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I. INTRODUCTION

The March 26, 1991 United States Supreme Court decision in *Arizona v. Fulminante*,[1] applying the harmless error rule to involuntary confessions, has met with unjust criticism. Contrary to these criticisms, the ramifications of the opinion are not abrogations of due process. *Fulminante* is significant as the admission of an involuntary confession will no longer automatically trigger reversal. Instead, the evidence will be subject to a stringent test requiring the prosecutor to prove beyond a reasonable doubt that the confession was harmless.[2]

Criminal defendants who are found guilty by trial often find an error in the proceedings leading to their conviction.[3] Accordingly, all fifty states and the United States Congress have enacted harmless error statutes.[4] Such statutes establish the rule that a judgment shall be sustained unless there are errors or defects which affect the material rights of the parties.[5] While a more stringent application of the harmless error rule applies to errors involving the denial of a federal constitutional right, the Court, for the first time, extends the rule to coerced confessions.[6] The Rehnquist majority opinion was met by a bitter dissent from Justice

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1. 111 S. Ct. 1246 (1991).

2. *Id.* at 1265.

3. James C. Scoville, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740 (1987) [hereinafter Scoville].

4. Chapman v. California, 386 U.S. 18, 22 (1967).

5. The current harmless error statute, 28 U.S.C. § 2111 (1988), incorporates the harmless error statute enacted in 1919, Act of February 26, 1919, ch. 48, 40 Stat. 1181, which provided that a judgment was to be affirmed "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." However, the original statute was repealed in 1948 and replaced a year later by a version in which the term "technical" was deleted, 63 Stat. 105 (1949). *See* FED. R. CRIM. P. 52(A) modeled after the Act of 1919, which provides, "any error, defect, irregularity or variance which does not affect the substantial rights shall be disregarded." *See also* FED. R. CIV. P. 61 and FED. R. EVID. 103(A).

Although it appears that repeal and reenactment resulted from confusion over whether FED. R. CRIM. P. 52(A) and FED. R. CIV. P. 61 made § 391 redundant, 11 CHARLES WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2881 (1973), the result is that § 2111 may be coextensive with *Chapman*. *See* United States v. Hastings, 461 U.S. 499 (1983) and ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR 41-43 (1970).

6. Chapman v. California, 386 U.S. 18 (1967). For a short history of harmless error rules see Phillip J. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969) [hereinafter Mause]; Vilija Bilaisis, Comment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 459-60 (1983); Nolan E. Clark, Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814 (1970).

For a discussion on the differences between constitutional and nonconstitutional harmless error rules, see Kotteakos v. United States, 328 U.S. 750 (1946); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 422-23 (history of nonconstitutional harmless error rules).

Byron R. White[7] and with much reproach from commentators[8] accusing the majority of deserting the privilege against self-incrimination.[9] However, *Fulminante* upholds the ban on admissions of coerced confessions into evidence and does not threaten resolution of the constitutional guarantees. The result is that no conviction will be affirmed if there is any reasonable doubt that it is based on the involuntary confession.

This Comment analyzes the Court's decision to apply the harmless error rule to the erroneous admission at a jury trial of involuntary confessions.[10] It specifically discusses how the Court balances society's interest in convicting the guilty with a defendant's interest in avoiding an unjust conviction. The Comment also examines the historical development of the constitutional harmless error doctrine and the future implications of the decision. Further, it will attempt to reconcile with the Rehnquist majority, the Court's critics who claim that a threat to the defendant's constitutional right to due process looms on the horizon.

II. BACKGROUND

A. *The Common Law*

Traditionally, the Court has found the erroneous admission of a coerced confession[11] at trial can never be considered harmless.[12] This traditional exclusion of coerced confessions from the harmless error doctrine reflects the attitude imbedded in American and English jurisprudence.[13] Originally, an error in a criminal trial proceeding led to reversal regardless of whether the error affected the outcome.[14] The federal courts rationalized there was a "stringent presumption of preju-

7. The Supreme Court, Justice White, held that: (1) defendant's confession was coerced; and (2) error in admission of the confession was not harmless; and, per C.J. Rehnquist, held that; (3) harmless error rule applied to admission of involuntary confessions.

8. *The Supreme Court's Harmful Error*, N.Y. TIMES, Mar. 29, 1991, at A22; Alan Ellis, *Time to Draw the Line on Police Power*, S.F. CHRON., Mar. 29, 1991, at A27; *A Supreme Court Retreat*, WASH. POST, Mar. 29, 1991, at A20; *Editorial: Supreme Court Ruling*, BOSTON GLOBE (City Edition), Mar. 29, 1991, at 47; *Opening the Door to Police Abuse*, CHI. TRIB., Mar. 28, 1991, at C22; *Who's Activist Now? Conservative Justices Rewrite Criminal Rights*, SEATTLE TIMES, Mar. 28, 1991, at A10; Todd Spangler, *Delegates Clear Bill to Make Coerced Confessions Useless*, WASH. TIMES, April 5, 1991, at B4 (judiciary committee chairman of the House of Delegates in Maryland, John Arnick, is pushing a House bill in Maryland which says that no conviction may stand in a case where a coerced confession was introduced).

9. U.S. CONST. amend. V provides, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

10. Supreme Court cases have used the terms "coerced confession" and "involuntary confession" interchangeably. Blackburn v. Alabama, 361 U.S. 199 (1960).

11. For the Supreme Court's interpretation of the meaning of "coerced," see Colorado v. Connelly, 479 U.S. 157, 163-64 (1986).

12. In Payne v. Arkansas, 356 U.S. 560 (1958), the Court held that a conviction must be reversed when a coerced confession is introduced into evidence. *Id.* at 568.

13. For a complete discussion of the English heritage and American modification of the harmless error rule, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6 (1985).

14. *See* James Duke Cameron & Jones Osborn II, *When Harmless Error Isn't Harmless*, 1971 LAW & SOC. ORD. 23 (1971); Scoville, *supra* note 3; Robert Pondolfi, Comment, *Principles for Application of the Harmless Error Standard*, 41 U. CHI. L. REV. 616, 617 (1974) [hereinafter Pondolfi]. For a complete discussion of harmless error, see ROGER TRAYNOR, THE

dice" from a trial error.[15] As retrials increased, the rule of automatic reversal was widely criticized as a waste of judicial resources[16] and reviewing courts were condemned as "impregnable citadels of technicality."[17] Critics were concerned that reversing convictions based on technical errors would undermine the public confidence in the judicial system.[18] Consequently, there was pressure for harmless error legislation.

In 1919 Congress adopted a federal harmless error statute, which served as the model for most state legislation.[19] As a result, a trial error does not automatically call for a reversal of a criminal conviction. Instead, the conviction will be upheld if the appellate court concludes that the error had no impact on the conviction.[20] The reviewing courts weigh the effect of the error on the jury's probable evaluation of defendant's culpability.[21] The federal statute was generally interpreted as applying only to nonconstitutional errors.[22] A nonconstitutional error involves any rule violation.[23] All federal constitutional errors were still subject to automatic reversal because of the conclusive presumption of prejudice when a criminal defendant was deprived of a constitutional right.[24] However, some state appellate courts applied their state harmless error statutes to both constitutional and nonconstitutional state rights.[25]

This inconsistent application of nonconstitutional harmless error rules led to the advent of the constitutional harmless error doctrine. In 1963, in *Fahy v. Connecticut*,[26] the Supreme Court declined to determine

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RIDDLE OF HARMLESS ERROR 8, 11-13 (1970); 1 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 21 (3d ed. 1940).

15. In Bram v. United States, 168 U.S. 532 (1897), the Supreme Court held that the illegal admission of defendant's statement is reversible error "since the prosecution cannot on one hand offer evidence to prove guilt . . . and on the other hand for the purpose of avoiding consequences of the error . . . be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." *Id.* at 541.

16. *See, e.g.*, WIGMORE, *supra* note 14, at 370-73 n.3.

17. Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925), *quoted in* Kotteakos v. United States, 328 U.S. 750, 759 (1946). *See* TRAYNOR, *supra* note 14, at 14-15 n.3 ("There had to be an end to battles of bright or dull wits in the courtroom on witless technicalities.").

18. *See* Delaware v. Van Arsdall, 475 U.S. 673 (1986) (recognizing the harmless error doctrine "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.") *Id.* at 681. *Cf.* TRAYNOR, *supra* note 14, at 50 ("Reversal for error, regardless of its effect on the judgement, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

19. Act of February 26, 1919, ch. 48, 40 Stat. 1181 (codified at 28 U.S.C. § 2111 (1988). *See supra* note 5.

20. LAFAVE & ISRAEL, *supra* note 13, at 996.

21. *Id.*

22. *Id.*

23. Nonconstitutional harmless errors include: joinder, venue, discovery, jury selection and any other violations of the Federal Rules of Criminal Procedure. LAFAVE & ISRAEL, *supra* note 13, at 996.

24. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

25. By 1967, all fifty states had adopted harmless error rules by statute. *See* Chapman v. California, 286 U.S. 18, 22 (1967).

26. 375 U.S. 85 (1963).

whether the erroneous admission of evidence obtained by an illegal search and seizure, a constitutional error, can ever be subject to harmless error under the federal standard.[27] Assuming that the rule applied, the majority reversed the conviction, holding that it was not harmless error for the trial judge to admit the evidence.[28] The dissenters in *Fahy* rejected the majority's approach. They saw no reason why the harmless error rule should not apply to constitutional errors as well as nonconstitutional errors.[29] This dissent ultimately prevailed and became the law in the landmark case of *Chapman*.

B. *The Chapman Case*

Four years after *Fahy*, the Supreme Court in *Chapman v. California*,[30] held that a conviction can be upheld despite a violation of a criminal defendant's constitutional right under the theory of constitutional harmless error.[31] In *Chapman*, the prosecutor persistently commented on the defendant's failure to testify.[32] Justice Black, writing for the majority, rationalized that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless.[33] However, there may be some constitutional errors that 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 automatic reversal of the conviction."[34] The majority concluded that the prosecutor's continued comments concerning a defendant's silence were subject to harmless error analysis.[35]

The Court noted that simply because the rule of automatic reversal had not been applied to constitutional errors in the past, that did not mean a constitutional error could never be harmless.[36] Justice Black explained that, "harmless error rules serve a useful purpose since they block setting aside convictions for small errors or defects that have little likelihood of having affected the result of the trial."[37] The Court held

27. *Id.* at 86. The constitutional violation was a breach of Mapp v. Ohio 1 367 U.S. 643 (1948).

28. Fahy v. Connecticut, 375 U.S. 87 (1963).

29. *Id.* at 92-95 (Harlan, J., dissenting).

30. 386 U.S. 18 (1967).

31. *Id*; *See* Skoglind, *Harmless Constitutional Error: An Analysis of Its Current Application*, 33 BAYLOR L. REV. 961 (1981) [hereinafter Skoglind] (examining commentators' theories attempting to explain *Chapman's* application of the harmless error doctrine).

32. In Griffin v. California, 380 U.S. 609 (1965), the Court held that a prosecutor's or judge's comment on the defendant's failure to testify overly burdens the defendant's right to exercise his Fifth Amendment privilege against self-incrimination and is constitutional error. *See* CAL. CONST. art. VI § 4.5 (forbids reversal unless the error complained of has resulted in a miscarriage of justice).

33. Chapman v. California, 386 U.S. at 23 n.8 citing as examples Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confessions), Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of right to counsel), Tumey v. Ohio, 273 U.S. 510 (1926) (biased judge).

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

35. *Id.* at 24.

36. *Id.* at 21-22 (Court noted that harmless error statutes do not distinguish between federal constitutional and nonconstitutional errors).

37. *Id.* at 22.

that a federal constitutional error can be harmless, but that the prosecution carries the burden of proving "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[38] This federal constitutional standard remains more stringent than the typical state rule.[39]

The *Chapman* decision provides a two-step analysis for dealing with a constitutionally based error. First, the reviewing court must decide whether the constitutional error falls within the types of violations subject to harmless error analysis.[40] Second, assuming the harmless error rule is appropriate, the court must consider whether, beyond a reasonable doubt, the error had no impact on the verdict.[41]

It is important to recognize that the nonconstitutional harmless error test applies to both evidentiary and "structural errors," but the constitutional harmless error rule applies only to those errors which implicate the jury's decision. Structural errors are those that cannot be compared to other evidence presented at trial in order to determine whether they were harmless. Under the constitutional harmless error doctrine, structural errors still result in automatic reversal.[42] This distinction reflects the Court's view that a constitutional error implicates the defendant's right to a fair proceeding more significantly than other trial errors.[43] The Supreme Court has increasingly utilized the constitutional harmless error doctrine,[44] and the Rehnquist Court recently declared that the rule presumptively applies to virtually all types of federal constitutional errors.[45]

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38. *Id.* at 24. There are numerous articles on *Chapman v. California*, note 3. *See, e.g.*, Field, *Assessing the Harmlessness of Federal Constitutional Error - A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976) [hereinafter Field]. *See also* supra note 3.

39. The typical state constitutional rule allowed an appellate court to uphold a conviction if the court could find that, despite the constitutional error, there was "overwhelming evidence" to support the conviction. Chapman v. California, 386 U.S. at 23. *See* Pondolfi *supra* note 14, at 619.

40. Scoville, *supra* note 3, at 743.

41. For example, even if the jury heard evidence that was obtained in violation of the Fourth Amendment's prohibition of unreasonable search and seizure, the appellate court will affirm the conviction if the evidence did not contribute to the verdict. Chambers v. Maroney, 399 U.S. 42, 53 (1970). For an explanation of the "affect" test or the "overwhelming evidence" test of *Chapman* see Field *supra* note 38; Skoglind *supra* note 31, at 961.

42. *See supra* note 33. *See also* Kotteakos V. United States, 328 U.S. at 764-65.

43. Scoville *supra* note 3 at 744-45 (1987).

44. Tom Stacey & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) [hereinafter Stacey & Dayton] (an examination of the expansion of constitutional harmless error). For discussion of the widespread use of constitutional harmless error during the Burger Court, *see* Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L. J. 249 (1971).

45. In Rose v. Clark, 478 U.S. 570, 578-79 (1986), the Court, in holding an erroneous malice instruction subject to harmless error analysis, explained:

> while there are some errors to which *Chapman* does not apply, they are the exception and not the rule . . . . [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.

C. *Post-Chapman*

Commentators and lower courts have criticized *Chapman* for providing little guidance and clouding the issue of which constitutional errors are subject to the harmless error rule, rather then to a rule of automatic reversal.[46] While *Chapman* failed to enunciate a clear standard to determine which errors fall into the harmless error category, the opinion tenuously established which types of errors would not be subject to the rule. There are two types of constitutional errors that are not subject to harmless error analysis. First, there are those errors which are so fundamental to the constitutional right to a fair trial that they mandate automatic reversal.[47] Second, there are those errors the effect of which on the jury is so uncertain that the appellate court is unable to determine whether the error is harmless. Consequently, the application of the outcome-determinative test is impossible.[48]

In an attempt to clarify which type of errors would not be subject to the harmless error analysis, the Court in *Chapman* cited to three cases: *Payne v. Arkansas*, which involved a coerced confession,[49] *Gideon v. Wainwright*, which involved the denial of the right to counsel at trial[50] and *Tumey v. Ohio*, a case which concerned a judge with a financial stake in the outcome.[51] The denial of the right to counsel and of the right to an impartial judge can be viewed as rendering "a trial fundamentally unfair."[52] In the case of a coerced confession, it was assumed that a reviewing court would not be able to determine with certainty that such an error was nonprejudicial.[53]

Since *Chapman*, the Court has continually expanded the application of the harmless error doctrine to a range of constitutional evidentiary related errors, but it has not offered guidance in determining which errors apply to the rule.[54] Conversely, the Court has found that the harmless error rule applies to the admission of evidence obtained in violation

46. *See, e.g.*, Mause *supra* note 6 at 527-33; Skoglind *supra* note 31. *Cf.* Rose v. Clark, 478 U.S. 570 (1986) (Stevens, J., concurring) ("Rather than creating a broad, new presumption in favor of harmless error analysis . . . *Chapman* merely rejected the notion that such analysis was always impermissible and articulated a rigorous standard for determining whether a presumptively prejudicial error could, in fact, be deemed harmless.").

47. U.S. CONST. amend. V. provides in pertinent part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . . "

U.S. CONST. amend. XIV, § 1 provides in pertinent part: "[n]o state . . . shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

48. *See* Delaware v. Van Arsdall, 475 U.S. 673 (1986); LAFAVE & ISRAEL, *supra* note 13, at 1001.

49. 356 U.S. 560 (1958).

50. 372 U.S. 335 (1963).

51. 273 U.S. 510 (1927).

52. Rose v. Clark, 478 U.S. 570, 577 (1986).

53. Payne v. Arkansas, 356 U.S. at 568 (When a "coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession.").

54. *See generally* Stacey & Dayton *supra* note 44, at 712.

of the Fourth[55] and Sixth Amendments.[56] The right to cross-examine an adverse witness,[57] violation of the *Bruton* rule[58] (prohibiting use of a nontestifying codefendant's confessions),[59] the failure to instruct the jury on the presumption of innocence[60] and the defendant's right to be present at all stages of the trial[61] have been translated by the Court as subject to the harmless error rule. More recently, the erroneous exclusion of defendant's testimony regarding circumstances of his confession,[62] and a jury instruction containing an erroneous conclusive presumption were found to violate the defendant's right to a fair trial.[63] On the other hand, the Court has frequently reiterated the *Bram*[64] decision, which held that the erroneous admission of a coerced confession automatically mandates reversal of the conviction.[65] In these cases, the Court apparently viewed coerced confessions as having such an impact on the jury as to make it impossible to establish harmlessness. Furthermore, the Court abhors[66] the use of involuntary confessions because it conflicts with the societal belief that "the police must obey the law while enforcing the law."[67] The use of an erroneously admitted confession

55. Chambers v. Maroney, 399 U.S. 42 (1970) (admission into evidence of gun obtained in illegal search and seizure was harmless error beyond a reasonable doubt).

56. Coleman v. Alabama, 399 U.S. 1 (1970) (denial of counsel at a preliminary hearing in violation of Sixth Amendment right to counsel was subject to the harmless error rule); Harrington v. California, 395 U.S. 250 (1969) (Sixth Amendment right to confrontation by accuser was subject to the harmless error rule).

57. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

58. *See* Bruton v. United States, 391 U.S. 123 (1968).

59. Schneble v. Florida, 405 U.S. 427 (1972); *see also* Brown v. United States, 411 U.S. 223 (1973).

60. Kentucky v. Whorton, 441 U.S. 786 (1979).

61. Rushen v. Spain, 464 U.S. 114 (1983).

62. Crane v. Kentucky, 476 U.S. 683 (1986).

63. Carella v. California, 491 U.S. 263 (1989).

64. In Bram v. United States, 168 U.S. 532 (1897), the defendant was arrested for murder committed on the high seas and was brought into the police detective's office where he was interrogated. He was tricked into an inculpatory statement when the detective told Bram that another sailor said that he saw Bram commit the murder. Bram replied: "[h]e could not see me from there." *Id.* at 562. The detective told Bram if he had an accomplice, he should say so and not carry the entire blame on "[his] own shoulders." *Id.* at 539. Bram then said that Brown was the murderer. *Id.* The majority, considering the totality of the circumstances, held that Bram's statements were involuntary. *Id.* at 562-64. The Court quoted a criminal law treatise: "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Id.* at 542-43 (quoting 3 William O. Russell, RUSSELL ON CRIMES 478 (6th ed. 1896)).

65. *See* Chapman v. California, 386 U.S. at 23 n.8; Jackson v. Denno, 378 U.S. 368, 376 (1964) (defendant's confession, which occurred while he was under drugs in a hospital emergency room, violated due process); Hayes v. Washington, 373 U.S. 503, 518 (1963) (defendant's written confession was obtained by substantial coercion and its admission constituted reversable error); Lynum v. Illinois, 372 U.S. 528, 537 (1963) (defendant may have made an involuntary confession when threatened that her financial aid would be discontinued); Blackburn v. Alabama, 361 U.S. 199 (1960) (defendant was incompetent at the time he confessed); Spano v. New York, 360 U.S. 315 (1959) (deceptive techniques were the cause of a coerced confession); Malinski v. New York, 324 U.S. 401, 404 (1945) (overturning conviction due to introduction of a coerced confession at trial).

66. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

67. *Id.*

has been characterized as an "impermissible doctrine."[68]

D. *Involuntary Confessions*

Supreme Court decisions since *Chapman* have reaffirmed *Payne* and held that the admission of an involuntary confession requires automatic reversal,[69] even though it relates to an evidentiary question. The Court declared that even though there may be sufficient evidence apart from the confession to support the conviction, admission of a coerced confession into evidence contaminates the judgment because it violates due process[70] and provides a "false foundation for any conviction."[71]

Payne was reaffirmed[72] after *Chapman*, but has also been judicially undermined. In *Milton v. Wainwright*,[73] the Court applied the harmless error rule to the admission of a confession obtained in violation of the defendant's Fifth and Sixth Amendment rights. A confession obtained through a violation of the Sixth Amendment may have a similar impact on a jury's evaluation of the defendant's guilt as a coerced confession,[74] and though it may have a higher likelihood of being false, the Court still applies the harmless error rule.

The harmless error rule's applicability to the erroneous confession cases was described as "inherently unreliable" for several reasons.[75] First, due to the broad standards used to determine whether a confession is coerced,[76] many confessions that are borderline involuntary could be the procedural error needed to reverse the defendant's conviction. In substance, a confession is voluntary if it is the product of "an essentially free and unconstrained choice"[77] by the party making the statement. The voluntariness of a confession is determined by the totality of all the surrounding circumstances,[78] including the characteristics of the suspect and the details of the interrogation.[79] In theory, it seems the voluntariness requirement could be stretched to include almost all

68. Lynum v. Illinois, 372 U.S. at 537.

69. Payne v. Arkansas, 356 U.S. at 561.

70. *Id.* at 562. In *Payne*, the defendant, a "mentally dull" nineteen year old negro was arrested without warrant, denied his right to a hearing before the magistrate, not advised to remain silent or on his right to counsel, held incommunicado for three days, denied food for long periods and told by police chief that thirty people were going to attack him outside.

71. Payne v. Arkansas, 356 U.S. at 568 (quoting Stein v. New York, 346 U.S. 156, 191 (1953)).

72. Nincey v. Arizona, 437 U.S. 385, 401 (1978) (quoting Blackburn v. Alabama, 361 U.S. at 206) ("the blood of the accused is not the only hallmark of an unconstitutional inquisition").

73. 407 U.S. 371 (1972).

74. LAFAVE & ISRAEL, *supra* note 13, at 1005.

75. *Id.*

76. Lorey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121 (proposing that a false confession includes a broad range of self-incriminating behavior).

77. *Id.* at 1123 n.4 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

78. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

79. *Id.*

confessions that are the result of arrest or interrogation.[80] In reality, the doctrine has been used to exclude from evidence two types of confessions: confessions obtained under prolonged and inherently coercive circumstances[81] and confessions produced by the suspect's weakness.[82]

Second, coerced confession cases can be hypothesized where they would have no impact on the jury's evaluation of the defendant's culpability.[83] Therefore, the justification for exclusion of coerced confessions from harmless error analysis seems dependent on the fear of police misbehavior,[84] concern for the "judicial proceedings as a whole"[85] and belief in the fundamental principle that our system of criminal justice is "an accusatorial and not an inquisitorial system . . . ."[86] Finally, the doctrine's applicability has confused lower courts because of the diverse and inconsistent application of the rule to certain constitutional errors.[87] Most lower courts have adhered to the rule of automatic reversal for coerced confessions, but some have held the erroneous admission of involuntary confessions to be harmless error.[88] Lower courts have also

80. Ayling, *supra* note 76, at 1123 n.4 (citing CHARLES MCCORMICK, MCCORMICK ON EVIDENCE, § 147 (3rd ed. 1984)).

81. Ayling, *supra* note 76, at 1123 n.4 (citing Ashcraft v. Tennessee, 322 U.S. 143 (1944) (defendant confessed after he was deprived of sleep, food and held incommunicado); Hayes v. Washington, 373 U.S. 503 (1963) (confession obtained after defendant had been held incommunicado for sixteen hours); *see also* Rogers v. Richmond, 365 U.S. 534 (1961) (police officer threatened to bring in defendant's wife if defendant did not confess).

82. Jackson v. Denno, 378 U.S. 368 (1964) (defendant who had a bullet wound confessed in a hospital emergency room); Mincey v. Arizona, 437 U.S. 385 (1978) (defendant confessed while in great pain and on drugs in the hospital emergency room).

83. LAFAVE & ISRAEL, *supra* note 13, at 1005.

84. Spano v. New York, 360 U.S. 315, 319 (1959) (defendant finally confessed, after repeatedly refusing to answer without counsel, when police initiated the help by his friend to invoke sympathy); *see also* Brown v. Mississippi, 297 U.S. 278 (1936) (confessions obtained after brutal beatings).

85. Chapman v. California, 386 U.S. at 50 (Harlan, J., dissenting).

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

87. Although most courts have held that involuntary confessions are subject to an automatic reversal, other courts have applied the *Chapman* rule. *See* Harrison v. Owen, 682 F.2d 138, 140-42 (7th Cir. 1982); United States v. Murphy, 763 F.2d 202, 208-10 (6th Cir. 1985), *cert. denied*, 474 U.S. 1063 (1986). These cases also applied Milton v. Wainwright, 407 U.S. 371 (1972), a Supreme Court case subsequent to *Chapman*, in which the defendant contended that one of his four confessions was involuntary. The Court held that any error was harmless beyond a reasonable doubt because the jury was presented with other overwhelming evidence of the defendant's guilt. *Id.* at 372.

88. The federal circuit court cases include: Moore v. Follette, 425 F.2d 925, 928 (2d Cir. 1970), *cert. denied*, 398 U.S. 966 (1970) (admission of an improperly obtained confession can be considered harmless); Meade v. Cox, 438 F.2d 323, 325 (4th Cir. 1971) (despite a dispute about the voluntariness of the statement, court found its admission to be harmless error); Harrison v. Owen, 682 F.2d 138, 142 (7th Cir. 1982) (admission of involuntary confession prompted by police telling the defendant that consideration would be given to defendant was held to be harmless error); United States v. Carter, 804 F.2d 487, 489-90 (8th Cir. 1986) (police detective misled defendant into thinking he was being questioned for an assault, not a murder, which induced an involuntary confession whose admission into evidence was harmless error).

State court cases include: State v. Castaneda 724 P.2d 1, 6 (1986) (admission of defendant's statement concerning the location of the victim's body induced by police deceit, if coerced was harmless error); People v. Gibson, 440 N.E.2d 339, 343-44 (1982) (improper admission of defendant's incriminating statements to his prison mate, a government informant, were, in light of other testimony, harmless error); People v. Ferkins, 497

applied the harmless error doctrine to a defendant's statements obtained in violation of *Miranda*.[89]

After expanding the categories of errors subject to harmless error analysis, the Supreme Court finally clarified the fate of the admission of an involuntary confession. Coerced confessions have been excluded for ninety years from scrutiny under the harmless error rule, but lower court confusion and Rehnquist's perseverance[90] prompted the Supreme Court to take a closer look at this issue. Conflicting opinions among state and federal courts over whether coerced confessions should be subject to harmless error analysis gave rise to the Supreme Court's grant of certiorari in the instant case, *Arizona v. Fulminante*.[91]

III. ARIZONA V. FULMINANTE

A. *Facts*

On September 14, 1982, Oreste C. Fulminante telephoned the police to report his 11-year-old stepdaughter, Jeneane Hunt, missing. Jeneane's body was discovered in the desert two days later. She had been shot in the head at close range with a large-caliber weapon and had a ligature tied around her neck that could have been used to choke her.[92] Due to inconsistencies in Fulminante's statements to the police concerning his stepdaughter's disappearance, Fulminante became a suspect in Jeneane's murder.[93] Since no charges were filed, Fulminante left Arizona. Later, Fulminante was convicted of an unrelated federal crime and imprisoned in a federal correctional facility in New York. While he was imprisoned, Fulminante cultivated a friendship with Anthony Sarivola ("Sarivola"), a former member of an organized crime family, who was serving a 60-day sentence for extortion. Sarivola, an informant for the Federal Bureau of Investigation, was masquerading as a member of an organized crime family.[94] After hearing that Fulminante was suspected of murdering a child in Arizona, Sarivola discussed the rumor with Fulminante. Fulminante initially denied any connection to the mur-

N.Y.S.2d 159, 161-62 (1986) (error in the admission of involuntary statements was harmless due to the cumulative impact of the statements).

89. The *Miranda* protections govern custodial interrogations, Miranda v. Arizona, 384 U.S. 436 (1966). *See* Amicus Curiae United States Brief for Petitioner at 26, Arizona v. Fulminante, 111 U.S. 1246 (1991) (No. 89-839); *see generally* Stacey & Dayton *supra* note 44.

90. When Rehnquist served as a law clerk for Justice Robert Jackson in 1952, Rehnquist wrote a memorandum concerning a coerced confession case, Stein v. New York, 346 U.S. 156 (1953). He argued against the dominant view (that convictions which may be based on coerced confessions cannot be sustained on appeal) alleging that "[t]he ivory towers of jurisprudence . . . [have] weakened local law enforcement . . . . Let's hope it has come to an end." Jackson did not succumb to Rehnquist's argument, but Jackson did uphold the convictions on different grounds. Tony Mauro, *How Television Captured the Court, Legal Times*, April 8, 1991, at 6-7 (quoting Rehnquist's memorandum to Robert Jackson in Jackson's papers at the Library of Congress).

91. Arizona v. Fulminante, 110 S. Ct. 1522 (1990).

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

93. *Id.*

94. *Id.*

der. Sarivola told his FBI contact, Agent Ticano, about the rumor, and Ticano asked Sarivola to try to discern more about it.[95] Sarivola then spoke with Fulminante again, who was "starting to get some rough treatment from the guys"[96] because of the rumor. Sarivola promised Fulminante protection from the other inmates, "but told him, 'You have to tell me about it,' you know. I mean, in other words, 'For me give you any help.' "[97] At that time Fulminante then admitted to Sarivola he had sexually assaulted and choked Jeneane, forced her to beg for her life, and then killed her.[98] Sarivola was released from prison in November of 1983 and Fulminante was discharged six months later.[99] After Fulminante's release, Sarivola and his fiancee, Donna, met Fulminante at a bus terminal. Fulminante told Donna he could not return to Arizona because he had killed a little girl there. Fulminante then admitted to Donna he had sexually assaulted and choked Jeneane, and then forced her to beg for her life.[100]

Before and during trial, Fulminante made motions to suppress his confessions, claiming they were involuntary. The trial court denied the motion and both confessions were admitted at trial. The jury found Fulminante guilty and sentenced him to death.[101]

Fulminante appealed, claiming the admission of his two confessions violated his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution.[102] The Arizona Supreme Court initially determined that Fulminante's confession to Sarivola was coerced, but that its admission was harmless beyond a reasonable doubt because of the overwhelming evidence against Fulminante.[103] Fulminante's second confession to Donna was not "fruit of a poisonous tree,"[104] which the court ruled admissible. Fulminante moved for a motion of reconsideration, which the court granted.

In its supplemental opinion, the majority held, over one dissent, that precedent precluded application of the harmless error doctrine to the erroneous admission of a coerced confession.[105] The court held that "until and unless the Supreme Court changes the law, we must order [the] defendant retried without the use of the coerced

95. Petitioner's Brief on the Merits at 5, Arizona v. Fulminante, 111 S. Ct. 1246 (No. 89-839).

96. 111 S. Ct. at 1250 (quoting Petitioner's Brief on the Merits at 83, Arizona v. Fulminante, 111 S. Ct. 1246 (No. 89-839)).

97. *Id.*

98. *Id.*

99. *Id.*

100. Petitioner's Brief on the Merits at 6, Arizona v. Fulminante, 111 S. Ct. 1246 (No. 89-839).

101. 111 S. Ct. at 1250-51.

102. State v. Fulminante, 778 P.2d 602, 608 (Ariz. 1988).

103. *Id.* at 610-11.

104. The court held that Fulminante's second confession was not tainted by the first confession to Sarivola based on the "fruit of the poisonous tree" doctrine as espoused in Wong Sun v. United States, 371 U.S. 471 (1963). This portion of the Arizona Supreme Court's holding was not challenged by the Supreme Court. 111 S. Ct. at 1251 n.1.

105. 778 P.2d at 627.

confession."[106]

B. *Supreme Court Decision*

1. Majority Opinions

In a fragmented majority opinion written in part by Justice White and in part by Chief Justice Rehnquist, the Supreme Court held that Fulminante's confession to Anthony Sarivola was coerced,[107] that the harmless error rule applied to the erroneous admission of a coerced confession,[108] but that the admission of Fulminante's confession was not harmless.[109]

The first issue the Court addressed was whether the Arizona Supreme Court erred in holding Fulminante's confession involuntary.[110] In determining the question of the voluntariness, the Court, speaking through Justice White, made an independent determination[111] by applying the totality of the surrounding circumstances test.[112] The White majority held that there was a credible threat of violence unless Fulminante confessed, and a credible threat suffices for a finding of a coerced confession. The Court affirmed the Arizona Supreme Court's supplemental finding that the confession was involuntary. Four Justices joined Chief Justice Rehnquist in dissenting on this issue.

The next issue the Court addressed was whether the admission of a coerced confession at trial is subject to harmless error analysis.[113] This portion of the majority opinion, written by Chief Justice Rehnquist, explained that the "common thread" connecting errors subject to harmless error analysis was that they all involved a "trial error."[114] This type of error, which occurs during the presentation of the case to the jury, may be assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.[115] Rehnquist distinguished trial errors from "structural defects" in the trial mechanism, the latter not subject to harmless error analysis.[116]

The Rehnquist majority concluded that the erroneous admission of an involuntary confession is a trial error, similar in kind and degree to other types of erroneously admitted evidence.[117] Thus, a coerced confession can be considered harmless error when there is enough addi-

106. *Id.*
107. Arizona v. Fulminante, 111 S. Ct. 1246, 1252 (1991) (White, J.).
108. *Id.* at 1266 (Rehnquist, J.).
109. *Id.* at 1258 (White, J.).
110. *Id.* at 1251.
111. *Id.* at 1252. *See also* Miller v. Fenton, 474 U.S. 104, 110 (1985); Mincey v. Arizona, 437 U.S. 385, 398 (1978); Hayes v. Washington, 373 U.S. 503, 515 (1963); Chambers v. Florida, 309 U.S. 227, 228-29 (1940).
112. Arizona v. Fulminante, 111 S. Ct. at 1251.
113. *Id.* at 1263-66.
114. *Id.*
115. *Id.* at 1264.
116. *Id.* at 1264-65. *See also infra* notes 141-45 and accompanying text.
117. 111 S. Ct. at 1265.

tional evidence to justify a guilty verdict.[118] The majority imposed a stringent standard for an appellate court to determine whether an error was harmless: the error must be harmless beyond a reasonable doubt.[119] Justice White, joined by four other justices, dissented on this issue.

The final issue the Court addressed was whether the State had met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction.[120] The majority on this third issue, again written by Justice White, explained that confessions profoundly impact the jury[121] and provided three reasons why this error was not harmless beyond a reasonable doubt. First, White explained both confessions were required for a successful prosecution.[122] Second, the jury's assessment of the second confession, to Donna, could have been dependent on the first involuntary confession to Sarivola.[123] Finally, the admission of the first confession led to the admission of other evidence prejudicial to Fulminante.[124]

2. Concurring Opinion

Justice Kennedy, accepting the majority's finding that the confession was coerced, wrote a separate concurrence "[i]n the interests of providing a clear mandate to the Arizona Supreme Court."[125] He agreed that the admission of involuntary confessions should be subject to harmless error analysis, but emphasized that a court must appreciate the "indelible impact a full confession may have on the trier of fact."[126]

3. Dissenting Opinions

Justice White strongly dissented on the second issue concerning the application of the harmless error rule to coerced confessions. Justice White, actually reading a bitter dissent from the bench,[127] accused the majority of abandoning "one of the fundamental tenets of our criminal justice system"[128] by not automatically reversing a conviction once an involuntary confession is admitted. He explained that the severity of a coerced confession required that improper admission of such evidence should never be subject to harmless error. Justice White cited numerous authorities accusing the majority of overturning a "vast body of precedent."[129] Moreover, White called the majority's distinction between

118. *Id.*
119. *Id.*
120. *Id.* at 1257.
121. *Id.*
122. *Id.* at 1258.
123. *Id.* at 1258-59.
124. *Id.* at 1259-60.
125. *Id.* at 1267.
126. *Id.* at 1266.
127. *See* David G. Savage, *High Court Allows Forced Confessions in Criminal Trials*, L.A. TIMES, Mar. 27, 1991, at A1.
128. Arizona v. Fulminante, 111 S. Ct. at 1254.
129. *Id.*

trial error and structural defects in the trial mechanism "meaningless."[130]

Chief Justice Rehnquist dissented from the majority's first finding that the confession was coerced. He agreed with the trial court's finding that there was no evidence to indicate Fulminante confessed because of fear.[131] Justice Rehnquist also dissented from the majority's final conclusion that the error was not harmless. He adhered to the Arizona Supreme Court's initial finding that, in light of the other overwhelming evidence against the respondent, the error was harmless beyond a reasonable doubt.[132]

IV. ANALYSIS

The result in *Fulminante* is an expansion of an already widening use of the constitutional harmless error doctrine, which strikes a balance between the defendant's interest in a fair trial and society's interest in judicial precision and economy.[133] The Supreme Court has increasingly extended the application of the constitutional harmless error rule since its inception in 1967.[134] There is no clear basis for the outrages against Chief Justice Rehnquist's majority opinion. Critics claim the Court has abandoned the constitutional requirement of due process,[135] however, the premise of these criticisms is distorted. The holding is a step towards preventing defendants from escaping conviction because of harmless constitutional errors. In this way, the decision balances society's interest in convicting the guilty and an innocent person's interest in avoiding an unjust conviction.

The key distinction between the majority and the dissent is the difference in their interpretations of *Chapman*. *Chapman* is the foundation upon which all law concerning the harmless error doctrine is built. White, in his dissent, used *Chapman's* citation to *Payne* in a footnote as an example of the blanket exclusion of coerced confessions from harmless error analysis. Yet, the majority held that it is not clear that *Payne* stood for such a premise.[136] The majority explained not all constitutional trial errors trigger automatic reversal[137] and *Chapman*, in dictum, merely made a historical reference to *Payne* in a footnote.[138] *Payne* did not reject applying the harmless error analysis to coerced confessions, but re-

130. *Id.*
131. *Id.* at 1262.
132. *Id.* at 1266.
133. *See generally* Stacey & Dayton *supra* note 44 (an examination of the expansion of the constitutional harmless error doctrine).
134. Chapman v. California, 386 U.S. 18 (1967). *See* authorities cited *supra* note 5.
135. *See* Arizona v. Fulminante, 111 S. Ct. at 1253 (White, J., dissenting); *see also* Martin Tolchin, *Defense Lawyers Assail Court Ruling on Coerced Confessions*, N.Y. TIMES, Mar. 28, 1991, at B10; Paul D. Kamenar, *Restore Balance of Society's Rights*, USA TODAY, April 2, 1991, at A12.
136. 111 S. Ct. at 1264.
137. *Id.* (citing Fahy v. Connecticut, 375 U.S. 85 (1963)).
138. *See* Arizona v. Fulminante, 778 P.2d 602, 627 (Ariz. 1989) (Cameron, J., dissenting).

jected a different, more lenient rule than the harmless error doctrine.[139]

Justice White's dissent discredits the Rehnquist majority's analogy between trial errors and structural defects in the trial mechanism. By claiming the majority makes a "meaningless dichotomy,"[140] the dissent overlooks the rationale. The majority cited a string of cases[141] that apply the harmless error rule to constitutional errors. Upon a thorough examination of all the cases, the majority concluded that each case may be assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. The "common thread" in these cases is that they each involved a "trial error."[142] This is distinct from a "structural defect."[143] A "trial error's" impact on the jury may be compared to and weighed against the other evidence presented at trial in order to determine whether it is harmless. On the other hand, a "structural defect" is an error in the engineering of the trial that cannot be cured by other evidence. While the total deprivation of the right to counsel[144] and an impartial judge[145] are structural defects in the trial mechanism and oppose analysis by the harmless error rule, the admission of an involuntary confession is not of the same caliber since the weight given it by the jury can be compared to other evidence admitted to determine its relative impact on the jury's verdict.[146]

Justice White's dissent neglects changes in the law that could allow the harmless error doctrine to apply to coerced confessions.[147] Some scholars have argued that the historic rationales for excluding coerced confessions from harmless error analysis no longer exist due to the recent widespread use of the constitutional harmless error doctrine.[148] The dissent makes a blanket assumption that any type of coerced confession is per se harmful and therefore reversible.[149] The cases the dissent cites include only three that held the admission of a coerced confession

139. Arizona v. Fulminante, 111 S. Ct. at 1264.

140. 111 S. Ct. at 1254 (White, J., dissenting).

141. Harmless error rules have been applied to a breadth of errors in state and federal proceedings. *See, e.g.*, Clemons v. Mississippi, 110 S. Ct 1441 (1990) (unconstitutionally broad sentencing jury instructions); Carella v. California, 491 U.S. 263 (1989) (erroneous conclusive presumption in jury instruction); Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of evidence in violation of the Sixth Amendment Counsel Clause); Pope v. Illinois, 481 U.S. 497, 501-504 (1987) (jury instruction, which misstated an element of the offense); Rose v. Clark, 478 U.S. 570 (1986) (erroneous rebuttal presumption in jury instruction); Rushen v. Spain, 464 U.S. 114 (1983) (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).

142. Arizona v. Fulminante, 111 S. Ct. at 1265.

143. *Id.*

144. Gideon v. Wainwright, 372 U.S. 335 (1963).

145. Tumey v. Ohio, 273 U.S. 510 (1927).

146. *Id.*

147. *See* Arizona v. Fulminante, 778 P.2d 602, 627 (Ariz. 1989) (Cameron, J., dissenting) (suggesting the changes in the law now make it possible for the harmless error doctrine to apply to coerced but reliable confessions); *see also* James D. Cameron & Jones Osborne, *When Harmless Error Isn't Harmless*, 1971 LAW & SOC. ORD. 24, 29-30 (1971).

148. Stacey & Dayton *supra* note 44 at 712 and accompanying text.

149. *Id.*

could not be considered harmless error.[150] In all three cases, the confessions were obtained under extreme coercive pressure, where the defendant was weakened and put through an intensive interrogation process by public authorities.[151] However, the facts of the confession should not be conclusive since the rationale is based on the amount of other evidence presented at trial.

The harmless error doctrine has been applied to a growing number of evidentiary errors.[152] In *Milton v. Wainwright*,[153] the Court applied the harmless error rule to a confession by the defendant to a police officer posing as a fellow inmate in the same cell as the defendant. The defendant had also made three other full confessions. The Court reasoned that in light of the overwhelming evidence of the defendant's guilt, assuming that the challenged testimony was improperly admitted, it was harmless beyond a reasonable doubt.[154] In *Delaware v. Van Arsdall*,[155] the Court held that the denial of the defendant's opportunity to impeach a witness for bias was subject to harmless error analysis.

Justice White's dissent makes a strong point concerning the impact of involuntary confessions. The majority acknowledged the damaging impact of a coerced confession on the defendant and enunciated a stringent standard to determine the contribution of the confession to the conviction.[156] The burden is on the prosecutor to prove that the admission of the confession was harmless beyond a reasonable doubt.[157] The *Fulminante* decision demonstrates the difficulty in proving the harmlessness of a coerced confession. This is due to the majority's rejection of the state's harmless error argument, despite Fulminante's second incriminating confession.

The dissent justifies precluding coerced confessions from harmless error analysis in light of brutal methods used to extract confessions. These tactics did not exist in *Fulminante*. Assuming there had been abusive tactics by the interrogators, the due process clause does not serve as an instrument to reform the behavior of state officials.[158] Nor does the *Fulminante* decision promote such official misbehavior; rather, the rule incorporating the deterrent policy as the constitutional ban on involun-

150. Mincey v. Arizona, 437 U.S. 385 (1978); Jackson v. Denno, 378 U.S. 368 (1964); Payne v. Arkansas, 356 U.S. 560 (1958).

151. In *Payne*, a "mentally dull" young defendant went through a brutal police interrogation process. *See supra* note 70. In *Jackson*, the defendant, who was shot twice, made incriminating statements to a police officer while the defendant was in the emergency room and drugged on demerol, an analgesic sedative. *Jackson*, 378 U.S. at 368. In *Mincey*, the defendant was in unbearable pain and almost comatose, when he made an incriminating statement after an interrogation. *Mincey*, 437 U.S. at 385.

152. *See* Stacey & Dayton *supra* note 44.

153. Milton v. Wainwright, 407 U.S. 371 (1972).

154. *Id.* at 372.

155. Delaware v. Van Arsdall, 475 U.S. 673 (1986). Violations of defendant's right to prohibit the use of a nontestifying codefendant's confession at trial as protected by Bruton v. United States, 391 U.S. 123 (1968), are also subject to harmless error analysis.

156. Arizona v. Fulminante, 111 S. Ct. at 1266.

157. *Id.*

158. Malinski v. New York, 324 U.S. 401, 438 (1945) (Stone, C.J., dissenting).

tary confessions is left in force by the decision. Involuntary confessions will continue to be subject to the voluntariness doctrine in order to determine their admissibility.[159] The opinion will not be a catalyst for corrupt police interrogation.[160]

The dissent underrates *Fulminante's* criminal justice policy. The overriding purpose of a criminal trial is to determine the defendant's guilt or innocence.[161] The harmless error doctrine is not a shield to protect the defendant from a fair prosecution.[162] This is why the Supreme Court in *Chapman* held that a constitutional error does not automatically trigger reversal.[163] This harmless error test covers a breadth of errors, and the majority in *Fulminante* saw no reason to preclude its extension to coerced confessions.[164] In criminal procedure, the problem has been described as one of balancing conflicting interests and of securing as many interests as possible.[165] By attempting to promote this goal, the Court has stressed that the defendant is entitled to a "fair trial, not a perfect one."[166] The harmless error doctrine recognizes that the underlying purpose of criminal justice is to concentrate on the equity of the trial rather than on a practically inevitable trial error in order to promote public respect for the criminal system.[167]

In the future, it seems there will be fewer trial errors that the defendant may use to escape a conviction because of the growing use of the harmless error doctrine.[168] The distinguishing feature between errors subject to the harmless error analysis and those that are excluded will be whether the court finds an error to be a trial error occurring during the course of the proceeding, or a structural defect in the trial mechanism. To determine which category the error falls into, reviewing courts will examine whether the error is such that its contribution to the conviction can be qualitatively assessed in light of other admitted evidence in order to determine whether the error was harmless beyond a reasonable doubt, or whether the error is a fault in the engineering of the trial whose impact upon the jury cannot be evaluated. When a court

159. *See supra* notes 76-84 and accompanying text.

160. Bruce Fein, *Crying Wolf on Coerced-Confession Cases*, N. J. LAW J., April 18, 1991, at 18 (Commentary).

161. United States v. Nobles, 422 U.S. 225, 230 (1975).

162. Fahy v. Connecticut, 375 U.S. 85, 94 (1963) (Harlan, J., dissenting); *cf.* United States v. Hastings, 461 U.S. 499 (1983) (it is the reviewing court's duty to ignore harmless errors).

163. Chapman v. California, 386 U.S. at 22-23. *See also* Pendolti *supra* note 14, at 618-19.

164. Arizona v. Fulminate, 111 S. Ct. at 1264.

165. Roscoe Pound, *The Future of the Criminal Law*, 21 COLUM. L. REV. 1, 11 (1921) provides:

> [T]he social interest in the general security and the social interest in the individual life continually come into conflict and in criminal law, as everywhere else in law, the problem is one of . . . balancing conflicting interests and of securing as many as may be and as completely as may be with the least sacrifice . . . .

166. Bruton v. United States, 391 U.S. 123, 135 (1968); United States v. Hastings, 461 U.S. 499, 508-09 (1983).

167. Delaware v. Van Arsdall, 475 U.S. 673 (1986); *see* TRAYNOR, *supra* note 14, at 50.

168. *See supra* note 6 and accompanying text.

finds a trial defect, as it did in *Fulminante*, the error will be subject to harmless error analysis.

V. CONCLUSION

Whether the Court faithfully adheres to this distinction between trial errors and structural defects is unpredictable. Will the Court preserve the categories it has created and continually conclude that no errors will be found to be harmless unless they are cured by other evidence? Will lack of adequate counsel remain an error in the trial engineering or will the Court maintain the category by changing the law and creating more stringent rules for competent counsel? A consistent application of the doctrine will depend on the Court's adherence to the standard Rehnquist pronounced in this opinion.

Wherever one falls on the ideological spectrum, the application of the harmless error rule to coerced confessions is no threat to civil liberties since the constitutional ban on coerced confessions is sustained. The Supreme Court has stated it is not willing to "discredit constitutional doctrines for the protection of the innocent by making them mere technical loopholes for the escape of the guilty."[169] A strong impetus behind the harmless error doctrine is a balancing of the defendant's interest in a fair trial against the societal interest in judicial economy and precision.[170] The expanding use of the harmless error doctrine will help to promote this goal and enhance judicial precision.

Fulminante has not dislodged a defendant's right to due process. While the enmity surrounding the opinion may cause critics to refuse to acknowledge that *Fulminante* has a relatively minor effect on criminal justice,[171] it remains to be seen how steadfastly the Court will adhere to their conviction.

Karina Pergament

169. Stein v. New York, 346 U.S. 156, 196-97 (1953), *overruled by* Jackson v. Denno, 378 U.S. 368, 398 (1964).

170. *See* United States v. Hastings, 461 U.S. 499, 509 (1983) (A balance needs to be struck "between the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other.").

171. N.Y. TIMES, Mar. 28, 1991, at B10 (Late Edition).