1991

*Arizona v. Fulminante*: Coerced Confessions and the Harm in Harmless Error Analysis

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Notes

Arizona v. Fulminante: Coerced Confessions and the Harm in Harmless Error Analysis

I. INTRODUCTION

One of the most important issues frequently before the United States Supreme Court is which constitutional protections should be accorded to a criminal defendant's extrajudicial confession to a police officer or other government official.\(^1\) Much controversy surrounds this issue, largely because many confessions are elicited during the course of police interrogations.\(^2\) Customarily, police interrogations are conducted privately,\(^3\) such that some concern exists that the police may employ coercive techniques during the course of questioning to force a suspect to confess.\(^4\)

The Supreme Court has long recognized the reality of coercive police activity,\(^5\) and thus has consistently held that a coerced confession\(^6\) is inadmissible as evidence in a criminal trial.\(^7\) Indeed, in twenty-five decisions spanning nearly ninety-five years, the Supreme Court held that the admission of a coerced confession would never be considered harmless error and, in fact, mandated

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1. Throughout this Note, the terms "confession(s)" and "admission(s)" will be used interchangeably. It should be noted, however, that some literature distinguishes between the two by defining a "confession" as a full admission of guilt, and an "admission" as a statement that merely tends to prove guilt. See, e.g., Edward W. Cleary et al., McCormick on Evidence § 144, at 361-62 (3d ed. 1984); Graham C. Lilly, An Introduction to the Law of Evidence § 9.12, at 436 (2d ed. 1987).


5. For a discussion of some of the cases in which the Court has acknowledged that coercive police practices exist, see Paulsen, supra note 3.

6. The Court has used the term "involuntary confession" as a "convenient shorthand" for the term "coerced confession." See Arizona v. Fulminante, 111 S. Ct. 1246, 1252 n.3 (1991); Blackburn v. Alabama, 361 U.S. 199, 207 (1960). Accordingly, the terms "coerced confession" and "involuntary confession" will be used interchangeably in this Note.

7. For a list of these cases, see infra note 39.
an automatic reversal.\textsuperscript{8} This automatic reversal rule was applied even in those instances in which sufficient evidence existed, independent of the involuntary confession, to establish the guilt of the defendant beyond a reasonable doubt.\textsuperscript{9}

On March 26, 1991, a sharply divided\textsuperscript{10} United States Supreme Court overturned that long line of precedent.\textsuperscript{11} In \textit{Arizona v. Fulminante},\textsuperscript{12} the Court held that the admission of a coerced confession need not result in an automatic reversal.\textsuperscript{13} The Court held that a reviewing court may instead apply a “harmless error analysis”\textsuperscript{14} to determine whether the admission of the confession into evidence was “harmless beyond a reasonable doubt.”\textsuperscript{15}

Although there are actually three separate holdings in \textit{Fulminante},\textsuperscript{16} this Note will focus on the Court’s holding that a harmless error analysis is applicable to the erroneous admission of a coerced confession. It will begin with an examination of the background surrounding the well-established rule that excludes such confessions from evidence in a criminal trial.\textsuperscript{17} This Note will also consider the harmless error doctrine and the reasons why the Court, until \textit{Fulminante}, consistently declined to apply such an analysis to cases involving coerced confessions.\textsuperscript{18} After discussing the lower court and the Supreme Court decisions in \textit{Fulminante},\textsuperscript{19} this Note will consider some of the defects in the reasoning used by the Court to reach the conclusion that a harmless error analysis applies to erroneously admitted coerced confessions.\textsuperscript{20} Finally, this Note will discuss the possible impact of the \textit{Fulminante} decision on our system of justice.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{8} See infra note 39.
\item \textsuperscript{9} See, e.g., infra notes 60-70 and accompanying text.
\item \textsuperscript{10} See infra note 121 for the shifting coalitions among the Supreme Court Justices.
\item \textsuperscript{11} \textit{Arizona v. Fulminante}, 111 S. Ct. 1246 (1991).
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.} at 1265.
\item \textsuperscript{14} For one definition of “harmless error analysis,” see infra text accompanying note 194.
\item \textsuperscript{15} \textit{Fulminante}, 111 S. Ct. at 1265.
\item \textsuperscript{16} The Court decided that Fulminante’s confession was coerced, that coerced confessions are subject to a harmless error analysis, and that the admission of Fulminante’s coerced confession was not harmless error. See infra notes 121-59 and accompanying text.
\item \textsuperscript{17} See infra notes 22-59 and accompanying text.
\item \textsuperscript{18} See infra notes 60-70 and accompanying text.
\item \textsuperscript{19} See infra notes 108-74 and accompanying text.
\item \textsuperscript{20} See infra notes 175-222 and accompanying text.
\item \textsuperscript{21} See infra notes 223-32 and accompanying text.
\end{itemize}
II. BACKGROUND

Before discussing the Arizona v. Fulminante decision, it is important to recognize that the case is best understood in the context of the Court's prior decisions in this area. Accordingly, this background section first considers how the Court defines "voluntary confessions." Next, this section discusses the history of the inadmissibility of coerced confessions and the rule that required an automatic reversal of a conviction in those instances where a coerced confession had been admitted into evidence at a criminal trial. Finally, this section considers the Court's prior decisions that held that a harmless error analysis should never be applied to coerced confessions.

A. The Definition of a Voluntary Confession

Involuntary confessions are always inadmissible as evidence in a criminal trial. Voluntary confessions, however, may be used against the defendant. The admissibility of a confession thus depends upon whether the confession was "voluntarily" made by the accused.

The issue of whether a particular confession was made voluntarily is one of federal constitutional law. Accordingly, a lower court's determination of the issue is not dispositive. Rather, the Supreme Court must make its own determination based upon an independent evaluation of the record. In so doing, the Court must employ a two-hundred-year-old "voluntariness" test which asks whether the confession was the result of the criminal suspect's free will.

A review of United States Supreme Court decisions reveals

22. See infra notes 25-38 and accompanying text.
23. See infra notes 39-59 and accompanying text.
24. See infra notes 60-70 and accompanying text.
25. See infra note 39 and accompanying text.
27. For a discussion of the federal voluntariness requirement, see Cleary, supra note 1, § 147, at 372-76.
29. Id. (Rehnquist, C.J., dissenting).
30. Id. (Rehnquist, C.J., dissenting).
32. For a list of some of the cases in which the Court has addressed the issue of whether a confession was made "voluntarily," see Spano v. New York, 360 U.S. 315, 321 n.2 (1959).
that no single factor determines whether an individual's will has been overcome in a particular instance. Instead, the Court historically has scrutinized all of the circumstances surrounding the confession, including both the details of the interrogation that resulted in the confession, and the personal characteristics of the accused. If the Court determines that the confession was obtained as a result of either physical or mental coercive police practices, the confession will be deemed inadmissible regardless of whether it is true.

B. The Longstanding Rule of Automatic Reversal

In a series of decisions that spanned nearly ninety-five years, the Supreme Court unequivocally held that the erroneous admission of a coerced confession in a criminal trial would result in an automatic reversal. The Court, however, never articulated the precise

34. Id. (noting that the Court considers the "totality of all the surrounding circumstances").
35. Id. The Court determines the "factual circumstances surrounding the confession, assess[es] the psychological impact on the accused, and evaluate[es] the legal significance of how the accused reacted." Id. (citing Culombe, 367 U.S. at 603). The details of the interrogation considered relevant by the Court may relate to "the government's conduct and the conditions under which the suspect was questioned, including the site and length of interrogation or detention, whether counsel was made available, and whether the suspect was advised of his constitutional rights." Brief for the United States as Amicus Curiae Supporting Petitioner at 7-8, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839); see also Davis v. North Carolina, 384 U.S. 737, 745-46 (1966) (citing the lack of advice to the accused regarding his constitutional rights); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944) (noting the prolonged and repeated nature of the interrogation); Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (considering the length of detention).

The relevant details that the Court may consider regarding the characteristics of the accused include "ones that affect his vulnerability to pressure, such as his age, intelligence, education, criminal experience, and physical condition." Brief for the United States as Amicus Curiae Supporting Petitioner at 7-8, Fulminante (No. 89-839); see also Payne v. Arkansas, 356 U.S. 560, 567 (1958) (considering the lack of education of the accused); Fikes v. Alabama, 352 U.S. 191, 196-97 (1957) (citing the low intelligence of the accused); Haley v. Ohio, 332 U.S. 596, 600 (1948) (noting the young age of the accused).

36. The Court "has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
37. Before a court may determine that a confession is involuntary, the confession must be found to result from a coercive police activity. Colorado v. Connelly, 479 U.S. 157, 164 (1986).
theoretical underpinnings of this automatic reversal rule. Nevertheless, it appears that most of the Court’s decisions are predicated upon one of three theories: a due process theory; an evidence theory; or a “hybrid” evidence-due process approach.

1. The History of the Voluntariness Requirement

In 1897, the United States Supreme Court held that, in federal criminal trials, the self-incrimination clause of the Fifth Amendment governs whether an accused’s confession was given voluntarily. That decision, however, did not impose the voluntariness requirement upon the states because the Fifth Amendment’s self-incrimination clause was not held to be binding upon the states until 1964.

The Court nevertheless found other grounds upon which to impose the voluntariness requirement on the states. In 1936, in Brown v. Mississippi, the Court set aside a state conviction on the rationale that the admission of an involuntary confession violated the Fourteenth Amendment prohibition against a state depriving...
a person of life or liberty without due process of law. The Brown Court observed that a trial serves only as a pretense in those instances where a conviction is based solely upon a confession elicited by violent means. The Court also predicated its decision on the belief that such confessions may be inherently unreliable as evidence.

Despite the narrow holding in Brown, the Court’s subsequent rulings clarified its position that any type of coerced confession would not be tolerated. Moreover, in 1958, the Court in Payne v. Arkansas further established that the introduction of a coerced confession in a criminal trial violates due process even if there may have been other evidence sufficient to support the conviction. Consistent with this, in Lynumn v. Illinois, the Court rejected as impermissible the argument that the error in such instances was harmless because other evidence existed to establish the defendant’s guilt.

These post-Brown cases acknowledged that coerced confessions were not excluded from evidence solely because of their inherent unreliability. The Court thus began to search for a stronger constitutional basis upon which to exclude coerced confessions. The Court gradually adopted theories of exclusion including the notion immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV.

47. Brown, 297 U.S. at 286. According to one source:

[Beginning with Brown, the Court] radically changed the law; it has imposed limitations on the admissibility of confessions, deriving from the fundamental notion that the interrogation at which a confession is obtained is a part of the process by which the state procures a conviction, and therefore subject to the requirements of the due process clause of the fourteenth amendment. . . . [T]he Court has encountered great difficulties in deciding just what process is due at interrogation.

Confessions, supra note 4, at 962.


49. See Lilly, supra note 1, § 9.12, at 438.

50. The decision applied to those convictions that rested solely upon a physically coerced confession. Brown, 297 U.S. at 286.

51. Lilly, supra note 1, § 9.12, at 438.


53. Id. at 567-68.


55. Id. at 537.


57. See Ritz, supra note 4, at 44 (citing Lisenba as the first case in which the Court recognized that “the evidence theory of untrustworthiness did not provide a satisfactory constitutional basis for overturning state convictions”).
that police practices designed to coerce a suspect into incriminating himself would not be tolerated because such practices are incompatible with our system of justice. The Court also excluded coerced confessions because it sought to protect the values underlying the Fifth Amendment.

2. Coerced Confessions and Harmless Error

In 1967, in *Chapman v. California*, the Supreme Court held that some constitutional errors are subject to the harmless error doctrine. The *Chapman* Court expressly stated, however, that a harmless error analysis should never be applied to those constitutional rights that are considered fundamental to a fair trial. The Court identified three such rights: the right to counsel; the right to an impartial judge; and the right to have coerced confessions excluded from evidence. The *Chapman* Court further elaborated that the harmless error analysis could never apply to coerced confessions because the defendant is entitled to a new trial without the taint of a constitutional violation even if it can be argued that the confession had been unnecessary to the conviction.

After *Chapman*, the Court continued to hold that due process is denied whenever a defendant’s coerced confession is used against him at trial. Indeed, the Court consistently has interpreted the *Chapman* decision as commanding a rule of “automatic reversal” in coerced confession cases. Moreover, even though the Court in *Rose v. Clark* noted the strong interests that support the harm-

59. Id.
61. Id. at 22. In *Chapman*, the Court held that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” Id. at 24. The *Chapman* Court observed: “All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'” Id. at 22 (quoting 28 U.S.C. § 2111 (1964)). The *Chapman* Court thus found that “there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.” Id.
62. Id. at 23.
63. Id. at 23 n.8.
64. Id. at 23-24.
less error doctrine, it nevertheless found that the admission of a coerced confession aborted the trial process, and thus could never be subject to a harmless error analysis.

III. ARIZONA V. FULMINANTE

A. The Facts

On September 14, 1982, Oreste Fulminante contacted the Mesa Police Department and notified them that his eleven-year-old step-daughter, Jeneane Hunt, had disappeared. Fulminante had been taking care of Jeneane while her mother, Mary, was in the hospital undergoing surgery. Shortly after he called the police to notify them that Jeneane was missing, Fulminante went to the hospital to bring Mary home. Fulminante told his wife that Jeneane had not come home the previous night.

Two days later, on September 16, 1982, Jeneane's body was found in the desert outside of Mesa. She had a ligature around her neck and had been shot twice in the head at close range with a large calibre weapon. Due to the decomposed condition of her body, the pathologist was unable to determine whether she had been sexually assaulted.

Fulminante became a suspect in the investigation of Jeneane's murder after making several inconsistent statements to the police about her disappearance and his relationship with her. No charges were filed against him at that time, however, and Fulminante left Arizona to go to New Jersey.

During their investigation of Jeneane's murder, the police discovered that on September 13, 1982, Fulminante had traded a rifle for an extra barrel for his .357 calibre revolver at a Mesa gun
The police also learned that Fulminante had a criminal record that included a felony conviction for impairing the morals of a child. After the Mesa police notified the federal authorities about the information they had accumulated, the federal authorities arrested Fulminante in New Jersey and charged him with possession of a firearm by a felon. Fulminante was then transported to Phoenix, Arizona, convicted in the United States District Court, and sentenced to a minimum of two years in federal prison. After his release from prison, he was arrested again on another charge of possession of a firearm. He was convicted again and sentenced to two more years in prison.

To serve this sentence, Fulminante was sent to the Ray Brook Federal Correctional Institution in New York. During his imprisonment, he became friends with another inmate, Anthony Sarivola, who was serving a 60-day sentence for extortion. Sarivola was a former police officer who once had been involved in organized crime. At the time he met Fulminante, Sarivola was a paid informant for the Federal Bureau of Investigation. As an informant at Ray Brook, Sarivola pretended to be an organized crime figure.

After the two had become friends, Sarivola heard a rumor that Fulminante had killed a child. When Sarivola inquired about the rumor, Fulminante repeatedly denied any involvement in Jeneane's murder. Sarivola informed his FBI agent-contact about the rumor and the agent told him to find out more.

One evening in October, 1983, Sarivola told Fulminante that he
knew that the other inmates were treating Fulminante roughly. Sarivola offered to protect him if Fulminante would tell him the truth about Jeneane's murder. Fulminante subsequently told Sarivola that he had driven Jeneane out to the desert on his motorcycle and then had shot her twice in the head. On November 28, 1983, Sarivola was released from prison. Fulminante was released from Ray Brook in May 1984, and was picked up at a bus terminal by Sarivola and Sarivola's fiancée, Donna. At that time, Fulminante told Donna that he could not go back to his home because he had murdered a little girl in Arizona. A month after his release from Ray Brook, Fulminante was arrested in New York for yet another weapons violation. On September 4, 1984, Fulminante was indicted for the first-degree murder of Jeneane. In December 1985, a jury found Fulminante guilty of the murder. In its special verdict, the trial court found that Fulminante had committed murder "in an especially cruel, heinous and depraved manner." Fulminante was sentenced to death after the court found that there were no mitigating circumstances sufficient to overcome the aggravating circumstances of the murder.

B. The Decisions of the Lower Courts

The trial court denied Fulminante's motion to suppress his confession to Sarivola because the court determined that Fulminante's confession had been made voluntarily. On appeal, the Supreme Court of Arizona originally found that the confession had been made involuntarily as the result of extreme coercion from Sarivola,
a paid government informant. Accordingly, the court held that the trial court improperly instructed the jury on the voluntariness issue. As a result, the court held that the record failed to support the trial court's finding of voluntariness and that Fulminante's statements to Sarivola should have been suppressed.

Notwithstanding these initial determinations, the Arizona Supreme Court held that any error in the instruction on the voluntariness of Fulminante's confession to Sarivola was "harmless beyond a reasonable doubt" because Fulminante's second confession to Sarivola's fiancé, along with some physical evidence, established his guilt. The court thus held that Fulminante's coerced

109. Id. The court found that Sarivola knew that Fulminante was at risk for being physically harmed by the other inmates because Fulminante was a suspected child molester. Id. Sarivola used this knowledge to obtain Fulminante's confession by promising Fulminante protection from the other inmates in exchange for the truth about his stepdaughter's murder. Id. The court found that "Sarivola's promise was 'extremely coercive' because the obvious inference from the promise was that [Fulminante's] life would be in jeopardy if he did not confess." Id.

110. 778 P.2d at 609. The trial court had instructed the jury that:

You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.

Id. The Arizona Supreme Court observed that even though the trial court had instructed the jury on the issue of voluntariness, it had failed to instruct the jury as to whether Sarivola was a law enforcement officer within the meaning of the instruction. Id. The Arizona Supreme Court thus held that the trial court erred in not tendering such an instruction. Id. Moreover, the Arizona Supreme Court found that Sarivola was a paid government agent at the time of Fulminante's confession. Id.

111. Id. After observing that Fulminante had confessed to Sarivola in response to his offer of protection, the Arizona Supreme Court wrote: "To be deemed free and voluntary within the meaning of the fifth amendment, a confession must not have been obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence.' ... These standards also apply to the states through the fourteenth amendment." Id. (emphasis added) (citations omitted) (quoting Bram v. United States, 168 U.S. 532, 543 (1897)).

112. Id. In Arizona, confessions are considered prima facie involuntary, and the State carries the burden of showing by a preponderance of the evidence that the confession was made voluntarily. Id. According to the Arizona Supreme Court, the State failed to meet this burden. Id. In response to Fulminante's motion to suppress the confessions, the State alleged that Fulminante had never indicated either that he was afraid of the other inmates or that he wanted Sarivola's protection. Id. The State also maintained that the defendant spoke to Sarivola in a conversational manner when he discussed the murder. Id. According to the court, the State's response was "insufficient to create a prima facie establishment of voluntariness by a preponderance of the evidence." Id.

113. Id. at 609-10. Although the court cited Chapman v. California, 386 U.S. 18, 24 (1967), for the federal standard of harmless error, it went on to observe that: "Federal courts have approached the determination of harmless error on a case-by-case basis. When a subsequent confession is obtained constitutionally, there is a definite inclination
first confession was merely "cumulative" of his admissible second confession to Sarivola's fiancée.\textsuperscript{114}

After the Arizona Supreme Court rendered its original opinion in the case, Fulminante moved for reconsideration arguing, \textit{inter alia}, that federal constitutional law precludes a harmless error analysis regarding the use of a coerced confession.\textsuperscript{115} In its supplemental opinion, the court acknowledged that a long line of Supreme Court precedent supported the rule that a harmless error analysis may not be applied to coerced confessions.\textsuperscript{116} Since the court had determined that Fulminante's confession to Sarivola had been coerced, the majority\textsuperscript{117} of the court held that Fulminate was entitled to a new trial without the use of his coerced confession.\textsuperscript{118} Thus, Fulminante's conviction and sentence were set aside, and the case was remanded for a new trial.\textsuperscript{119} The United States Supreme Court granted the State's petition for certiorari.\textsuperscript{120}

to hold that the admission of prior 'inadmissible' confessions constitutes harmless error." \textit{Id.} at 610.

\textsuperscript{114} \textit{Id.} at 610.

\textsuperscript{115} \textit{Id.} at 626 (Moeller, J., supplemental opinion). According to the Arizona Supreme Court, "the defendant correctly pointed out that the cases we relied upon to support our harmless error analysis were not cases in which the first confession was a coerced confession in violation of defendant's fifth amendment rights. Instead, these cases involved confessions obtained in violation of defendant's \textit{Miranda} rights." \textit{Id.}

\textsuperscript{116} \textit{Id.} The Arizona Supreme Court noted that "There is an unbroken line of authority supporting the rule that, although receipt of a confession obtained in violation of \textit{Miranda} may be harmless, the harmless error doctrine does not apply to coerced confessions." \textit{Id.}

\textsuperscript{117} \textit{Id.} One justice, Justice Cameron, dissented in the supplemental opinion. Justice Cameron believed that the harmless error doctrine was applicable. \textit{Id.} at 628 (Cameron, J., dissenting). He wrote, "At this time... I question the blanket assumption that the admission of any coerced confession is per se harmful and therefore reversible." \textit{Id.} (Cameron, J., dissenting). He further elaborated:

A review of the case law mandates that a court should look to the circumstances surrounding the involuntary confession. If the confession was a result of the type of coercion found in \textit{Payne}, \textit{Jackson}, and \textit{Mincey}, then admission of the incriminating statement will constitute reversible error. If, however, the involuntary confession is only "coerced" in a technical sense, and is merely duplicative of other testimony or admissible statements of the defendant, then a harmless error analysis is appropriate. Additionally, if the record reveals overwhelming evidence of defendant's guilt, any error in admitting such statements may be considered harmless. \textit{Id.} at 632-33 (Cameron, J., dissenting).

\textsuperscript{118} \textit{Id.} at 627. According to the Arizona Supreme Court, "until and unless the [United States] Supreme Court changes the law, we must order defendant retried without the use of the coerced confession." \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} Arizona v. Fulminante, 110 S. Ct. 1522 (1990).
C. The Opinion of the Supreme Court

Technically, the Supreme Court affirmed the judgment of the Arizona Supreme Court. The Court employed different reasoning, however, than that upon which the Arizona Supreme Court had relied. In shifting coalitions, the Supreme Court held that Fulminante’s confession was coerced, that the harmless error analysis applies to coerced confessions, but that the admission of Fulminante’s confession to Sarivola was not harmless error. Each of these holdings will be discussed in turn.

1. The Coerced Confession Holding

Although the Court normally accords great deference to the factual findings made by state courts, the issue of whether a confession was made voluntarily requires an independent determination by the federal reviewing court. The Court observed that a showing of actual physical violence by a government agent against the accused is not required for a confession to be considered coerced. As long as a “credible threat” exists, a confession will be deemed involuntary. The Court, therefore, affirmed the Arizona Supreme Court’s finding that Fulminante’s confession had been coerced because the “credible threat” of physical violence by other inmates caused him to confess to Sarivola.

2. The Harmless Error Analysis Holding

In a five-to-four decision, the Court held that the harmless error analysis is applicable to the erroneous admission of coerced confessions. The Court based its reasoning on two premises: (1) that

121. Justice White delivered the opinion of the Court with respect to Parts I, II, and IV. He also filed a dissenting opinion in Part III. Id. at 1249. Justices Marshall, Blackmun, and Stevens joined in Parts I, II, III, and IV of Justice White’s opinion. Id. Justice Scalia joined Parts I and II. Id. Justice Kennedy joined Parts I and IV. Id. Chief Justice Rehnquist delivered an opinion, Part II of which was for the Court, concluding that a harmless error analysis is applicable to the admission of involuntary coerced confessions. Id. The Chief Justice also filed a dissenting opinion in Parts I and III. Id. Justice O’Connor joined Parts I, II, and III of that opinion. Justices Kennedy and Souter joined Parts I and II. Id. Justice Scalia joined in Part II and Part III. Id. Justice Kennedy filed an opinion concurring in the judgment. Id.

122. Id. at 1250.

123. Id.

124. See supra note 121.

125. Fulminante, 111 S. Ct. at 1252 (quoting Miller v. Fenton, 474 U.S. 104, 110 (1985)).

126. Id. at 1252-53.

127. Id. at 1253; see supra note 36.

128. Fulminante, 111 S. Ct. at 1253.
such an admission is mere "trial error"; and (2) that such an error does not transcend the criminal process.

a. Characterization of the Admission of a Coerced Confession as Mere "Trial Error"

The Court observed that since Chapman v. California,\textsuperscript{129} the Court has applied a harmless error analysis to several different types of constitutional errors and has recognized that most such errors can be harmless.\textsuperscript{130} Writing for the majority on this issue, Chief Justice Rehnquist noted that:

The common thread connecting these cases is that each involved "trial error"—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.\textsuperscript{131}

Rehnquist further observed that the primary purpose of a criminal trial is to determine the defendant's guilt or innocence.\textsuperscript{132} According to the Chief Justice, the harmless error doctrine promotes this truthseeking objective.\textsuperscript{133} Rehnquist also contended that the harmless error doctrine fosters public respect for the criminal process because it places the emphasis on the fairness of the trial instead of focusing on the immaterial error that is almost always present in any trial.\textsuperscript{134}

Chief Justice Rehnquist distinguished "trial errors"—those errors that are subject to the harmless error analysis—from "structural defects" in the trial process—those errors that are not subject to such an analysis.\textsuperscript{135} Structural defects, according to Rehnquist, influence the entire trial process because they affect the framework in which the trial is conducted.\textsuperscript{136} Trial errors, on the other hand, reflect an error within the actual trial process.\textsuperscript{137}

With these premises as a foundation, the Court proceeded to

\textsuperscript{129} Chapman v. California, 386 U.S. 18 (1967).
\textsuperscript{130} Fulminante, 111 S. Ct. at 1263.
\textsuperscript{131} Id. at 1264.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id. (citing Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).
\textsuperscript{135} Id. at 1264-65. Some of the constitutional violations that would be considered structural defects, rather than trial errors, are: the total deprivation of the right to counsel at trial; the failure to appoint an impartial judge to preside over the trial; the right to represent oneself at trial; and the right to a public trial. Id. at 1265.
\textsuperscript{136} Id. at 1265.
\textsuperscript{137} Id.
hold that the admission of involuntary confessions constitutes "trial error," similar to the improper admission of other types of inadmissible evidence. Thus, when reviewing such an error, an appellate court need only review the remaining independent evidence to decide whether the admission of the coerced confession was harmless beyond a reasonable doubt.

b. The Erroneous Admission of a Coerced Confession as "Transcending the Criminal Process"

According to Rehnquist, the admission of an involuntary confession is not the type of error that "transcends the criminal process" because the harmless error analysis has been applied in other cases that involved police misconduct and the violation of other constitutional rights. Chief Justice Rehnquist thus reasoned that confessions elicited as a result of Fourteenth Amendment violations should not be treated differently from confessions obtained as a result of Sixth Amendment violations.

Rehnquist acknowledged that in some instances a coerced confession may affect a trial more dramatically than other types of trial errors. Rehnquist concluded, however, that in those cases the appellate court will simply determine that the erroneous admission of the confession was not a harmless error.

3. The Harmless Beyond a Reasonable Doubt Holding

After the Court found that Fulminante's confession had been coerced and that the admission of a coerced confession should be subject to a harmless error analysis, it was necessary to determine whether the admission of Fulminante's confession was "harmless error beyond a reasonable doubt." The Court had to decide whether Arizona had met its burden of proving that the admission of Fulminante's confession had not contributed to his conviction. In a five-to-four decision, the Court held that the State failed to meet this burden. Consequently, the Court affirmed the

138. Fulminante, 111 S. Ct. at 1265.
139. Id.
140. Id.
141. Id.
142. Id. at 1266.
143. Id.
144. Id. at 1257.
145. Id.
146. Id.
lower court's judgment and reversed Fulminante's conviction.\textsuperscript{147}

In reaching its conclusion that the admission of the confession was not harmless error beyond a reasonable doubt, the Court first considered the particularly damaging nature of confessions.\textsuperscript{148} Specifically, the Court noted that when a defendant makes a full confession, a jury may rely solely upon such a confession in reaching its decision, without regard to the other evidence presented.\textsuperscript{149} In addition, the Court conceded that involuntary confessions may be unreliable.\textsuperscript{150} Given these concerns, the Court warned that an appellate court must proceed cautiously before it determines that the admission of the confession was harmless error beyond a reasonable doubt.\textsuperscript{151}

The Court concluded that at least four considerations mandated the decision that the State had failed to carry its burden of establishing that the admission of Fulminante's confession was harmless error beyond a reasonable doubt.\textsuperscript{152} First, the Court noted that without Fulminante's confession to Sarivola, it was highly unlikely that Fulminante ever would have been prosecuted for the murder because there was scant physical evidence linking him to the crime.\textsuperscript{153} Second, although Fulminante later confessed to Sarivola's fiancée, the jury's assessment of this second confession "could easily have depended in large part" upon his prior confession to Sarivola.\textsuperscript{154} In particular, without Fulminante's original confession to Sarivola, the jury may not have believed Sarivola's fiancée's story.\textsuperscript{155} The Court rejected the State's argument that one

\begin{itemize}
  \item \textsuperscript{147} Fulminante, 111 S. Ct. at 1257.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Id. at 1258.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id. at 1258-60.
  \item \textsuperscript{153} Id. at 1258.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Id. The Court noted that Fulminante's confession to Donna allegedly took place during a ride that Sarivola and she were giving Fulminante on the day he was released from Ray Brook. Id. at 1258-59. Sometime during the course of the trip, Donna asked Fulminante why he was not going to Arizona to see his friends and family. Id. at 1259. Donna stated that, in response to her innocuous inquiry, Fulminante made a full confession to her, even though it was the first time that they had met. Id. The Court also noted that, despite her alleged disgust for Fulminante, she went on a later trip with him. Id. Donna hardly discussed the confession with Sarivola, who allegedly overheard it in the car. Id. Moreover, both Donna and Sarivola failed to notify the authorities about this alleged confession until several months later. Id. The Court observed that the jurors may have found that Donna had a motive to fabricate the confession because Sarivola received many benefits from the federal authorities. Id. Donna also received favorable treatment and was placed in the Witness Protection Program. Id.
\end{itemize}
In addition, the Court found that the admission of Fulminante's confession to Sarivola led to the admission of other evidence prejudicial to Fulminante. Finally, the Court believed that the sentencing phase of the trial was also influenced by the admission of the first confession. Accordingly, the majority of the Court determined that the admission of Fulminante's involuntary confession was not harmless error beyond a reasonable doubt.

D. The Dissent

In dissenting from the majority’s harmless error holding, Justice White vigorously protested the Court’s holding that the harmless error rule is applicable to erroneously admitted coerced confessions. White argued that the majority’s holding ignored the well-established proposition that whenever a defendant’s involuntary confession is introduced into evidence, the defendant has been deprived of due process even though other evidence may support the conviction. Justice White maintained that the admission of a coerced confession may never be subject to a harmless error analysis.

Justice White also disagreed with the majority’s contention that because a harmless error analysis previously had been applied to other types of trial errors, such an analysis could be applied to this

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156. Id. Even though some of the details in Fulminante's alleged confession to Donna were corroborated by circumstantial evidence, many were not. Id. Furthermore, the only corroborating evidence of Fulminante's state of mind and motive as given in the second confession was to be found in the first. Id. Therefore, according to the Court, “contrary to what the Arizona Supreme Court found, it is clear that the jury might have believed that the two confessions reinforced and corroborated each other.” Id.

157. Id.

158. Id. at 1260.

159. Id. at 1261.

160. Justice White, who wrote the dissent on this particular issue, “took the highly unusual step” of reading his opinion from the bench. Linda Greenhouse, High Court, 5 to 4, Softens Stand Against Confession by Coercion, N.Y. TIMES, Mar. 27, 1991, at A1.


162. According to Justice White:

The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] 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 to the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction."

Id. at 1253 (White, J., dissenting) (citations omitted).

163. Id. (White, J., dissenting) (citing Payne v. Arkansas, 356 U.S. 560, 568 (1958)).
type of error as well.\textsuperscript{164} He observed that a coerced confession is fundamentally different from the other types of inadmissible evidence to which a harmless error analysis has been applied.\textsuperscript{165}

Justice White emphasized that in \textit{Chapman v. California},\textsuperscript{166} the Court recognized that prior cases had held some constitutional rights to be so fundamental to a fair trial that their violation can never be considered harmless error.\textsuperscript{167} The Court in \textit{Chapman} specifically placed the constitutional rule excluding the defendant’s coerced confession from evidence into that category.\textsuperscript{168}

According to Justice White, the majority’s holding was predicated upon a meaningless classification scheme in which it attempted to categorize a constitutional error as either a “trial error” or a “structural error.”\textsuperscript{169} Justice White observed that the Court had not placed the constitutional errors previously held to be subject to a harmless error analysis in such mutually exclusive categories.\textsuperscript{170}

Justice White further observed that a confession may well be the most “probative and damaging evidence” admitted against a criminal defendant.\textsuperscript{171} In particular, he noted that it is impossible for a reviewing court to determine what credit and weight the jury gave to an erroneously admitted confession.\textsuperscript{172}

Finally, Justice White observed that one of the most important reasons for excluding coerced confessions is that the police practices sometimes used to extract such admissions offend our system of justice.\textsuperscript{173} Thus, in accordance with the Court’s prior decisions, the dissent would have upheld the long-established rule that the erroneous admission of a coerced confession should never be subject to a harmless error analysis.\textsuperscript{174}

\textbf{IV. ANALYSIS}

In \textit{Arizona v. Fulminante}, the Supreme Court improperly held that a harmless error analysis may be applied to the erroneous ad-

\textsuperscript{164} \textit{Fulminante}, 111 S. Ct. at 1254 (White, J., dissenting).
\textsuperscript{165} \textit{id.} (White, J., dissenting).
\textsuperscript{167} \textit{Fulminante}, 111 S. Ct. at 1254 (White, J., dissenting).
\textsuperscript{168} \textit{id.} (White, J., dissenting) (quoting \textit{Chapman}, 386 U.S. at 23 \& n.8).
\textsuperscript{169} \textit{id.} (White, J., dissenting).
\textsuperscript{170} \textit{id.} at 1255 (White, J., dissenting).
\textsuperscript{172} \textit{id.} (White, J., dissenting).
\textsuperscript{173} \textit{id.} at 1256 (White, J., dissenting).
\textsuperscript{174} \textit{id.} at 1254 (White, J., dissenting).
mission of a coerced confession. In so holding, the Court not only disregarded the doctrine of stare decisis, but it also disavowed the reality of coercive police practices. As a result, Fulminante symbolizes a patchwork of rationalizations and justifications that may eventually work to subvert constitutional protections previously afforded by our criminal justice system.

A. The Court's Disregard of the Doctrine of Stare Decisis

As the United States Supreme Court has repeatedly recognized, the doctrine of stare decisis is fundamental to the rule of law. Consequently, the Court has overruled prior decisions only when compelling evidence demonstrates the necessity of doing so. Fulminante, however, did not present such a necessity. Compelling evidence has not yet been produced to illustrate the necessity for the Court to reverse the well-established rules that: (1) the admission of a coerced confession requires the automatic reversal of the conviction upon appeal; and (2) such an admission may not be subject to harmless error analysis.

For nearly a century, the Supreme Court held that the erroneous admission of a coerced confession in a criminal trial would vitiate a conviction. Although the theoretical underpinnings of this rule sometimes varied, the Court never wavered in its pronouncement that involuntary confessions simply would not be tolerated in our system of justice. In accordance with this principle, both pre-Chapman and post-Chapman cases consistently held that the

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175. The doctrine of stare decisis requires a court "[to] abide by, or adhere to, decided cases . . . [It is the p]olicy of courts to stand by precedent and not to disturb settled point." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). "Stare decisis insures that 'the law will not merely change erratically' and 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.' " Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Respondent at 18, Fulminante (No. 89-839) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)); see infra notes 177-201 and accompanying text.

176. See infra notes 202-22 and accompanying text.


179. According to Justice White, historically the admission of an involuntary confession vitiated the judgment because such a judgment violated the Due Process Clause of the Fourteenth Amendment. Fulminante, 111 S. Ct. at 1253 (White, J., dissenting) (citing fourteen Supreme Court decisions in support of this proposition).

180. For a list of pre-Chapman cases, see Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in support of Respondent at 15, Fulminante (No. 89-839).

181. For a list of post-Chapman cases, see Fulminante, 111 S. Ct. at 1254 (White, J., dissenting).
admission of a coerced confession could never be subject to a harmless error analysis. The doctrine of stare decisis, therefore, dictates that the Court should continue to follow the well established rule that the introduction of a coerced confession into evidence requires an automatic reversal upon appeal.

In *Fulminante*, however, the Rehnquist majority essentially repudiated the principle of stare decisis when it abruptly veered off the course charted and travelled by the Court for over nine decades. The Court failed to offer an adequate explanation or to point to any compelling evidence that justified its decision to overrule decades worth of precedent. Evidently, the Court was engaged in a goal-oriented process whereby it either distorted or ignored prior decisions in an attempt to justify a holding that was otherwise without any authoritative support.

In his dissent, Justice White enumerated several compelling reasons why prior cases made it clear that the admission of a coerced confession should never be subject to a harmless error analysis. Nevertheless, the means by which the majority reached a contrary end are so fatally flawed that they deserve separate criticism.

As justification for his decision to overturn the longstanding automatic reversal rule, Chief Justice Rehnquist ostensibly relied on *Chapman v. California*. His reliance was misplaced, however, because he misconstrued the harmless error analysis adopted in *Chapman*. The *Chapman* Court adopted an analysis which demands that a reviewing court determine that the federal constitutional error was harmless error beyond a reasonable doubt. According to Rehnquist, this analysis suggests that it is possible to conduct a quantitative assessment to determine whether such an
error was harmless beyond a reasonable doubt.\textsuperscript{190} Rehnquist’s quantitative formulation of the \textit{Chapman} analysis simply fails to give adequate consideration to the \textit{Chapman} Court’s own construction of harmless error analysis.

First, the \textit{Chapman} Court held that a harmless error analysis may be applied only to a special category of constitutional errors.\textsuperscript{191} Specifically excluded from this category was the admission into evidence of a coerced confession.\textsuperscript{192} Second, the \textit{Chapman} Court indicated that it was adhering to the harmless error analysis adopted by the Supreme Court in \textit{Fahy v. Connecticut}.\textsuperscript{193} In \textit{Fahy}, the Court found that the question to be resolved in a harmless error analysis is whether there is a reasonable possibility that the erroneously admitted evidence may have contributed to the defendant’s conviction.\textsuperscript{194} The \textit{Chapman} Court expressly acknowledged that its own formulation of the harmless error analysis and the analysis adopted in \textit{Fahy} were virtually identical.\textsuperscript{195}

Further, even assuming that it may be constitutionally permissible to apply a harmless error analysis to the admission of a coerced confession, the very nature of a defendant’s confession requires that such an error could never be found harmless under the \textit{Chapman} analysis outlined above. By definition, a confession consists of a defendant’s own admission of guilt.\textsuperscript{196} As such, a confession is probably the most damaging evidence that can be admitted against a defendant, and it can be expected to have a tremendous impact on the jury.\textsuperscript{197} Indeed, a jury may rely entirely upon an involuntary confession in reaching its decision.\textsuperscript{198} Thus, in those instances where an involuntary confession was admitted into evidence, there will always be a reasonable possibility that the confession at least contributed to the conviction. According to the harmless error analysis spelled out in \textit{Fahy} and \textit{Chapman}, such an error may never be held harmless.

Despite the logical conclusion that the admission of a coerced confession may never be harmless error, the Rehnquist majority nevertheless held that such an error is subject to a harmless error

\textsuperscript{191} See supra notes 62-64 and accompanying text.
\textsuperscript{192} \textit{Chapman}, 386 U.S. at 23 n.8.
\textsuperscript{193} Id. at 23 (referring to \textit{Fahy v. Connecticut}, 375 U.S. 85 (1963)).
\textsuperscript{194} Id. (quoting \textit{Fahy}, 375 U.S. at 86-87).
\textsuperscript{195} Id. at 24.
\textsuperscript{196} See supra note 1.
\textsuperscript{197} Fulminante, 111 S. Ct. at 1257 (White, J., dissenting) (citing \textit{Bruton v. United States}, 391 U.S. 123, 139-40 (1968)).
\textsuperscript{198} Id. at 1258 (White, J., dissenting).
analysis. This holding requires that reviewing courts go through the internally inconsistent and meaningless motions of conducting an "analysis" from which the court may reach only one conclusion: that the error was not harmless. Such a harmless error analysis clearly would constitute a waste of judicial resources.

There is yet another glaring defect in the *Fulminante* Court's justification. According to the Court, a reviewing court need only determine whether the evidence independent of the confession renders the admission of the coerced confession harmless beyond a reasonable doubt.\textsuperscript{199} This formulation, however, provides little guidance to reviewing courts. Far from being the "simple" quantitative analysis that Rehnquist suggests, such an analysis will prove to be an extremely difficult standard to apply. This is perhaps best evidenced by the *Fulminante* decision itself, in which nine Justices of the Court were unable to reach a unanimous decision as to whether the evidence independent of the coerced confession rendered the introduction of the coerced confession harmless beyond a reasonable doubt.\textsuperscript{200}

As the split in *Fulminante* indicates, Rehnquist's so-called "quantitative analysis" simply will not enable reviewing courts to quantify with any degree of mathematical certainty whether the erroneous admission of an involuntary confession was "harmless error beyond a reasonable doubt." Rather, whether such an erroneous admission constituted harmless error in a particular instance will depend upon the subjective view of the appellate court reviewing the case.\textsuperscript{201}

As courts across the nation struggle with the Supreme Court's formulation, their efforts will yield inconsistent results. Surely, a defendant's fundamental right not to have his involuntary confession introduced against him cannot be entrusted to such a perilous and subjective position. Accordingly, the erroneous admission of a coerced confession should never be subjected to a harmless error analysis.

\textbf{B. The Court's Disavowal of the Lessons of Police Brutality}

In *Fulminante*, the Supreme Court acted in complete disregard of the wisdom inherent in a substantial body of well-established

\textsuperscript{199} \textit{Id.} at 1265.

\textsuperscript{200} Five Justices held that the admission of the involuntary confession was not harmless. Four Justices dissented. \textit{Id.} at 1249.

\textsuperscript{201} See Bob Cohn, \textit{Coerced Confessions: No Harm Done}, \textit{Newsweek}, Apr. 8, 1991, at 52.
precedent. In doing so, the *Fulminante* Court also acted in a frightening disavowal of the lessons of history which prior Court decisions had wholeheartedly embraced.

The *Fulminante* Court contends that the admission of an involuntary confession is not the type of error which "transcends the criminal process." Even a cursory review of the relevant confession case law, however, serves as a disturbing reminder of the abuses that have occurred in the Anglo-American system of justice. Indeed, the Court consistently has acknowledged that "[f]ormulas or respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died."  

Coerced confessions are prevalent in inquisitorial systems that employ inhumane methods to "get the truth" from an accused. Confessions so obtained may be inherently unreliable as the accused may scream "I did it!" in a desperate effort to escape the torment inflicted by his captors. The majority's decision in *Fulminante* completely disregards the underlying principle of our criminal justice system: that we have purposefully adopted an accusatorial system of justice rather than an inquisitorial one. Our system of justice requires that the state independently establish a criminal defendant's guilt without employing coercive police practices to compel a confession that may later be used against him.

As a society, we find that the brutal methods characteristic of the inquisitorial system are repugnant to our philosophy of justice. The methods employed within that system, however, have

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204. See, e.g., *Paulsen*, supra note 3, at 412; *Confessions*, supra note 4, at 938.
205. The Court recognized the truth of this proposition almost one hundred years ago in *Bram v. United States*, 168 U.S. 532 (1897). The *Bram* Court observed, "The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail." *Id.* at 547 (quoting 2 *LEACH*, *HAWKIN'S PLEAS OF THE CROWN* ch. 31, § 2 (6th ed. 1787)).
206. See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1961). The *Rogers* Court stated: [A]n underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitional system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. *Id.* at 540-41.
207. *Id.* at 540-41.
208. See *The Supreme Court's Harmful Error*, N.Y. Times, Mar. 29, 1991, at A22 ("[T]he assumption has always been that forcing a suspect to incriminate himself,
not been relegated to the pages of our history books.\textsuperscript{209} The troubling reality is that the law enforcement agents who represent our own system of justice sometimes employ the same abhorrent methods of the inquisitorial system.\textsuperscript{210} Recognizing that coercive police practices exist, the Court repeatedly has held that the "fruits of [such] illicit methods" may not be introduced in evidence.\textsuperscript{211} In so holding, the Court believed that such an exclusionary rule would serve as a deterrent to those government agents who might otherwise be tempted to engage in brutal tactics.\textsuperscript{212}

The \textit{Fulminante} Court's holding that a harmless error analysis is applicable to coerced confessions fails to give adequate consideration to the enduring concerns of police misconduct and its deterrence. Although the Court held that the erroneous admission of a coerced confession theoretically may be held harmless only in those instances where there is other evidence to support the conviction, this requirement will fail to deter shrewd police officers who desire quick "investigation" results. Indeed, as Justice Frankfurter once warned:

\begin{quote}
[I]f law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confession provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree.\textsuperscript{213}
\end{quote}

Further, when viewed in the context of police brutality, the requirement that evidence independent of the confession must exist to support the conviction weakens the Court's argument. It has been observed that where "the coercive devices used . . . were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a con-

\begin{footnotesize}

210. At a hearing before the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights in March 1991, it was reported that Justice Department figures show 48,000 complaints against police over the last six years. See Linda P. Campbell, \textit{Police Brutality Triggers Many Complaints, Little Data}, CHI. TRIB., Mar. 24, 1991, § 1, at 16.


212. \textit{Id}.

\end{footnotesize}
viction[, t]he procedures . . . are . . . perhaps more unwarranted because so unnecessary." 214

Although involuntary confessions obtained by any illegal means are deemed to be inadmissible, some of the case law indicates that unscrupulous police officers presently engage in psychological, rather than physical, coercive activity. 215 Yet some police still physically brutalize criminal suspects. Indeed, the Fulminante decision came at a time when the videotaped beating of a suspect by Los Angeles police officers focused national attention on the issue of police brutality. 216 The Supreme Court, however, shamefully ignores this reality in its Fulminante decision.

Chief Justice Rehnquist asserts that the harmless error doctrine is essential to the truth-seeking function of the Court. 217 As the Court, however, once recognized:

As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. 218

Further, the concern that government agents may attempt to "beat the system" by engaging in professional misconduct should not be limited to police officers. As Justice Stevens once cautioned, the automatic application of harmless error review in cases susceptible to such an analysis will also serve to encourage prosecutors to subvert constitutional requirements in order to secure convictions. 219

Justice Stevens' concern is quite justified in coerced confession cases. As a result of Fulminante, prosecutors now may be tempted to use involuntary confessions in their efforts to "win" convictions in otherwise close cases. 220 Whereas prior decisions made it clear

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215. See, e.g., Jackson v. Denno, 378 U.S. 368, 389 (1964) ("As reflected in the cases in this Court, police conduct requiring exclusion of a confession has evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will.").
220. In Chapman v. California, the Court itself acknowledged that "we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence . . . though legally forbidden, finds its
that the introduction of a coerced confession would result in an automatic reversal upon appeal, that rule will no longer serve as a constant reminder to "officers" of the court that every government agent must "play fair" in our system of justice.

V. CONCLUSION

Although it is difficult to determine the immediate impact of *Fulminante*, the decision eventually may result in widespread abuses in the criminal justice system and may have a "corrosive impact on the administration of justice." In addition, the Court has sent a subtle message that the doctrine of stare decisis will no longer stand as a sentinel to ensure that a state may not benefit from its wrongdoing.

During an era where the "war on crime" continues to be waged, the *Fulminante* decision may prove to be "harmful error." Indeed, as public concern about crime increases, so too will the pressure placed upon the police to decide where to set limits when conducting their investigations. Although the police are taught to act within the bounds of the law, the *Fulminante* decision may reinforce their belief that the real message is to get the desired results at any cost.

Our society needs to heed the wisdom that "we must give no ear to the loose talk about society being 'at war with the criminal' if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people." Rather than resorting to the crude law enforcement practices employed in inquisitorial systems, we must strive to develop more intelligent and sophisticated methods with which to enforce our laws. To do otherwise would be

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222. According to one source, "The ruling may give police more latitude in questioning suspects and prosecutors more confidence in using dubious confessions. 'Before this case prosecutors knew that they risked blowing their whole case if they took a chance with a bad confession.' . . . Now they can take that chance.' " Cohn, *supra* note 201, at 52 (quoting University of Michigan law professor Yale Kamisar).


224. See *Jackson*, *supra* note 209, at 1.

225. *Id.*


227. For example, some jurisdictions started videotaping a suspect's confession to
to wage war not against criminals, but against the fundamental principles upon which our system of justice is based.

Every day the media provides us with jolting revelations about the police brutality occurring throughout our nation.\(^{228}\) Often, these episodes are directed against the poor and uninfluential members of our society.\(^{229}\) As a result of *Fulminante*, such an individual now may have lost his only remedy against being subject to brutality—an automatic reversal in the event that his involuntary confession is introduced at trial.\(^{230}\)

Whatever *Fulminante*’s ultimate impact, as a civilized society we cannot afford the message that the decision presently conveys. The *Fulminante* Court overturned precedent that had long recognized that the Constitution does not require the sacrifice of either security or liberty.\(^{231}\) Hopefully, in future decisions, the Supreme Court will recall that “Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective.”\(^{232}\)

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\(^{228}\) For recent statistics about the incidence of police brutality in some of the major cities across the nation, and for some examples of specific instances in which police brutality has been alleged, see Campbell, *supra* note 210, at 16.

\(^{229}\) See *Chambers v. Florida*, 309 U.S. 227, 238 n.11 (1940).

\(^{230}\) See *Paulsen, supra* note 3, at 413 (“Perhaps only because of the utter inadequacy of the other presently available remedies, the most effective weapons against these illegal police practices are the evidence rules excluding from the jury certain statements illegally obtained.”).

\(^{231}\) *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (“The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect.”).
