to treat coerced confessions any differently than other "trial" errors.<sup>269</sup>

The *Cahill* majority's view by no means represents an absolute consensus within the legal community. In *Fulminante*, Justice Kennedy's concurring opinion stated that a confession may have an

indelible impact . . . on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence. If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case.<sup>270</sup>

Professor Ogletree insists that a coerced confession's "overwhelming" prejudicial effect on a jury is nondeterminative and thus unsusceptible to harmless-error review.<sup>271</sup>

Moreover, he asserts that the admission of a coerced confession distorts the trial process by altering the defense counsel's entire strategy.<sup>272</sup> Normally, an attorney can challenge improperly admitted incriminating

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265. *Fulminante*, 499 U.S. at 310.

266. *Cahill*, 5 Cal. 4th at 503, 853 P.2d at 1054, 20 Cal. Rptr. 2d at 599.

267. *Id.*

268. *See id.*

269. *Id.*

270. *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring). Justice Mosk made special reference to this language in his argument in favor of treating coerced confessions as sui generis evidence. *Cahill*, 5 Cal. 4th at 552-53, 853 P.2d at 1088, 20 Cal. Rptr. 2d at 633 (Mosk, J., dissenting). Further, Justice White, who echoed Justice Kennedy's view, argued that "a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." *Fulminante*, 499 U.S. at 296 (White, J., dissenting).

271. Ogletree, *supra* note 4, at 165.

272. *Id.* at 166.

evidence, such as fingerprints, through "traditional" trial methods like cross-examination, chain-of-control questions, and probability of mistake arguments.<sup>273</sup> These defense tactics become wholly impracticable when the improperly admitted evidence is a coerced confession.<sup>274</sup> In such cases, a defendant's constitutionally guaranteed right against self-incrimination is jettisoned away—since once admitted, a confession is not easily forgotten.<sup>275</sup> Coerced confessions, the "evidentiary bombshells"<sup>276</sup> that shatter defenses, thus necessitate special treatment. Confessions are unlike any other evidentiary creature; their impact is unparalleled. Accordingly, the only effective medicine for a trial infected with a coerced confession is a new trial.<sup>277</sup>

## 2. The science of psychology and coerced confessions

### a. *harmless-error standard of review*

The *Cahill* court specifically pronounced that California would now subject coerced confessions to harmless-error review.<sup>278</sup> The harmless-error standard of review, originally promulgated in *Chapman v. California*,<sup>279</sup> required the prosecution to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."<sup>280</sup> This somewhat vague language regarding an appellate court's standard of review was recently reinterpreted in *Sullivan v. Louisiana*.<sup>281</sup> The Court announced the appropriate inquiry on review "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."<sup>282</sup> In other words, an appel-

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273. See *id.* at 165-66 (discussing ways to challenge improperly admitted eyewitness testimony).

274. *Id.* at 166 (noting that jurors rarely disregard involuntary confession even when other evidence may raise reasonable doubt of guilt).

275. *Id.*; see also *infra* part IV.D.2.c (discussing indelible imprint of coerced confessions on jury).

276. *People v. Schader*, 62 Cal. 2d 716, 731, 401 P.2d 665, 674, 44 Cal. Rptr 193, 202 (1965), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

277. See Ogletree, *supra* note 4, at 165-67; Stacy & Dayton, *supra* note 151, at 102-04; Aronson, *supra* note 4, at 591. But see Sara E. Welch, *Fifth Amendment—Harmless Error Analysis Applied to Coerced Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 849, 869-70 (1992) (arguing that all constitutional errors should be subjected to harmless-error review because it is not judge's province to hierarchically rank errors).

278. *Cahill*, 5 Cal. 4th at 509-10, 853 P.2d at 1059, 20 Cal. Rptr. 2d at 604.

279. 386 U.S. 18 (1967).

280. *Id.* at 24.

281. 113 S. Ct. 2078 (1993).

282. *Id.* at 2081.

late court cannot simply look at the other evidence in isolation, but rather must examine *all* the evidence, including the coerced confession and its devastating impact on the jury, in reaching its conclusion.

*b. the "average jury" and appellate review*

*Sullivan* commands a reviewing court to assume an intellectual omniscience in attempting to determine the involuntary confession's impact on an "average jury."<sup>283</sup> As with other errors subjected to the harmless-error standard of review, coerced confessions are analyzed not by a representative cross section of the community, but rather by a judicial tribunal reading a "cold record."<sup>284</sup>

This distinction is important for several reasons. First, the "average jury" has been regarded as a "fictional character, whose attitudes are ultimately supplied by the appellate court."<sup>285</sup> Consequently, there is no such thing as an "average jury" and decisions rendered by an appellate court merely represent the judges' best guess as to a typical jury's decision-making process.<sup>286</sup> Such review is extremely improvidential in the case of coerced confessions because unlike other evidence, "incriminating statements from [the] defendant's own tongue are *most* persuasive evidence of his guilt, and the part they play in securing a conviction cannot be determined."<sup>287</sup>

Second, and related to the above discussion, is the appellate court's "brute usurpation" of the jury's fact-finding role.<sup>288</sup> Since coerced confessions are arguably the most damaging form of evidence,<sup>289</sup> the jury's

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283. *See id.*

284. For a general discussion of appellate judges' biases interfering with their duty to neutrally adjudicate cases, see Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311 (1985).

285. 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, 1185. Teitelbaum further asserts that "judges can[not] accurately assess the prejudice created by an item of proof." *Id.* at 1197.

286. For a comprehensive review of the jury decision-making process, see, for example, Thomas M. Ostrom et al., *An Integration Theory Analysis of Jurors' Presumptions of Guilt or Innocence*, 36 J. PERSONALITY & SOC. PSYCHOL. 436 (1978).

287. *People v. Matteson*, 61 Cal. 2d 466, 470, 393 P.2d 161, 163, 39 Cal. Rptr. 1, 3 (1964) (emphasis added), *overruled by* *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).

288. Ogletree, *supra* note 4, at 167; *see also* 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6(a), at 257 (1984) (discussing English courts' Exchequer Rule, which presumed most trial errors caused prejudice warranting a new trial, thus ensuring appellate courts could not encroach upon jury's fact-finding function).

289. *See supra* note 270 and accompanying text.

initial fact-finding process is almost meaningless.<sup>290</sup> Thus, the reviewing court is passing judgment based on an inherently prejudicial trial record. The resulting inequity surrounding the review of a skewed trial record cannot be overstated: One writer has suggested 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."<sup>291</sup>

Harmless-error review imposes a daunting task upon our appellate courts. It not only requires judges to completely ignore their own preconceived notions of guilt or innocence, but also commands them to delve into the minds of average jurors and divinely ascertain their methods of decision making.<sup>292</sup> The above arguments suggest this is nearly impossible when the error is a coerced confession.

*c. . indelible imprint of coerced confession on jury*

Not surprisingly, the rationales counseling against appellate review of coerced confessions also apply in the context of juror decision making. For example, psychological research suggests antidefendant individuals more readily abandon their presumption of innocence when incriminating evidence is presented than prodefendant subjects.<sup>293</sup> Assume for the point of argument that a twelve-member jury has an equal distribution of anti- and prodefendant members. Although a defendant is plainly prejudiced by the improper introduction of a coerced confession, or other improperly admitted evidence, this research implies that the extent of the harm may be greater than expected.<sup>294</sup> Fifty percent of the jury will

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290. See Ogletree, *supra* note 4, at 167.

291. Aronson, *supra* note 4, at 602 (citing *Harmless Error*, 252 THE NATION 471 (1991)); see also Allen, *supra* note 284, at 332 (suggesting common thread in most appellate opinions affirming criminal convictions is "a staunch belief . . . in the guilt of the appellants"). Psychological literature also supports the view that appellate judges, like everyone else, have a natural predisposition to seize upon negative, or incriminating, evidence. See Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1047 (1980) (suggesting that belief perseverance is enhanced when subject must explain proffered evidence); Willard L. Brigner & Joyce G. Crouch, *Is Perceptual Set Negatively Biased?*, PERCEPTUAL & MOTOR SKILLS, Aug. 1985, at 81, 82 (discussing observers' tendency to choose "ugly" portraits as most like "true" picture, thereby implying negative effect has greater weight than positive effect in influencing perception); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979) (maintaining people are more likely to accept evidence confirming their preconceived beliefs).

292. See *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 (1993).

293. Ostrom et al., *supra* note 286, at 446.

294. *Id.*

quickly change their existing opinion to one favoring guilt.<sup>295</sup> In essence, a coerced confession provides a golden opportunity for jurors who are looking for a reason to convict.

Further, since coerced confessions are arguably *sui generis* evidence,<sup>296</sup> they will have an almost immeasurable impact on at least one-half of the jury. Such tremendous impact not only skews the entire trial process, inviting this error's classification as structural,<sup>297</sup> but also renders accurate appellate review unattainable.<sup>298</sup>

A related study concerned the effect of group discussion on juror decision making.<sup>299</sup> This study concluded that where evidence is predominantly incriminating, jurors will convict with a greater degree of certainty *after* discussion with other jurors than before.<sup>300</sup> Therefore, it appears that group discussion leads to decisions gravitating toward the nature of the proffered evidence.<sup>301</sup> If a coerced confession is indeed *sui generis* evidence,<sup>302</sup> the degree of "guilt gravitation" is enormous and arguably undiscernible on review.<sup>303</sup> Thus, psychological research suggests coerced confessions are not amenable to harmless-error review.

## V. CONCLUSION

In *Arizona v. Fulminante*,<sup>304</sup> the United States Supreme Court ruled that improperly admitted coerced confessions were no longer grounds for automatically reversing a conviction.<sup>305</sup> Instead, these errors were now subject to the *Chapman* harmless-error standard of review.<sup>306</sup> In *People v. Cahill*,<sup>307</sup> the California Supreme Court seized upon this "opportunity" to independently reexamine California's treatment of these er-

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295. *See id.* Clearly, this concern is meaningless in cases where a juror has already reached a determination regarding guilt or innocence before the introduction of the evidence.

296. *See supra* part IV.D.1.

297. *See supra* part IV.B discussing the critical distinction between trial and structural errors.

298. *See supra* part IV.D.2.b.

299. *See* Martin F. Kaplan & Charles E. Miller, *Judgments and Group Discussion: Effect of Presentation and Memory Factors on Polarization*, 40 *SOCIOMETRY* 337 (1977). For a general discussion of the jury deliberation process, see Ewart A.C. Thomas & Anthony Hogue, *Apparent Weight of Evidence, Decision Criteria, and Confidence Ratings in Juror Decision Making*, 83 *PSYCHOL. REV.* 442 (1976).

300. Kaplan & Miller, *supra* note 299, at 337.

301. *Id.*

302. *See supra* part IV.D.1.

303. *See supra* part IV.D.2.b.

304. 499 U.S. 279 (1991).

305. *Id.* at 309-10.

306. *Id.*

307. 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr. 2d 582 (1993).



rors.<sup>308</sup> The *Cahill* court stated that both California law and prudential considerations compelled it to adopt the federal standard.<sup>309</sup> The *Cahill* majority was wrong.

The *Cahill* court blatantly disregarded over 100 years of principled precedent,<sup>310</sup> adopted the specious trial-structural error distinction,<sup>311</sup> slighted considerations of fairness to the defendant,<sup>312</sup> and failed to recognize coerced confessions as *sui generis* error.<sup>313</sup>

In our "civilized" society, the legal system serves as the substitute for physical violence in dispute resolution—whether it be in a civil or criminal context. Our Constitution has implicit safeguards that guard against primitive, barbaric means of ascertaining truth. The resulting abhorrence that our system of jurisprudence previously maintained regarding coerced confessions manifested itself in the laudable reversible-per-se rule. *Cahill*, unfortunately, signifies the return to a more primitive, barbaric truth-seeking era.

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308. *Id.* at 500, 853 P.2d at 1052, 20 Cal. Rptr. 2d at 597; *see also supra* note 13 (discussing state's ability to grant defendants greater rights than federal constitutional minimum).

309. *Cahill*, 5 Cal. 4th at 510-11, 853 P.2d at 1059-60, 20 Cal. Rptr. 2d at 604-05.

310. *See supra* part IV.A.

311. *See supra* part IV.B.

312. *See supra* part IV.C.

313. *See supra* part IV.D.

\* This Note is dedicated to my loving and supportive parents; my brother Joel, who is both a friend and mentor; and a wonderful young lady, Jennifer. I would also like to thank Professor Beres for her timely assistance.