CASENOTES

Harmful Error:¹

Arizona v. Fulminante
and the Expansion of the Harmless-Error Rule

I. INTRODUCTION

For over fifty years the United States Supreme Court has overturned convictions based on the use of coerced confessions at trial.² Even where the remaining evidence supported a conviction, the Court has nonetheless ordered a new trial with the confession excluded.³

In Arizona v. Fulminante, ⁴ the Supreme Court revisited a familiar topic, namely coerced confessions. In Fulminante, as in previous decisions,⁵ a coerced confession was admitted during trial.⁶ Given the vast body of precedent barring the use of coerced confessions at trial, it seemed likely that the Fulminante Court would rule accordingly. However, the Court defied prediction and held that if admission of a coerced confession was harmless error,⁷ then a new trial was unnecessary.⁸


⁵. For citations to such cases, see supra note 2.


⁷. 28 U.S.C. § 2111 (1988). The harmless-error rule states: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an
In extending the scope of the harmless-error doctrine to include coerced confessions, the Court noted the doctrine applied to "trial error," and not to "structural defects." "Trial error" was defined as "error which occurred during the presentation of the case to the jury," which could then be quantitatively compared to the other evidence to decide if admission of the error was harmless beyond a reasonable doubt. The Court described "structural defects" as defects that affected the framework in which a trial proceeded. After analyzing coerced confessions, the Court concluded they were "trial errors," and were therefore subject to harmless-error analysis.

The Fulminante majority reached this conclusion by way of questionable reasoning. Not only did the majority ignore well-developed case law that mandated reversal of a conviction based on a coerced confession, but the Court also failed to explain why this precedent was no longer valid. In addition, the Court based its decision on a hazy distinction between "trial error" and "structural defects."

Moreover, the Fulminante decision promises troubling ramifications for the future. Specifically, Fulminante has created inconsistency within the area of law dealing with coerced confessions, increased the possibility for unfair trials, and narrowed defendants' due process rights.

To support these assertions this note examines the Arizona v. Fulminante decision. Part II discusses coerced confessions and their historical relationship to the harmless-error rule. Part III presents the facts, the procedural history, and the Supreme Court's decision in Arizona v. Fulminante. Part IV explains why application of the harmless-error doctrine to involuntary confessions is inappropriate. Part V indicates the problems Fulminante portends for the future.

examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." Id. The harmless-error rule is also codified in the Federal Rules of Criminal Procedure, which reads: "Any error, defect, irregularity or variance which does not affect substantial rights should be disregarded." FED. R. CRIM. P. 52(a).

8. Fulminante, 111 S. Ct. at 1265.
9. Id. at 1264-65.
10. Id. See infra notes 112-120 and accompanying text for a full discussion of "trial error" and "structural defects."
12. Id.
13. Id. at 1265.
14. Id.
II. BACKGROUND

A. INVOLUNTARY CONFESSIONS

In eighteenth century England only voluntary confessions were admitted into evidence because involuntary confessions were considered untrustworthy. The underlying reason for this rule was that a person subjected to physical or psychological torture might confess to a crime he or she did not commit.

Early United States Supreme Court decisions adopted the English common law treatment of coerced confessions. For example, in Hopt v. Utah the Court recognized that "[a] confession, if freely and voluntarily made, is evidence of the most satisfactory character." Likewise, in Sparf v. United States the Court reiterated that "a deliberate voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it . . . ." The common law approach, however, was limited in that the states were not bound because there is no constitutional basis allowing federal courts to instruct state courts on how the common law should be applied.

15. A "confession is involuntary if it is not the product of an essentially free and unrestrained choice of its maker or where maker's will is overborne at the time of the confession." BLACK'S LAW DICTIONARY 827 (6th ed. 1990).

16. 3 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 822, at 329 n.1 (Chadbourn rev. 1970). For an in-depth analysis of the history of confessions, see id. at §§ 817-863.

17. Id. at 329 n.1.


20. 156 U.S. 51 (1895).


22. DAVID M. NISSMAN ET AL., LAW OF CONFESSIONS § 1:2, at 5 (1985). But see Bram v. United States, 168 U.S. 532, 542 (1897) (quoting U.S. CONST. amend. V.) (The Court held that involuntary confessions violated the right against self-incrimination and were "controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"). Bram's holding appears to be an anomaly for it was later criticized in Stein v. New York, 346 U.S. 156, 190-91 n.35 (1953), overruled by Jackson v. Denno, 378 U.S. 368 (1964). In addition, when Bram was decided the Fifth Amendment's privilege against self-incrimination was not yet incorporated into the Fourteenth Amendment's Due Process Clause. Twining v. New Jersey, 211 U.S. 78, 113 (1908), overruled by Malloy v. Hogan, 378 U.S. 1 (1964). The Fifth Amendment's privilege against self-incrimination was incorporated, thus binding the states, in
Brown v. Mississippi\textsuperscript{23} overcame this limitation as the Supreme Court, through the Due Process Clause of the Fourteenth Amendment,\textsuperscript{24} overturned a conviction based on Brown's confession, which was obtained after he was repeatedly tortured.\textsuperscript{25} The Court stated that when a conviction is based on a confession obtained through violence,

> [t]he due process clause requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice' . . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.\textsuperscript{26}

Although in Brown the Supreme Court used the Due Process Clause of the Fourteenth Amendment to overturn a state conviction based on a coerced confession, some commentators point out that the Court's underlying rationale nonetheless was the common law notion that coerced confessions are not reliable evidence because they are untrustworthy.\textsuperscript{27} Thus, while a new theory, due process,

\textsuperscript{23} Brown v. Mississippi, 297 U.S. 278 (1936).

\textsuperscript{24} U.S. Const. amend. XIV, § 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\textsuperscript{25} Id. at 286. Later the Court held confessions obtained through psychological torture would also overturn a conviction. See Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (Defendants, denied food and rest, confessed to murder after being interrogated for a week.).

\textsuperscript{26} Id. at 286. Later the Court held confessions obtained through psychological torture would also overturn a conviction. See Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (Defendants, denied food and rest, confessed to murder after being interrogated for a week.).

was used to void convictions based on coerced confessions, the old common law theory had not been repudiated.

However, subsequent decisions such as *Lisenba v. California*, Brown v. Allen, and Stroble v. California signalled the Court's shift away from the untrustworthiness theory as justification for overturning convictions based on coerced confessions. The *Lisenba* Court recognized that the untrustworthiness theory did not provide an adequate constitutional basis for overturning state convictions. The Court reasoned that the policy rationales behind the untrustworthiness theory and the Due Process Clause were not analogous. It stated that the "aim of the [common law] rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence"; but "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."
From the foregoing cases it is evident that due process has supplanted the common law untrustworthiness theory as the primary justification for voiding convictions based on coerced confessions. This does not mean the Court is indifferent to the admission of false evidence; rather, these cases illustrate the primacy of the constitutional principle of due process over the common law's untrustworthiness theory.

B. HARMLESS ERROR

The application of the harmless-error rule to constitutional errors had its genesis in *Chapman v. California*. In *Chapman* the defendants were convicted at a trial in which the prosecutor commented on the defendants' failure to testify, as allowed by state constitutional law. Also, the judge instructed the jury that adverse inferences could be drawn from this failure to testify. Before the defendants appealed their case, the state constitutional provision was invalidated. The California Supreme Court recognized that the defendants were denied a federal constitutional right, but applied the state's harmless-error rule and upheld the convictions.

In determining whether the comments surrounding the defendants' failure to testify required a reversal of their conviction, the
United States Supreme Court noted that in particular cases some constitutional errors, because of their insignificance, may be considered harmless, "thereby not requiring the automatic reversal of the conviction."\(^{43}\) Nevertheless, the Court concluded that the error in Chapman was not harmless because the state failed to prove beyond a reasonable doubt that the constitutional error did not contribute to defendants' convictions.\(^{44}\) Subsequent cases have greatly expanded the types of constitutional error subject to harmless-error analysis.\(^{45}\)

While Chapman announced a general rule of applying harmless-error analysis to constitutional error, Chapman itself also recognized exceptions to the application of the rule: "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."\(^{46}\) Three errors were specifically excluded from harmless-error analysis: a biased judge,\(^{47}\) denial of counsel,\(^{48}\) and use of a coerced confession at trial.\(^{49}\)

Payne v. Arkansas,\(^{50}\) which Chapman cited to illustrate the inapplicability of harmless error to coerced confessions, involved a mentally dull youth whose confession was used to convict him of murder.\(^{51}\) The youth confessed after the Police Chief promised to try to protect the boy from an approaching mob, if the boy told the truth.\(^{52}\) Upon review, the Supreme Court held that when a coerced confession is part of the evidence before the jury, even though there is sufficient other evidence to support a conviction, the coerced confession invalidates the judgment because the defendant's due process rights have been violated.\(^{51}\) Payne, in conjunction with Chap-
man, strongly suggests that harmless-error analysis is inapplicable to coerced confessions.54

Accordingly, the Supreme Court has consistently held since Chapman that convictions based on coerced confessions must be reversed.55 This was the status of the law when the Supreme Court decided Arizona v. Fulminante.56

III. ARIZONA V. FULMINANTE

A. FACTS

On September 16, 1982, Oreste Fulminante’s stepdaughter, Jeneane, was found murdered in an Arizona desert.57 Fulminante became a suspect58 in her murder, but when no charges were filed against him he left the state for New Jersey.59

Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary 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. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

Id.


55. See, e.g., Rose v. Clark, 478 U.S. 570, 577 (1986) (“Despite the strong interests that support the harmless-error doctrine, the Court in Chapman recognized that some constitutional errors require reversal without regard to the evidence in the particular case.”); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (“[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law . . . .”) (alteration in original); Lego v. Twomey, 404 U.S. 477, 483-84 (1972) (quoting Jackson v. Denno, 378 U.S. 368, 376-77 (1964)) (“It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.”).


57. Arizona v. Fulminante, 111 S. Ct. 1246, 1250 (1991). She had been shot twice in the head at close range with a large caliber weapon, and a ligature was found around her neck. Id.

58. Fulminante was in charge of Jeneane from September 7-14 since his wife was in the hospital. On the wife’s return she discovered Fulminante’s revolver was
In 1983, Fulminante was arrested and incarcerated for possession of a firearm by a felon. While in prison he befriended another inmate, Anthony Sarivola. Sarivola, a former policeman, was a paid informant for the Federal Bureau of Investigation. Sarivola heard a rumor that Fulminante was a suspect in Jeneane's murder, but Fulminante consistently denied any role in her murder. Later, Sarivola learned Fulminante was getting rough treatment from other inmates because of the rumor. Sarivola offered Fulminante protection from the other inmates if Fulminante told him about the events surrounding Jeneane's death. Fulminante then confessed to murdering Jeneane.

Seven months after this confession to Sarivola, Fulminante was released from prison. Fulminante thereafter had a conversation with Sarivola's fiancee, Donna, wherein he confessed he "could not go back to Arizona because he had killed a little girl there." Based largely on these two confessions, Fulminante was indicted in September of 1984 for the first-degree murder of Jeneane. missing from their bedroom. The day before Jeneane disappeared, Fulminante traded a rifle for an extra barrel for his .357 revolver. Because of this transaction and his inconsistent statements regarding Jeneane's disappearance, Fulminante became a suspect. Petition for Writ of Certiorari at *8-9, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839) (LEXIS, Genfed library, Briefs file) (hereinafter Writ of Certiorari).

59. Fulminante, 111 S. Ct. at 1250.
61. Fulminante, 111 S. Ct. at 1250.
62. Sarivola was connected with organized crime before being arrested for extortion in 1982. After his arrest he agreed to become an FBI informant, and was paid on a contingent fee basis for information that could be used against other inmates. The FBI paid Sarivola $22,490.00 between March of 1983 and September of 1984. Brief for the Respondent at *8-9, Arizona v. Fulminante, 111 S. Ct 1246 (1991) (No. 89-839) (LEXIS, Genfed library, Briefs file) (hereinafter Respondent's Brief).
64. Id.
65. Id.
66. Id.
67. Id. Fulminante admitted to driving Jeneane to the desert, choking her, sexually assaulting her, and making her beg for her life before shooting her twice in the head. Id.
69. Writ of Certiorari, supra note 58, at *10.
70. Fulminante, 111 S. Ct. at 1250.
B. PROCEDURAL HISTORY

At trial, both confessions were deemed voluntary and admitted into evidence.\textsuperscript{71} Fulminante was convicted of Jeneane's murder and sentenced to death.\textsuperscript{72} He appealed his conviction in \textit{State v. Fulminante}.\textsuperscript{73}

In \textit{State v. Fulminante}, the Supreme Court of Arizona initially affirmed the lower court's holding, but it used a different analysis than that of the trial court.\textsuperscript{74} First, the court decided Fulminante's confession to Sarivola was involuntary.\textsuperscript{75} The court focused on the fact that Fulminante confessed to Sarivola, a paid FBI informant,\textsuperscript{76} and that Fulminante's confession coincided with Sarivola's offer of protection from the other inmates.\textsuperscript{77} The court stated that for a confession to be voluntary it "must not have been obtained by 'any direct or implied promises, however slight, \textit{nor by the exertion of any improper influence}'."\textsuperscript{78} Second, the court decided that because Fulminante's confession to Donna was admissible,\textsuperscript{79} any error regarding the confession to Sarivola was harmless beyond a reasonable doubt.\textsuperscript{80}

In looking at the evidence, the Arizona Supreme Court held that Fulminante's second confession established his guilt, which the other evidence corroborated.\textsuperscript{81} The court concluded "the invalid first con-

\textsuperscript{71.} \textit{Id.} at 1250-51. Fulminante "asserted that the confession to Sarivola was coerced, and that the second confession was the 'fruit' of the first." \textit{Id.} The fruit of the poisonous tree doctrine involves "[e]vidence which is spawned by or directly derived from an illegal search or illegal interrogation [and] is generally inadmissible against the defendant because of its original taint . . . ." \textsc{Black's Law Dictionary} 670 (6th ed. 1990); see \textit{Wong Sun v. United States}, 371 U.S. 471 (1963) (discussing fruit of the poisonous tree doctrine); see generally \textsc{Steven R. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence} (1977) (analyzing the "fruits" of illegal searches).

\textsuperscript{72.} \textit{Fulminante}, 111 S. Ct. at 1251.


\textsuperscript{74.} \textit{Id.}

\textsuperscript{75.} \textit{Id.} at 609.

\textsuperscript{76.} For a discussion about Sarivola, see \textit{supra} note 62.


\textsuperscript{78.} \textit{Id.} (alteration in original) (citations omitted).

\textsuperscript{79.} \textit{State v. Fulminante}, 778 P.2d 602, 609 (Ariz. 1988), \textit{aff'd on other grounds}, 111 S. Ct. 1246 (1991). Fulminante's confession to Donna was held admissible because it had occurred six months after his initial confession, and it was made after he was released from prison, so presumably Fulminante did not need protection anymore. \textit{Id.} at 611. Also, he confessed during a casual conversation to someone who was not an agent of the state. \textit{Id.}

\textsuperscript{80.} \textit{Id.} at 609-10. The court came to this conclusion by using a harmless-error
fession was cumulative of the admissible second confession."82 Consequently, the court decided that admission of the first confession was harmless error.83 To support its reasoning, the court cited and followed federal precedent that applied harmless-error analysis to involuntary confessions.84

Fulminante submitted a motion to reconsider, arguing that prior Supreme Court rulings precluded categorizing coerced confessions as harmless error.85 The Arizona Supreme Court agreed and observed that the cases initially relied upon "were not cases in which the first confession was a coerced confession in violation of defendant's fifth amendment rights."86 The court then acknowledged that federal precedent compelled it to hold that the admission of the original coerced confession could not be considered harmless error.87 The court reversed Fulminante's conviction and remanded for a new trial without the use of his confession to Sarivola.88

standard that focuses "on whether there is overwhelming additional evidence sufficient to establish the prosecution's case." Id. at 610.

81. Id. at 610-11. The court specifically pointed to the "[p]hysical evidence from the wounds, the ligature, location of the crime scene and motorcycle tracks." Id.


83. Id. The court stated: "The admission of the first confession was, therefore, harmless error beyond a reasonable doubt." Id.

84. Id. at 610 (citing United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987) (admission of invalid oral confession was harmless error when subsequent written confession was admissible and more credible); Bryant v. Vose, 785 F.2d 364, 367 (1st Cir. 1986) (court admitted subsequent written confession that strongly indicated guilt), cert. denied, 477 U.S. 907 (1986); Martin v. Wainwright, 770 F.2d 918, 932-34 (11th Cir. 1985) (improper admission of first confession was harmless error when a lawful confession was later admitted at trial), cert. denied, 479 U.S. 909 (1986); United States v. Packer, 730 F.2d 1151, 1157 (8th Cir. 1984) (harmless error when subsequent statements reiterated earlier inadmissible statements and strongly indicated guilt)).

85. State v. Fulminante, 778 P.2d 602, 626 (Ariz. 1988), aff'd on other grounds, 111 S. Ct. 1246 (1991). Fulminante had seven contentions, but the court decided that only the claim regarding coerced confessions was meritorious. Id.

86. Id. The cases the court relied upon dealt with Miranda rights. Id.; see also Arizona v. Fulminante, 111 S. Ct. 1246, 1256 n.7 (1991) (quoting Oregon v. Elstad, 470 U.S. 298, 310 (1985)) ("[A] Miranda violation 'does not mean that the statements received have actually been coerced, but only that the courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised.").


88. Id.
The United States Supreme Court granted certiorari because of the differing views in the state and federal courts as to whether coerced confessions admitted at trial were subject to harmless-error analysis.\(^\text{89}\) In a five-four decision, the Supreme Court held that the harmless-error rule applied to coerced confessions.\(^\text{90}\)

**C. THE SUPREME COURT DECISION**

The Supreme Court began its analysis by noting that *Chapman v. California*\(^\text{91}\) announced that constitutional errors do not automatically require the reversal of a conviction.\(^\text{92}\) The Court listed cases where an automatic reversal was not required,\(^\text{93}\) and concluded that the similarity among them which did not mandate reversal was that they all involved "trial error."\(^\text{94}\) The Court defined "trial error" as an "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."\(^\text{95}\) The Court concluded that coerced confessions fell under this definition.\(^\text{96}\)

Before explaining why coerced confessions were "trial errors," the Court distinguished two key cases, *Chapman v. California*\(^\text{97}\) and

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\(^{90}\) Id. at 1263-66. The Court resolved three issues: (1) Fulminante's confession was coerced; (2) harmless-error analysis applies to coerced confessions; and (3) admission of Fulminante's first confession was not harmless beyond a reasonable doubt. As to the first holding, which Justice White wrote, the majority consisted of Justices Stevens, Blackmun, Marshall, and Scalia. As to the second holding, which Chief Justice Rehnquist wrote, the majority consisted of Justices O'Connor, Kennedy, Souter, and Scalia. Finally, as to the third holding, written by Justice White, the majority consisted of Justices Marshall, Blackmun, Stevens, and Kennedy. This casenote focuses on the Court's second holding.

\(^{91}\) 386 U.S. 18 (1967).

\(^{92}\) *Fulminante*, 111 S. Ct. at 1263 (quoting *Chapman v. California*, 386 U.S. 18 (1967)).

\(^{93}\) Id. at 1263. For case citations where automatic reversal is not required, see *supra* note 45.

\(^{94}\) *Fulminante*, 111 S. Ct. at 1264.

\(^{95}\) Id. at 1263-64 (emphasis added). The Court described the use of the harmless-error analysis as essential to preserving the purpose of criminal trials. That purpose is "to decide the factual question of the defendant's guilt or innocence, and promote[] 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 1264 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).


\(^{97}\) 386 U.S. 18, 23 (1967); see *supra* notes 38-49 and accompanying text discussing *Chapman*. 
Payne v. Arkansas,\textsuperscript{98} in order to show that there was no precedent hindering the Court from applying harmless-error analysis to coerced confessions. Chapman announced that harmless-error analysis applied to constitutional errors: "[a]lthough our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . . [not] all trial errors which violate the Constitution automatically call for reversal."\textsuperscript{99} Chapman\textsuperscript{100} also, albeit in a footnote, specifically listed three cases involving constitutional rights to which the harmless-error rule did not apply, including Payne v. Arkansas,\textsuperscript{101} which dealt with a coerced confession. However, the Fulminante majority maintained that the Chapman language "'[a]lthough our prior cases have indicated,'" when combined with the citation of Payne in a footnote, was properly viewed as a historical reference to Payne's holding, rather than precedent holding that harmless-error analysis was inapplicable to coerced confessions.\textsuperscript{102}

To reinforce its conclusion that the cases listed in the Chapman footnote were merely historical references, the Court distinguished Payne v. Arkansas. The Payne Court stated:

Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary 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. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because

\textsuperscript{98} 356 U.S. 560 (1958); see supra notes 50-56 and accompanying text discussing Payne.

\textsuperscript{99} Chapman v. California, 386 U.S. 18, 23 (1967).

\textsuperscript{100} Id. at 23 n.8 (citing Gideon v. Wainwright, 372 U.S. 335 (1963) (deprivation of counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (biased judge)).

\textsuperscript{101} 356 U.S. 560 (1958).

\textsuperscript{102} Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). The dissent did not make this distinction, but pointed out that the cases before and after Chapman prohibited the use of coerced confessions against a defendant; thus, stare decisis applied. Id. at 1254 (White, J., dissenting).
it violates the Due Process Clause of the Fourteenth Amendment.\textsuperscript{103}

Using this language, the \textit{Fulminante} majority decided that \textit{Payne} did not reject the harmless-error analysis that \textit{Chapman} later adopted, but rather a more lenient test which allowed affirmanse of a conviction if there was sufficient evidence, other than the coerced confession, to sustain the verdict.\textsuperscript{104} In contrast, the harmless-error test requires the state to prove \textit{beyond a reasonable doubt} that the error did not contribute to the conviction. Thus, a sufficiency test would render analysis of admitted coerced confessions a hollow formality because it would make admission of a coerced confession almost risk-free for the state, unlike the more rigorous harmless-error test.\textsuperscript{105} Apparently the majority concluded that \textit{Chapman} could only footnote to \textit{Payne} as a historical reference, rather than as precedent showing that harmless-error analysis was inapplicable to coerced confessions, simply because \textit{Payne} was not discussing a harmless-error test.

In contrast, the dissent read \textit{Payne} as clearly recognizing that use of a coerced confession automatically invalidated a conviction, \textit{"regardless"} the amount of other evidence.\textsuperscript{106} This interpretation of \textit{Payne} suggests that the \textit{Payne} Court would have rejected both a sufficiency test and a harmless-error test. In other words, because admittance of a coerced confession requires the automatic reversal of a conviction, a court will not apply any test to determine if the conviction can be salvaged.

The dissent used the majority's definition of \textit{"trial error"} to support this reading of \textit{Payne}.\textsuperscript{107} The majority held that coerced confessions were \textit{"trial errors,"} because coerced confessions, like other \textit{"trial errors,"} could be quantitatively assessed with the other evidence before the jury to decide if admission of the error was harmless.\textsuperscript{108} However, the dissent argued that when a coerced confes-

\textsuperscript{104} Fulminante, 111 S. Ct. at 1264 (noting that Justice Clark's dissent in \textit{Payne} confirmed the idea that \textit{Payne} dealt with a more lenient sufficiency analysis). A sufficiency analysis looks to the adequacy of the remaining evidence and ignores any impact admission of the coerced confession may have had; if the other evidence supports the conviction any such impact does not matter. Harmless error, however, looks to the impact the admission of the coerced confession had on the trial to the exclusion of the other evidence.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 1254 (White, J., dissenting).
\textsuperscript{108} Id. at 1264.
sion is admitted and the jury returns a general verdict\textsuperscript{109} of guilty, the weight and credit the jury gave the confession cannot be determined.\textsuperscript{110} Because the weight given the coerced confession cannot be quantitatively assessed, coerced confessions are not "trial errors," and thus, ""defy analysis by 'harmless-error' standards."\textsuperscript{111}

After determining that \textit{Chapman} and \textit{Payne} did not prohibit the application of harmless-error analysis to coerced confessions, the majority explained why coerced confessions were ""trial errors."" The majority delineated between coerced confessions and the other two constitutional violations, deprivation of counsel\textsuperscript{112} and biased judge,\textsuperscript{113} referred to in the \textit{Chapman} footnote.\textsuperscript{114} These violations were classified as ""structural defects,"" which affected the framework in which a trial proceeded.\textsuperscript{115} Such ""structural defects"" tainted the entire trial because ""[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.""\textsuperscript{116}

By contrast, coerced confessions were considered ""trial errors"" that only affected the ""trial process itself.""\textsuperscript{117} Admission of a coerced confession does not result in a trial structured to the detriment of the defendant. Rather, it results in a tactical loss to the defendant. Such

\textsuperscript{109} A general verdict is ""[a] verdict whereby the jury find either for the plaintiff or for the defendant in general terms; the ordinary form of a verdict."" Glenn v. Sumner, 132 U.S. 152, 156 (1889).

\textsuperscript{110} \textit{Fulminante}, 111 S. Ct. at 1254 (White, J., dissenting) (citing \textit{Payne v. Arkansas}, 356 U.S. 560, 568 (1958)).

\textsuperscript{111} \textit{Id.} (quoting \textit{Arizona v. Fulminante}, 111 S. Ct. 1246, 1265 (1991) (Rehnquist, C.J.)).


\textsuperscript{114} \textit{Arizona v. Fulminante}, 111 S. Ct. 1246, 1264-65 (1991); \textit{see also} \textit{Chapman v. California}, 386 U.S. 18, 23 n.8 (1967).

\textsuperscript{115} \textit{Fulminante}, 111 S. Ct. at 1265.

\textsuperscript{116} \textit{Id.} (quoting \textit{Rose v. Clark}, 478 U.S. 570, 577-78 (1986)).

\textsuperscript{117} \textit{Id.} The dissent did not think a distinction could be made between ""trial errors"" and ""structural defects"" in the trial mechanism when deciding what could be considered harmless error. \textit{Id.} at 1254-55 (White, J., dissenting). As an example, the dissent stated that the failure to instruct the jury on the presumption of innocence was susceptible to harmless-error analysis, but the failure to instruct a jury on the reasonable doubt standard was not. \textit{Id.} at 1255. The labels of ""trial error"" or ""structural defect"" break down, the dissent asserted, because both those instructions occur at the same stage of the trial. \textit{Id.} The dissent pointed out that the ""omission of a reasonable doubt instruction, though a 'trial error,' distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof."" \textit{Id.}
tactical losses or disadvantages can, of course, be quantitatively assessed and subjected to harmless-error analysis. The Court held as such because it could see no difference between a coerced confession and the other constitutional errors subject to harmless-error analysis. The Court reasoned that such errors all had the exact same evidentiary impact upon the trial record. Accordingly, the majority stated that when a court reviewed the admission of a coerced confession, it would, "as it does with the admission of other forms of improperly admitted evidence, simply review[] the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."

To further support its holding that coerced confessions were susceptible to harmless-error analysis, the Court noted that confessions obtained in violation of the Sixth Amendment were also subject to harmless-error analysis. The majority was unable to discern any functional difference between the impact on a trial of admitting a coerced confession or a confession obtained in violation of the Sixth Amendment. Consequently, the Court determined that the "inconsistent treatment of statements elicited in violation of the Sixth and Fourteenth Amendments ... can be supported neither by evidentiary or deterrence concerns nor by the belief that there is something more 'fundamental' about involuntary confessions."

Finally, the Court conceded that coerced confessions could have a more dramatic effect than other "trial errors" on the course of a

118. Id. at 1265. The Court specifically mentioned "confession[s] obtained in violation of the Sixth Amendment - of evidence seized in violation of the Fourth Amendment - or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment." Id.

119. Id.


121. Id. (citing Milton v. Wainwright, 407 U.S. 371 (1972)). The dissent argued that "a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the [harmless-error] rule has been applied." Id. at 1254 (White, J., dissenting). Additionally, the dissent reasoned that there were specific distinctions between confessions obtained in violation of the Fourteenth Amendment and the Sixth Amendment. Id. at 1256. First, coerced confessions may be untrustworthy, which "may distort the truth-seeking function of the trial ..." Id. Second, "permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice." Id.

122. Fulminante, 111 S. Ct. at 1265. The Court thought this was especially true when no physical violence is used by the police to extract the confession. Id. at 1266. It went on to say that law enforcement violations of other constitutional rights can involve police conduct as flagrant as eliciting a coerced confession. Id. But see id. at 1255-56 (White, J., dissenting).
trial, and in some cases, admission of the coerced confession could be devastating to a defendant.\textsuperscript{123} But according to the majority, this was not a reason to avoid the harmless-error test.\textsuperscript{124} In such cases the reviewing court would simply conclude that admission of the confession was not harmless error.\textsuperscript{125}

**IV. Analysis**

Since *Brown v. Mississippi*\textsuperscript{126} the Supreme Court has consistently held that convictions cannot rest, in whole or in part, on coerced confessions.\textsuperscript{127} *Arizona v. Fulminante* flies in the face of this vast body of cases and is an unjustified, unprincipled departure from this precedent. This body of case law and the dissent’s arguments will be used to highlight the invalidity of the *Fulminante* majority’s holding.

There are two major flaws in the majority’s holding. First, the majority ignored fifty years of precedent disallowing convictions based on coerced confessions; second, the majority’s purported distinction between “trial errors” and “structural defects” cannot withstand scrutiny.

There are two problems with the majority’s failure to follow relevant precedent. First, the majority disregarded the doctrine of stare decisis. Additionally, the Court neglected to explain why this precedent was no longer valid.

The benefits that stare decisis engenders have been thoroughly documented.\textsuperscript{128} Because of its importance, the dissent used the majority’s disregard for stare decisis as its primary argument against the majority opinion.\textsuperscript{129} In its opinion, the majority not only failed to follow precedent, it also ignored a large body of applicable cases. This is hard to rectify inasmuch as overturning convictions based on

\begin{itemize}
\item \textsuperscript{123} Id. at 1266.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} 297 U.S. 278 (1936); see supra notes 23-27 and accompanying text discussing *Brown*.
\item \textsuperscript{127} For case citations, see examples in supra note 2.
\item \textsuperscript{128} See, e.g., Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595-98 (1987). For example, stare decisis helps achieve consistent results in similar cases which avoids unfair decisions. Id. at 595-97. It also adds predictability to judicial decisions which allows people to plan their lives, and “avoid the paralysis of foreseeing only the unknown.” Id. at 597. Additionally, stare decisis promotes judicial economy because less time is spent on issues a court has already addressed. Id. at 599.
\item \textsuperscript{129} Arizona v. Fulminante, 111 S. Ct. 1246, 1253-54 (1991) (White, J., dissenting) (citing forty years of precedent).
\end{itemize}
coerced confessions was a "fundamental tenet" of the criminal law system up to the Fulminante decision.130

More importantly, the Court failed to explain why this precedent was no longer valid. Although stare decisis is not an unyielding command,131 and may have less influence in constitutional cases,132 when the Court overrules constitutional precedent it should still offer "special justification" for doing so.133 "Special justification" requires the Court to argue its decision on the merits, and to show one of the following: that a changed condition has weakened the precedent's support, that lower courts are not able to apply the old rule, or that there is conflicting precedent.134 Adherence to these justifications when overturning precedent indicates the Court's decision is not based on the majority's arbitrary, personal beliefs, but on a principled analysis of the law.135 This principled analysis not only garners respect for the judiciary, but also protects the precedential framework in which our system of justice operates. Unfortunately, in its abandonment of stare decisis the Fulminante Court failed to offer any justification, let alone one of these traditional justifications. This departure from precedent would have been more reasonable if past Courts had used unpersuasive or inconsistent arguments to overturn convictions involving coerced confessions, but this is not the case.

Since 1936, the Court has overturned convictions involving coerced confessions for two reasons. First, is that a coerced confession may be untrustworthy.136 Although this has not been the Court's

130. Fulminante, 111 S. Ct. at 1254 (White, J., dissenting). See, e.g., Rose v. Clark, 478 U.S. 570, 588 (1986) (recognizing that a conviction cannot stand if a coerced confession is admitted at trial); Rogers v. Richmond, 365 U.S. 534, 541 (1961) (arguing that the State cannot use a defendant's coerced coercion to prove its case); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (due process is denied when coerced confession is used).


133. The Supreme Court, 1990 Term - Leading Cases, supra note 131, at 182.

134. Id.

135. Id. at 183 (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting) ("[W]hen governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.")).

136. See, e.g., Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (observing that one problem arising from an erroneously admitted coerced confession is the likelihood that the confession is untrue).
primary basis for overturning convictions, it is still a valid reason to do so.\textsuperscript{13\textit{7}} If a defendant confesses merely to avoid mental or physical cruelty, this will affect the truth-seeking function of a trial, a function the majority decided was central to a criminal trial.\textsuperscript{13\textit{8}} More importantly, convictions have been overturned because the admission of a coerced confession violates a defendant's due process rights.\textsuperscript{13\textit{9}} This fundamental right is violated because the presence of a coerced confession renders a criminal trial unfair for a defendant.\textsuperscript{14\textit{0}} Our society recognizes "that important human values are sacrificed where an agency of the government . . . wrings a conviction out of an accused against his will."\textsuperscript{14\textit{1}} Therefore, a trial loses all semblance of fairness when inquisition replaces accusation.\textsuperscript{14\textit{2}} Courts, before and after \textit{Fulminante}, have adamantly argued that admission of a coerced confession does too much damage to a defendant's due process rights to ever allow a conviction involving one to stand.\textsuperscript{14\textit{3}} Because the importance of due process has not diminished, the \textit{Fulminante} Court should have adhered to precedent.

Although \textit{Fulminante} recognized that admission of a coerced confession could be devastating to a defendant, it noted that in those situations a reviewing court would simply conclude that its admission was not harmless error.\textsuperscript{14\textit{4}} This argument, however, ignores an impor-
tant point: that a coerced confession is "probably the most probative and damaging evidence" used against a defendant. Because criminal trials result in general verdicts, there is no way to know how much weight the jury gave the confession. This is why the Supreme Court has shown reluctance in trusting juries to ignore the probative value of a confession, even if coerced. Because the impact of a coerced confession on a jury's verdict is immeasurable, a reviewing court would be unable to decide if it was harmless or not. Consequently, subjecting coerced confessions to harmless-error analysis is inappropriate because of the potential harm to defendants.

It appears that the Fulminante majority avoided justifying its overturning of precedent through its narrow reading of applicable case law. The Court implied that because Payne v. Arkansas did not reject harmless-error review, there was no other precedent preventing the Court from applying harmless error to coerced confession cases. However, the majority misinterpreted Payne, and erroneously concluded that no other precedent needed to be addressed.

The majority decided Payne did not reject the harmless-error test that Chapman v. California later adopted, but rather a more lenient sufficiency test. As the dissent noted, this interpretation distorts the Payne decision. The Payne Court held that a conviction must be overturned when "a coerced confession constitutes a part of the evidence before the jury and general verdict is returned, [since] no one can say what credit and weight the jury gave to the confession." This language illustrates the Payne Court would overturn a conviction involving a coerced confession, "regardless" the amount of other evidence before the court. Therefore, Payne would have rejected both a sufficiency test and a harmless-error test. In other words, because admittance of a coerced confession requires the automatic reversal of a conviction, applying any test to determine whether a conviction can be salvaged is impermissible.

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146. Id. at 1254 (citing Payne v. Arkansas, 356 U.S. 560, 568 (1958)).
150. 386 U.S. 18 (1967).
151. Fulminante, 111 S. Ct. at 1264.
152. Id. (White, J., dissenting).
154. Fulminante, 111 S. Ct. at 1254 (White, J., dissenting).
In addition to Payne's unambiguous language, other Courts have interpreted Payne as refusing to subject coerced confessions to harmless-error analysis. For example, the majority in Chapman footnoted to Payne as an example of a constitutional error that could never be treated as harmless error.\(^{155}\) The concurring\(^{156}\) and dissenting\(^{157}\) Justices also read Payne as refusing to apply harmless-error analysis to coerced confessions. Rose v. Clark\(^{158}\) explicitly interpreted Payne in the same way. Also, Mincey v. Arizona\(^{159}\) cited to the Chapman footnote as precedent that a judgment based on a coerced confession had to be overturned, regardless of the amount of other evidence supporting it. Consequently, before Fulminante, there was no uncertainty as to Payne's holding.

Besides misinterpreting Payne, the majority incorrectly assumed that there was no other precedent needing to be addressed. Aside from Payne, a substantial number of cases reversed, or recognized the need to reverse, convictions based on coerced confessions.\(^{160}\) The majority's purpose in distinguishing Payne was to show that Payne had not rejected harmless-error review of coerced confessions. This, however, did not distinguish the substantial body of cases, before and after Payne, that implicitly rejected harmless-error review by automatically reversing judgments based on coerced confessions. The Fulminante Court ignored these cases and treated Payne as the only case dealing with the analysis of convictions based on coerced confessions. Apparently the Court ignored what it could not refute.

Not only did the majority ignore precedent, it also drew an invalid distinction between "trial errors" and "structural defects."\(^{161}\) The majority defined "trial error" as "an error in the trial process itself"; whereas a "structural defect" affects the framework in which a trial proceeds.\(^{162}\) The majority decided coerced confessions were
"trial errors" subject to harmless-error review. Prompting this conclusion was the evidentiary impact of admitting a coerced confession at trial. The majority contended that if a coerced confession was admitted as evidence, a reviewing court could simply look at all the evidence and decide if the "admission of the confession was harmless beyond a reasonable doubt." Thus, the majority concluded that the evidentiary impact of coerced confessions was indistinguishable from other constitutional "trial errors" that could be considered harmless error.

The dissent effectively dispatched this argument. First, it proved the majority's distinction between "trial errors" and "structural defects" was invalid. The dissent accomplished this through its comparison of jury instructions on the presumption of innocence and reasonable doubt standard. Under the majority's definition, a "trial error" occurs during the presentation of a case to the jury. The presumption of innocence instruction and reasonable doubt standard also occur during this time frame. Therefore, following the majority's definition, both should be subject to harmless-error analysis. However, this is not the case. On the one hand, omission of the reasonable doubt standard falls under the majority's definition of "trial error." But on the other hand, omission of the reasonable doubt standard falls under the majority's definition of "structural defects" because it "distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof." Consequently, the majority's distinction fails by its own terms. As the dissent stated: "these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial."

Furthermore, the reason for excluding coerced confessions goes beyond evidentiary concerns. The search for truth is critical to a trial, but an individual's constitutional rights should not fall victim to that search. The Supreme Court has stressed this view:

163. *Fulminante*, 111 S. Ct. at 1265.
164. *Id.* at 1265.
165. *Id.*
167. *Id.* at 1254-55 (White, J., dissenting).
168. *Id.* at 1255 (citing Kentucky v. Whorton, 441 U.S. 786 (1979)).
169. *Id.* (citing Jackson v. Virginia, 443 U.S. 307, 320 & n.14 (1979)).
170. *Id.* at 1264.
172. *Id.*
173. *Id.*
174. *Id.* at 1257 (White, J., dissenting); see also Charles J. Ogletree, Jr.,
'certain constitutional rights . . . protect important values that are unrelated to the truth-seeking function of the trial.' The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession 'abort[s] the basic trial process' and 'render[s] a trial fundamentally unfair.'

By focusing solely on the evidentiary concerns of coerced confessions, the majority disregarded a defendant's fundamental right to due process. As the dissent recognized, "the use of coerced confessions, 'whether true or false,' is forbidden 'because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . . .'" Furthermore, the Fulminante majority ignored the Court's shift away from the common law theory for excluding coerced confessions to its current preference for due process concerns.

Thus, not only was the majority's distinction between "trial errors" and "structural defects" based on ambiguous and flawed reasoning, but the Court's focus on the evidentiary concerns of coerced confessions ignored defendants' due process rights. Unfortunately, these problems will negatively affect how lower courts interpret Fulminante, and how potential defendants are treated whose situations are analogous to Oreste Fulminante's case.

V. PRACTICAL IMPACT

Only a short time was needed before the most obvious negative effect of Arizona v. Fulminante materialized, inconsistent state court decisions. Two additional implications raise concerns: first, the greater potential for unfair trials, and second, the narrowing of defendants' due process rights.

Prior to Fulminante, convictions involving coerced confessions were uniformly overturned. However, Fulminante held that if a coerced confession is erroneously admitted into evidence, instead of
overturning the conviction, the confession is now subject to harmless-
error analysis.\textsuperscript{178} This reversal of precedent only leads to confusion
and inconsistency in this area of law.

Already this confusion has manifested itself. In \textit{Iowa v. Quin-
tero},\textsuperscript{179} the Iowa Appellate Court considered whether the trial court
erred in not suppressing a defendant’s allegedly coerced statements.\textsuperscript{180}
The court recognized the Supreme Court’s holding in \textit{Fulminante}, but
refused to follow it.\textsuperscript{181} The court stated that, unlike the Supreme
Court, it was not able to distinguish between coerced confessions and
other “structural defects,” such as denial of the right to counsel or a
biased judge.\textsuperscript{182} The court argued that coerced confessions could be
untrustworthy, and that they completely destroy the adversarial sys-
tem.\textsuperscript{183} Consequently, the court, relying on the Due Process Clause
contained in the Iowa Constitution,\textsuperscript{184} held that the admission of a
coerced confession into evidence is still cause for automatic reversal.\textsuperscript{185}

Conversely, \textit{People v. Toran}\textsuperscript{186} followed \textit{Fulminante}'s holding.\textsuperscript{187}
The court quoted passages from \textit{Fulminante} which stated that coerced
confessions were “trial errors,” and like other “trial errors,” were
subject to harmless-error analysis.\textsuperscript{188} The court agreed that \textit{Fulminante}
should be followed, and applied \textit{Fulminante}'s holding to the case
before it.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{178}. Arizona v. Fulminante, 111 S. Ct. 1246, 1261 (1991).
\item \textsuperscript{179}. Iowa v. Quintero, No. 90-44, 1991 WL 207111 (Iowa Ct. App. Aug. 27,
\item \textsuperscript{180}. \textit{Id.} at *1.
\item \textsuperscript{181}. \textit{Id.} at *6-7.
\item \textsuperscript{182}. \textit{Id.} at *7.
\item \textsuperscript{183}. \textit{Id.}
\item \textsuperscript{184}. IOWA CONST. art. I, § 9 (The Due Process Clause states: “no person shall
be deprived of life, liberty, or property, without due process of law.”). The court
noted that Iowa’s Constitution “contains due process guarantees substantially the
same as those in the fourteenth amendment.” Iowa v. Quintero, No. 90-44, 1991
N.W.2d 50 (1992). The court then stated that “[t]he United States Supreme Court
sets the minimum guarantees of due process required under the federal constitution;
however, Iowa courts are the guardians of the due process rights reserved under the
Iowa Constitution, and may grant such additional protections as are necessary to
satisfy the Iowa Constitution.” \textit{Id.} (citations omitted).
\item \textsuperscript{185}. Iowa v. Quintero, No. 90-44, 1991 WL 207111, at *7 (Iowa Ct. App. Aug.
\item \textsuperscript{187}. People v. Toran, 580 N.E.2d 595, 598 (Ill. App. Ct. 1991) (citing Arizona
v. Fulminante, 111 S. Ct. 1246, 1265-66 (1991)).
\item \textsuperscript{188}. \textit{Id.}
\item \textsuperscript{189}. \textit{Id.} at 598-99.
\end{itemize}
These two contemporaneous cases indicate that *Fulminante* creates confusion within this area of law. Instead of appellate courts "simply review[ing] the ... evidence against a defendant to determine whether the admission of the confession was harmless," courts may decide to rely on their own state constitutions to avoid *Fulminante's* holding in order to protect a defendant's due process rights. Therefore, no longer is this area of law uniform from state to state.

This inconsistent treatment among states leads to confusion for practitioners also. Because *Fulminante* did not explicitly reject the vast body of case law overturning convictions involving coerced confessions, a lawyer will now have the difficult decision of deciding whether his or her state will follow *Fulminante*. Unfortunately, an accurate decision of how a state court will treat *Fulminante* might not be revealed until that practitioner is trying a case involving the admission of a coerced confession.

Not only are states uncomfortable with *Fulminante's* holding, but so are members of Congress. There is a section in a proposed House bill overruling *Fulminante*. The bill states that "[t]he admission into evidence of a coerced confession shall not be considered harmless error. For the purposes of this section, a confession is coerced if it is elicited in violation of the [F]ifth or [F]ourteenth [A]rticles of [A]mendment to the Constitution of the United States.""192

Potential for unfair trials is a more serious repercussion of *Fulminante*. *Chapman v. California* noted that some constitutional rights are so basic to a fair trial that their violation can never be considered harmless error. One of these constitutional rights, as *Chapman* recognized, was a trial devoid of coerced confessions.

There are two conceivable ways *Fulminante's* holding could lead to an unfair trial. First, the Court's holding will send a message to the police that coercing a suspect's confession will not automatically ruin a case against that individual. This concern was voiced thirty years ago in *Spano v. New York*:

> there is a "deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual

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192. Id.
195. Id. at 23 n.8.
criminals themselves." The Court’s holding in *Fulminante* could turn this concern into a reality. Because a coerced confession may be considered harmless error, police officers may see no danger in exerting excessive pressure on a defendant to confess to a crime. If the officer’s coercive methods are successful there is a greater chance for a conviction, inasmuch as a defendant’s confession might be the most probative and damaging evidence used against the defendant. Even if the police officer’s methods are revealed in court, a conviction will stand if the court rules admission of the confession was harmless error. Besides the obvious unfairness of having a defendant’s coerced confession used against him or her at trial, there is little protection against an unfair trial even if the judge rules the confession was harmless error. For when the jury returns with a general verdict, the credit and weight the jury gave the confession is unknown.

Second, *Fulminante’s* holding may result in an unfair trial for a defendant because judges may not be as cautious in excluding confessions bordering between voluntary and coerced. The reason is that “an arguably involuntary confession [will not] automatically blow the whole case” because harmless error may save the conviction on appeal.

The third, and perhaps most serious effect of *Fulminante*, is the narrowing of defendants’ rights under the Due Process Clause. Throughout past case law, the Court excluded coerced confessions because they violated due process of law. Despite this precedent, the majority concluded that there was no difference between coerced confessions and constitutional errors that were subject to harmless-error analysis. This holding directly contradicted precedent which held “the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process

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198. See Neisser, *supra* note 1, at 13 (suggesting that police may now have an incentive to beat a confession out of a prisoner); Stuart Taylor, Jr., *Devaluing Liberty*, MANHATTAN LAW., July 1991, at 15 (maintaining that officers may now feel that “coercing confessions may sometimes pay, at least if [it is] not too obvious ...”).
Clause of the Fourteenth Amendment." It would now appear that because coerced confessions do not mandate reversal of a conviction, the Due Process Clause offers individuals less protection. *Iowa v. Quintero* illustrates this point, for the court would not follow *Fulminante* because it thought the admission of an involuntary confession violated the due process clause of its state constitution. The *Quintero* court recognized that the adversarial nature of the trial was subverted when an involuntary confession was admitted as evidence. Thus, a defendant's due process rights would be violated.

VI. CONCLUSION

In *Arizona v. Fulminante* the Supreme Court addressed the issue of whether the harmless-error doctrine applied to coerced confessions admitted at trial. Divorcing itself from a long history of cases, the Court held that it did. The Court reached this conclusion by examining constitutional errors that could be considered harmless. The Court labeled these "trial errors," and decided coerced confessions belonged in this group.

However, the Court's decision is problematic for two reasons. First, in reaching its decision the Court ignored the doctrine of stare decisis. Furthermore, the Court neglected to explain why the reasoning of those cases was no longer valid. Second, the Court's sole reason for holding that harmless error was applicable to coerced confessions was based on an invalid distinction between "trial errors" and "structural defects." Not only was it impossible to draw a distinct line between the two, but in coming to this conclusion the Court focused on the evidentiary effects on the trial of admitting coerced confessions, to the exclusion of more important due process concerns.

This decision may have a great impact on criminal trials in which coerced confessions are allowed. The consequences include confusing the law in an area that had been settled, increasing the chances that a defendant may undergo an unfair trial, and lastly, narrowing a defendant's rights under the Due Process Clause.

The Court's holding in *Arizona v. Fulminante* rejects a valuable lesson that past Courts continually recognized and respected: that

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206. Id.
even though the search for truth is important to our system of justice, some constitutional rights should not be classified as harmless error because they protect important human values unrelated to the truth-seeking function of the trial.\textsuperscript{208}

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\textsuperscript{208} \textit{Id.} at 1257 (White, J., dissenting) (citing Rose v. Clark, 478 U.S. 570, 587 (1986) (Stevens, J., concurring)).