

Confessions and Harmless Error: A New Argument for the Old Approach

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False confessions are perilous because “juries almost always believe a defendant who confesses to a crime, in spite of any other evidence to the contrary.”¹ Accordingly, courts should carefully guard against the introduction of unreliable confessions.² To a certain extent, they do. Trial judges exclude confessions if the police failed to observe certain procedures,³ or if, based on the totality of the circumstances, the confessions seem to have been the product of coercion.⁴ Until 1991, whenever a court of appeals determined that a confession was erroneously admitted into evidence, the court would automatically reverse the defendant’s conviction.⁵ However, in *Arizona v. Fulminante*,⁶ the United States Supreme Court altered this approach, holding that wrongful admission of a confession is subject to harmless-error review.⁷

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1. Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36 (Saundra D. Westervelt & John A. Humphrey eds., 2001); see also Richard Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429 (1998) (“A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case.”).

2. See, e.g., Saul Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 42–43 (1997) (“Our results thus suggest that confession evidence has a profound, context-resistant impact on jurors and should be admitted only with extreme caution.”).

3. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 462–63 (1966) (holding that a confession must be excluded if a suspect is not informed of his rights to counsel and silence prior to interrogations).

4. *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991) (White, J., joined by Marshall, Brennan, Stevens, Scalia, JJ.).

5. See, e.g., *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (reversing defendant’s conviction and death sentence because his confession was coerced). The court of appeals reviews *de novo* the determination that a confession was voluntary. *Miller v. Fenton*, 474 U.S. 104, 110 (1985).

6. 499 U.S. 279 (1991).

7. The appellate court applies the same harmless-error standard to wrongly admitted confessions as it applies to all other trial errors, that set forth in *Chapman v. California*, 386 U.S. 18 (1967): “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Id.* at 24. Over the years, in various harmless-error decisions, the Court has vacillated between two different inquiries into

While *Fulminante* attracted some negative commentary, the case remains good law.

This essay offers a new argument in favor of undoing *Fulminante* and returning to automatic reversal. Part I sets the stage by highlighting *Fulminante*'s critical unstated assumption: that judges are uniquely able to keep confessions in perspective. Parts II and III argue the falsity of this assumption, maintaining that judges cannot be trusted to do a reliable harmless-error analysis: They will predictably err on the side of finding error to be harmless, thereby affirming convictions of innocent defendants.⁸ Part IV briefly addresses the standard for admitting confessions,⁹ proposing that this too be changed because the current standard requires judges to disregard their knowledge that the defendant confessed, which they cannot do. Part V addresses the underlying distinction between "trial errors" and "structural errors" that is essential to *Fulminante*, and discusses how that distinction plays out in the context of confessions.

I. THE HIDDEN PREMISE OF *FULMINANTE*

In *Fulminante*, the Supreme Court held that wrongful admission of a confession is merely a "trial error," distinct from the "structural errors" (e.g., a biased judge or lack of defense counsel) that warrant automatic reversal.¹⁰ Therefore, an improperly admitted confession may, on the facts of a case, be deemed harmless error by the court of appeals. On the surface, this holding seems sound. The truth-seeking function of the criminal trial would be defeated if non-decisive evidentiary rulings resulted in reversal.¹¹ If, even without the confession, overwhelming evidence established the defendant's guilt, reversal would serve no purpose because the error in admitting the confession had no effect.

harmless error: whether the error may have affected the jury's deliberations, or whether, regardless of any such effect, other evidence was so overwhelming that any rational jury would have convicted. Jeffrey Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 311–12 (2002). I do not address these two different approaches, because my argument for automatic reversal in the case of improperly admitted confessions is unaffected by which inquiry is undertaken.

8. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

9. Although, in the course of an appeal, the question of the admissibility of a confession arises prior to the question of harmless error, I reverse the order of discussion in this essay with good reason. See discussion *infra* Part IV.

10. *Fulminante*, 499 U.S. at 309–10 (Rehnquist, C.J., joined by O'Connor, Kennedy, Souter, Scalia, JJ.). The majority opinion on this issue was written by Chief Justice Rehnquist and joined by four other Justices. *Id.* at 281. A different grouping of five Justices joined an opinion by Justice White finding that the error in this particular case was not harmless. *Id.*

11. See *id.* at 308 ("[H]armless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence'") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)).

However, the four dissenting Justices and several commentators noted two flaws in the Court's holding. First, because a confession necessarily colors a jury's view of a case, the improper introduction of a confession can never be harmless.¹² Second, the majority inappropriately focused solely on the trial's truth-seeking function, ignoring other key values served by an automatic reversal rule, most notably the need to deter improper interrogation practices.¹³ While these arguments may well have merit,¹⁴ I shall not revisit them; instead, I offer a new argument sufficient to demonstrate the wisdom of automatic reversal.

I believe *Fulminante* should be reconsidered because, in cases involving confessions, judges are ill-equipped to assess harmless error.¹⁵ Judges, no less than juries, are tainted by the awareness that the defendant confessed.

To appreciate this argument, we need to consider why coerced confessions are inadmissible. In large part, such statements are regarded as unreliable.¹⁶ This view, long accepted, seems particularly powerful today. DNA testing has freed many falsely convicted people,¹⁷ of whom a surprising

12. See, e.g., Kassin & Sukel, *supra* note 2, at 42 (Studies show that “mock jurors did not sufficiently discount a defendant’s confession in reaching a verdict—even when they saw the confession as coerced, even when the judge ruled the confession inadmissible The mere presence of a confession was thus sufficient to turn acquittal into conviction”); Charles Ogletree, *The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 165–66 (1991) (“[C]oerced confessions generally are not susceptible to harmless error analysis because of the overwhelming, prejudicial effect such confessions have on jurors’ beliefs. . . . The trial becomes skewed, and appellate courts cannot meaningfully apply harmless error analysis.”).

13. See, e.g., Kassin & Sukel, *supra* note 2, at 44 (expressing “fear that *Fulminante* will trigger an increase in the number of criminal cases involving coercive interrogations”); Ogletree, *supra* note 12, at 172 (“[A]pplication of the automatic reversal rule . . . places the largest possible deterrent on police and prosecutorial misconduct.”).

14. As may another criticism of *Fulminante*—that the distinction between structural and trial errors is contrived and unconvincing. See discussion *infra* Part V.

In addition to the arguments specific to *Fulminante*, some commentators oppose harmless-error analysis in all cases involving violation of constitutional rights. See, e.g., Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 117–26 (1988).

15. I am not making the argument others have made about judges’ difficulty assessing harmless error in all cases. See Lee Teitelbaum, Gale Sutton-Barbere & Peder Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147 (1983). Teitelbaum et al. claim that judges cannot discern with any reliability the extent to which jurors were influenced by prejudicial material. *Id.* at 1153–57. My point, restricted to confessions, is different. It concerns not the generic difficulty of judges reading jurors’ minds, but the extent to which any effort to gauge the impact of a confession on a jury will be tainted by the judge’s own knowledge that the defendant confessed.

16. LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 35 (1993) (noting that Supreme Court decisions reflect the view that coerced confessions are considered to be of “questionable validity”). That said, some commentators believe the current test of voluntariness “provides few safeguards against the admission of untrustworthy confessions.” Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 117 (1997).

17. The Innocence Project, www.innocenceproject.com (last visited on Aug. 31, 2007) (reporting 207 post-conviction DNA exonerations as of Aug. 31, 2007).

number had confessed.¹⁸ A recent study by Professors Richard Leo and Steven Drizin documented 125 proven false confessions.¹⁹ Since false confessions are “not easily discovered and are rarely publicized, these documented cases likely represent only the tip of a much larger iceberg.”²⁰

Although we know that people confess falsely for a wide variety of reasons,²¹ the notion that anyone would do so remains deeply counterintuitive. There is a pervasive sense, almost impossible for people to overcome, that absent physical coercion (or perhaps severe pathology), no one would confess to a crime he did not commit.²² The pervasiveness of that belief alone may be a solid basis for automatic reversal. Even in cases where there is ample additional evidence of guilt, jurors will invariably be powerfully influenced by the confession when assessing that evidence.²³ Indeed, the three opinions in *Fulminante*, which stake out conflicting positions on key questions, converge in recognizing that confessions are such potent evidence that an improperly admitted confession can severely taint a conviction.²⁴

Justice White suggested a solution: a more searching harmless-error analysis.²⁵ “The risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing

18. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 92 (2000) (“Among DNA exonerations studied by the Innocence Project, 23 percent of the convictions were based on false confessions or admissions.”).

19. Steve Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 900 (2004).

20. *Id.* at 921.

21. WRIGHTSMAN & KASSIN, *supra* note 16, at 84–101. These reasons include protecting friends or relatives, fear of consequences, desire for notoriety, desire to expiate guilt for other wrongful actions, and even the false belief that one did commit the crime. *Id.* at 86.

22. Leo & Ofshe, *supra* note 1, at 444 n.33 (noting the deep-seated belief, even among people who should know better, such as psychologists, that innocent people do not confess). *See also* White, *supra* note 16, at 108 (“The idea that a suspect, who is neither insane nor the victim of physical coercion, will confess to a crime he did not commit seems counterintuitive. Even in 1940, when police interrogation methods were less humane than they are today, the great evidence scholar, John Henry Wigmore, asserted that false confessions were rare.”).

23. *See* Saul Kassir, Christine Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 187 (2003) (“In criminal law, confession evidence is the state’s most potent weapon.”).

24. *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) (White, J., dissenting) (noting that a confession is “so damaging that a jury should not be expected to ignore it even if told to do so”); *id.* at 313 (Kennedy, J., concurring) (“If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case.”); *id.* at 312 (Rehnquist, C.J., joined by O’Connor, Kennedy, Souter, Scalia, JJ.) (“Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant.”).

25. Justice White himself favored automatic reversal, but was forced to apply the harmless-error test because he was outvoted on that point. *Id.* at 288 (White, J., dissenting). In that context, he opined that if a harmless-error analysis is to be applied to wrongly admitted confessions, it must be applied with extra rigor. *Id.* at 295–96.

court to exercise extreme caution before determining that the admission of the confession at trial was harmless.”²⁶ Likewise, Justice Kennedy opined that “the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact.”²⁷ In other words, improperly admitted confessions may not require automatic reversal, but they do require special caution before a finding that error is harmless.

This ‘compromise’ may be fatally flawed, for White and Kennedy fail to consider that judges may be as prone as jurors to over-value a coerced confession. In assessing the impact of a confession on a jury, and whether the remaining evidence would have guaranteed a conviction, judges may themselves be unduly influenced by knowledge that the defendant confessed. If jurors are overwhelmed by confessions, finding it difficult to give the other evidence proper attention and to evaluate that evidence dispassionately, why assume that judges will do any better when conducting a harmless-error analysis?²⁸

In *Fulminante*, the Court apparently assumed that judges, unlike jurors, are able to keep a coerced confession in perspective.²⁹ But judges are human, and have no special expertise in evaluating confessions.³⁰ The idea that an

26. *Id.* at 296.

27. *Id.* at 313 (Kennedy, J., concurring).

28. A few commentators have raised this question, albeit not in connection with harmless error. *See, e.g.*, Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV 2001, 2023–24 (1998) (“If jurors are not able to assess the actual probative value of particular confessions, there is no reason to believe that judges can do better. . . . [J]udges—like juries—may find it difficult to believe that a suspect would confess to a crime that he did not commit.”); Paul Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1129–30 (1997) (arguing that there is no reason to assume judges are better than juries in evaluating the reliability of confessions).

29. Judges’ experience and temperament are sometimes cited as reasons to treat them as uniquely capable of handling certain types of evidence. A federal rule of evidence, with a counterpart in most states, authorizes judges to exclude evidence deemed more unfairly prejudicial than probative. FED. R. EVID. 403. However, courts have uniformly held that judges need not exclude such evidence in a bench trial, in part because of greater confidence in judges to keep the evidence in perspective. *See, e.g.*, *United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001) (“[W]e have confidence that at the bench trial, the experienced district judge was able to separate the emotional impact from the probative value of this potentially prejudicial evidence.”); *EEOC v. Farmer Bros.*, 31 F.3d 891, 898 (9th Cir. 1994) (“[I]n a bench trial, the risk that a verdict will be affected unfairly and substantially by the admission of irrelevant evidence is far less than in a jury trial.”); *Shultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (“[W]e are confident that the district court can hear relevant evidence, weigh its probative value and reject any improper inferences.”). More generally, “the assumption that the greater training and experience of trial judges immunize them against mistakes to which jurors may be susceptible” leads courts to apply rules of evidence less strictly in bench trials. Andrew Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1256 n.23 (2005).

30. One commentator makes this point with respect to character evidence, which is often excluded on the ground that jurors cannot evaluate it properly. Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 790 (1998) (“There is no good reason to believe that a single judge, who is likely to be relatively isolated and separated from ordinary life and ordinary

innocent person would confess is so counterintuitive that arguably no one, judges included, can be relied on to escape the intuition. We should not lightly assume that appellate judges, convinced of the defendant's guilt, can undertake a harmless-error analysis properly.³¹

To say this is not to question the special trust placed in judges to make a variety of difficult decisions, including many that could conceivably be tainted by their awareness of facts they are supposed to ignore. My premise is that confessions are different, and they present a particularly serious obstacle to a judge's detached judgment.³² That argument, of course, challenges the hidden premise of *Fulminante*—that judges can dispassionately evaluate a case notwithstanding their awareness that a defendant confessed. Parts II and III contest the assumption underlying *Fulminante*.

II. THE HIDDEN PREMISE CHALLENGED: INDIRECT EVIDENCE

Jurors are not the only participants in the criminal justice system with trouble keeping confessions in perspective.³³ One leading authority on confessions, Richard Leo, notes that “all criminal justice officials presume the guilt of any defendant who has confessed and treat her more harshly as a result.”³⁴ He proceeds to show how prosecutors, defense attorneys, jurors, trial judges, and prison officials act on the assumption that a confession must be true.³⁵ But is it possible that Leo erred by including judges?³⁶ Is it possible that they, alone among participants in the criminal justice system, can reliably keep confessions in perspective?³⁷ Alas, substantial evidence suggests that

people . . . [is] better qualified than a jury of twelve, eight, or six people, drawn from a cross-section of the community and having a variety of backgrounds and experiences, to make sound inferences about the probative force of human character.”)

31. See Kassin, Goldstein & Savitsky, *supra* note 23, at 201 (arguing that a “presumption of guilt can set into motion a biased chain of events”).

32. My argument does not depend on any *unique* effect of confessions. If it can be established that other evidence or circumstances taint judges in a similar manner, we would be wise to consider the implications for restricting harmless error in other categories of cases as well. That said, at the conclusion of Part III, I directly tackle the objection that the ‘tainted harmless error’ argument proves too much, explaining how harmless-error analysis in confessions cases involves a combination of circumstances not present in most other situations.

33. For a discussion of prosecutors’ tendency to over-value confessions, see Alan Hirsch, *The Tragedy of False Confessions (and a Common Sense Proposal)*, 81 N.D. L. REV. 343 (2005) (book review).

34. Leo, *supra* note 1, at 46.

35. *Id.* at 46–47.

36. Leo’s discussion of judges centers on their tendency to set high bail and sentence confessors more harshly. In text accompanying notes 43–47, I consider trial judges’ assumptions that confessions must be true in contexts more closely related to harmless-error analysis. Interestingly, there is one omission from Leo’s list of criminal justice officials who assume confessions true: *appellate* judges. Their tendency to over-value confessions, see *infra* text accompanying notes 48–156, is the point central to my argument about harmless error.

37. See, e.g., Sellars v. Procnier, 641 F.2d 1295, 1299 (9th Cir. 1981) (“The judge is in a unique posture in the adversary system. His or her sole task is to make impartial decisions in

judges, like everyone else, intuit that innocent people do not confess.³⁸

The first piece of evidence comes from two studies: the aforementioned study of 125 proven false confessions by Professors Leo and Drizin and a study by Leo and Professor Richard Ofshe of sixty confessions the authors categorized as demonstrably false or likely false.³⁹ In these cases, it was not just police, prosecutors, and juries who were insufficiently skeptical of confessions: Judges were accomplices. According to Leo and Ofshe, in all sixty cases, judicial suppression of the confession would have led to dismissal because “no credible evidence linked the suspect to the crime and varying amounts of evidence indicated that the suspect was factually innocent.”⁴⁰ Yet, judges suppressed confessions in few of the cases, even those where suppression was clearly justified and would have prevented an unjust conviction.⁴¹

In some of the cases reported in the two studies, courts admitted dubious confessions, upheld dubious verdicts, and imposed severe sentences, all the while relying on confessions that were the sole evidence of guilt.⁴² These judges apparently regarded a confession alone, unaccompanied by or even contradicted by other evidence, as a guarantor of guilt.

In some cases, unusual circumstances highlight the judge’s assumption that a confession must be true. When Johnny Lee Wilson was exonerated by another man’s confession,⁴³ and later was pardoned by the governor, the trial judge in the case still insisted on Wilson’s guilt.⁴⁴ Another case is especially significant because it was a bench trial—the judge himself found the defendant guilty of murder beyond a reasonable doubt where the only evidence was a

vigorously contested actions.”)

38. See *infra* text accompanying notes 39–159. Judges do not receive special training either in evaluating confessions or disregarding coerced confessions. Even if they did, these could well number among those tasks where training simply does not improve performance. See, e.g., Christian Meissner & Saul Kassin, “He’s Guilty!”: Investigator Bias in Judgments of Truth and Deception, 26 LAW & HUM. BEHAV. 469, 472 (2002) (“In contrast to what one might have expected, however, training and experience had no significant effect on participants’ ability to accurately discriminate truth from deceit.”).

39. See Drizin & Leo, *supra* note 19; Leo & Ofshe, *supra* note 1. There is no overlap between the cases covered in the two studies, since Leo and Drizin, authors of the later study, deliberately created a fresh cohort. Drizin & Leo, *supra* note 19, at 924–25.

40. Leo & Ofshe, *supra* note 1, at 475 n.393.

41. Drizin & Leo, *supra* note 19, at 922 (“Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions, even highly questionable ones.”).

42. Leo & Ofshe, *supra* note 1, at 458–66.

43. Anyone doubting Wilson’s innocence should read the summaries of the case by the United States Court of Appeals, *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), and in Terry Ganey, *Pardoned Man Wants “To Pick Up My Life”*, ST. LOUIS POST-DISPATCH, Sept. 30, 1995, at 1A. The only evidence of Wilson’s guilt was his blatantly coerced confession, and Wilson was mentally retarded. *Wilson*, 260 F.3d at 950; Ganey, *supra*. Subsequently, another man, convicted of a different murder, confessed to this one and provided accurate details not known to the public. Ganey, *supra*.

44. Ganey, *supra* note 43.

vehemently recanted confession.⁴⁵ The trial court acknowledged that his finding of guilt “was based on the weight of the alleged oral confession.”⁴⁶ It turns out the defendant could not conceivably have committed the crime.⁴⁷

One might argue that trial judges deciding whether to admit a confession differ from appellate judges who, having already found that a confession was improperly admitted, must determine only whether the error was harmless. After all, appellate judging necessarily involves distance from the facts and sharper focus on the legal issues.⁴⁸ But despite the theoretical plausibility of this distinction, evidence suggests that appellate judges, too, are improperly influenced by their awareness that a defendant confessed. First, note that appellate courts upheld the admission of dubious confessions in many of the cases covered in the studies discussed above. In at least one case, even after prosecutors acknowledged the defendant’s innocence, and urged her release, the court of appeals resisted.⁴⁹ A number of other cases vividly illustrate how courts of appeals, no less than trial courts (and police, prosecutors, and juries), lose perspective when faced with a confession—even where there is ample ground to doubt the accuracy of the confession.

Consider the case of Earl Washington. Sentenced to death for rape and murder almost exclusively on the basis of an error-riddled confession, Washington sought habeas corpus review.⁵⁰ His arguments included a powerful claim of ineffective assistance of counsel: Although DNA tests apparently exonerated Washington, his attorney ignored them.⁵¹ The United States Court of Appeals for the Fourth Circuit recognized that this appeared to be a clear case of ineffective assistance, and that the case against Washington was weak: “The evidence consisted essentially of a confession obtained by

45. *Castillo v. Zuniga*, 2002 U.S. Dist. LEXIS 4261, at *11 (N.D. Ill. 2002) (civil suit by defendant subsequent to his exoneration).

46. *Id.*

47. *See id.* at *1–2 (“Plaintiff Miguel Castillo has served eleven and a half years of a state prison sentence for a murder he did not commit.”). Castillo was in prison on the day the murder was committed. *Id.* at *12.

48. Goodman Caplan, *In Memoriam: Judge Bell*, 37 S. TEX. L. REV. 623, 624 (1996) (“An appellate judge obviously requires different talents than a trial judge. This involves the ability to focus on the legal issues in a dispute and resolve those issues by the application of the appropriate rules of law.”); Dan Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923–28 (1989) (discussing assorted advantages of appellate courts over trial courts in addressing issues of law).

49. *Pair Still in Prison Despite Confession from Killer; Law Makes It Hard to Reverse Verdict*, N.Y. TIMES, Nov. 26, 1995, at 28 (“That they remain behind bars has astounded not only Pavlinac, 62, and Sosnovske, 44, but virtually everyone who has followed their case, especially the prosecutors, who in October urged an Oregon appeals judge to set aside their convictions. . . . But the judge, Paul Lipscomb of the Third Circuit Court of Appeals, declined to free the prisoners, at least for now.”). Eventually, the two were released. *2 Released in ‘Happy Face’ Murder*, WASH. POST, Nov. 28, 1995, at A11.

50. *Washington v. Murray (Washington I)*, 952 F.2d 1472, 1475 (4th Cir. 1991).

51. *Id.* at 1476.

interrogation almost a year after the crime, from a mildly retarded person.”⁵² Moreover, the confession “contained numerous original factual errors—including the race of the victim, the injury inflicted, the non-presence of any others at the crime scene (two children were present), and the location of the victim’s apartment.”⁵³

The Fourth Circuit remanded the case to the trial court for a hearing to determine whether the apparent ineffective assistance had indeed prejudiced Washington.⁵⁴ However, the rehearing seemed like a formality. Ignoring key exculpatory evidence is by definition ineffective assistance, and such an error surely warrants reversal in a case that was weak from the beginning.⁵⁵ Yet, on remand, the trial court found the exculpatory evidence to be inconclusive and therefore unlikely to sway the jury.⁵⁶

Even more surprisingly, when the case returned to the Fourth Circuit, the court viewed the evidence very differently than it had previously. The Fourth Circuit jumped through hoops to affirm the trial court’s holding.⁵⁷ In the course of doing so, the court examined the non-confession evidence. When the court initially heard the case, it recognized that even without the exculpatory scientific evidence, the prosecution’s case was weak.⁵⁸ In viewing the identical record a second time, the court found “a strong case against petitioner.”⁵⁹ Whereas its initial opinion recognized major errors in the confession, the court

52. *Id.* at 1477.

53. *Id.* at 1478. In addition, “expert medical opinion . . . [was offered] that he was highly suggestible, ‘easily led,’ that ‘out of his need to please and his relative incapacity to determine the socially and personally appropriate, he relies on cues given by others and reflexive affability.’” *Id.*

54. *Id.* at 1479.

55. To establish ineffective assistance the defendant must show that counsel’s performance fell below an objective standard of reasonableness and there was a “reasonable probability” that it affected the outcome. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

56. *Washington v. Murray (Washington II)*, 4 F.3d 1285, 1286–88 (4th Cir. 1993). In addition, the trial court found that the failure to introduce the exculpatory evidence was a reasonable “strategic decision” by his attorney. *Id.* at 1288. The Fourth Circuit dismissed this odd suggestion. *Id.* at 1289.

57. At the hearing, two defense experts testified that DNA tests established that semen stains at the crime scene could not have been left by the defendant and were consistent with the blood type of the original suspect in the case. *Id.* at 1286. However, under cross-examination, these witnesses acknowledged the possibility that the stains could have been left by the victim’s husband during an earlier consensual sexual encounter. *Id.* at 1287. Although the stain did not match the husband’s blood type, it could have mixed with vaginal fluid and “mask[ed]” his blood type. *Id.* No evidence supported this conjecture, but it was a theoretical possibility. *See id.* Reasoning that the DNA did not *necessarily* exonerate the defendant, the Fourth Circuit made a large and unjustified inferential leap, affirming the district court’s finding that there was no “reasonable probability” that such evidence would have led the jury to a different conclusion. *Id.* at 1290.

58. *Washington I*, 952 F.2d at 1479 (Though the evidence was technically sufficient to support conviction, “it is not without real, as opposed to merely fanciful, problems for any fair-minded jury asked . . . to find guilt beyond a reasonable doubt.”).

59. *Washington II*, 4 F.3d at 1290.

subsequently strained to find explanations for the errors.⁶⁰ In its initial opinion, the court noted that the evidence “essentially” consisted of the confession, and described the extreme weakness of the only other putative evidence: a shirt found at the crime scene.⁶¹ In its second opinion, the circuit court simply stated that Williams’s confessions were “corroborated [by] his admitted ownership of a shirt linked to the crime scene”⁶² and made no mention of the weakness of this evidence.⁶³

Virginia’s governor eventually ordered a more sophisticated DNA test, which confirmed Washington’s absence from the crime scene.⁶⁴ Washington was pardoned in 2000.⁶⁵ He spent eighteen years in prison for a crime he did not commit—not only because of overzealous prosecutors and a fallible jury, but because appellate judges also failed to scrutinize the confession properly. There seems to be only one conceivable explanation for the Fourth Circuit’s jarring shift that left Washington in prison, without even a new trial, for several years *after* DNA evidence suggested his innocence: The judges over-valued Washington’s confession.

This phenomenon is reflected in other appellate decisions as well, suggesting an assumption commonly held by appellate judges that defendants who confess must be guilty, regardless of whether there is other inculpatory evidence. For example, no other reason explains the Missouri Supreme Court’s finding, in the case of Johnny Lee Wilson, that crucial exculpatory evidence was irrelevant.⁶⁶ The mentally retarded suspect was coerced into an error-ridden confession under conditions so extreme that the United States Court of Appeals for the Eighth Circuit stated that “no officer could have reasonably

60. For example, Washington had claimed that he stabbed the victim a few times, whereas the victim was actually stabbed thirty-eight times. *Washington II*, 4 F.3d at 1291 n.4. He had said that no one was present, whereas two children witnessed the event. *Id.* Prosecutors argued that Washington may have been too embarrassed to state these facts accurately. *Id.* The court had no explanation for Washington incorrectly identifying the race of the victim, but pointed out that he subsequently changed his mind. *Id.* at 1291 n.4.

61. *Washington I*, 952 F.2d at 1477–78.

62. *Washington II*, 4 F.3d at 1290.

63. *See id.* As the dissent indicated, “in a thorough, investigative search of the crime scene the shirt was not discovered. The victim’s mother-in-law found it in a dresser drawer that contained clothes belonging to the victim and her husband. . . . The laboratory report shows that hairs in the shirt were consistent with the hair of [the original suspect]. When defense counsel requested comparison with Washington’s facial hair, the request was denied. Washington’s sister, who laundered his clothes, testified that the shirt was not his.” *Id.* at 1293 (Butzner, J., dissenting). Note, too, that the defendant (who had an I.Q. of sixty-nine, roughly that of a ten-year-old boy) did not volunteer information about the shirt. *Washington I*, 952 F.2d at 1475, 1478. He was shown the shirt and assented when asked—perhaps very suggestively—if it was his. *Id.* at 1478.

64. GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* 290 (2003).

65. Francis X. Clines, *Virginia Man Is Pardoned in a Murder*, N.Y. TIMES, Oct. 3, 2000, at A20.

66. *See Wilson v. Lawrence County*, 260 F.3d 946, 955 (8th Cir. 2001).

thought this conduct consistent with Wilson's constitutional rights."⁶⁷ To avoid the death penalty, Wilson pled guilty, while insisting on his innocence.⁶⁸ Later, when another man confessed to the crime and gave details known only to the perpetrator, Wilson sought to vacate his plea.⁶⁹ The Missouri Supreme Court held that, because Wilson had pleaded guilty, the newly discovered evidence was irrelevant.⁷⁰

There is a patina of plausibility to this holding. Had Wilson been convicted in a trial, the new evidence would obviously call into question whether the jury reached the correct decision. However, since he pleaded guilty, and he presumably knew whether he had committed the crime, new evidence of innocence arguably made little difference. Nevertheless, there was ample basis to vacate the plea and afford Wilson a trial (or to release him, since there was no evidence against him). A guilty plea must be supported by a "factual basis,"⁷¹ a requirement that is particularly important when the defendant denies his guilt even while pleading guilty.⁷² Since the only evidence against Wilson was a recanted confession,⁷³ the court arguably should not have accepted his plea in the first place. Later, in the face of overwhelming exculpatory evidence, the court ought to have vacated the plea. The most likely explanation for the court's failure to do so is that the judges considered Wilson's confession—coerced and uncorroborated though it was—to be proof of his guilt.

The case of Steven Linscott, while technically not a harmless-error case, involved the Illinois Supreme Court in an inquiry similar to harmless-error analysis.⁷⁴ The convicted defendant did not challenge the admissibility of his confession, but chose instead to argue that the guilty verdict was not sufficiently supported because the only evidence was a highly unreliable confession.⁷⁵ Thus, the question before the Illinois Supreme Court was

67. *Id.* at 954.

68. *Id.* at 949. This is permissible. *See* North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970) (upholding plea where defendant asserts his innocence but chooses to plead guilty).

69. Tim Poor, *When Justice and the Law Are Strangers*, ST. LOUIS POST-DISPATCH, Dec. 6, 1990, at C1.

70. *Id.* ("What this case is not about is the guilt or innocence of the defendant. That was decided when he entered the plea of guilty.") (quoting a statement by the prosecutor); *see also id.* ("Newly discovered evidence is not a basis for relief in a post-conviction motion proceeding.") (quoting the appellate court opinion).

71. This is the rule both in the federal courts, FED. R. CRIM. P. 11(e)(2), and in Missouri state courts, MO. R. CRIM. P. 24.02(e).

72. *See Alford*, 400 U.S. at 38 n.10 ("[V]arious state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea . . .").

73. *Wilson*, 260 F.3d at 949.

74. *See* People v. Linscott (*Linscott II*), 500 N.E.2d 420, 423–24 (Ill. 1986).

75. *Id.* at 422. The intermediate appellate court had reversed the conviction as unsupported by the evidence. People v. Linscott (*Linscott I*), 482 N.E.2d 403, 407–08 (Ill. App. Ct. 1985).

whether a rational jury could find guilt beyond a reasonable doubt.⁷⁶ Even without the benefit of Linscott's eventual exoneration (after many years in jail) through DNA testing,⁷⁷ the clear answer should have been no.⁷⁸

Linscott did not exactly confess: He came forward, claiming psychic powers, and told police that his "dream" could help solve a rape and murder.⁷⁹ That dream was the sole basis for his subsequent conviction, and the Illinois Supreme Court's affirmance of that conviction.⁸⁰ The court found the dream sufficient to support the conviction because it allegedly contained accurate details about the crime.⁸¹ This determination was troubling, however, in three respects. First, the 'details' mostly amounted to generalities rather than specifics.⁸² Second, the defendant had indisputably read newspaper accounts about the crime that could have supplied most of the information he mentioned.⁸³ Finally, the court ignored decisive discrepancies between the defendant's version and the actual crime, including the race of the victim.⁸⁴

If Linscott's case illustrates that some courts of appeals will assume any confession to be true,⁸⁵ the same applies to the case of Eddie Joe Lloyd.⁸⁶ Lloyd's appeal, like Linscott's, involved an inquiry similar to harmless-error analysis. Convicted solely on the basis of a patently unreliable confession⁸⁷

76. *Linscott II*, 500 N.E.2d at 424.

77. Bob Secter, *Slaying Charge Dropped, Ending Twelve Year Ordeal*, CHI. SUN TIMES, July 16, 1992, at 3.

78. This is not simply a case of 20/20 hindsight: Illinois's intermediate court of appeals reversed Linscott's conviction because it was not supported by the evidence, and when the Illinois Supreme Court reinstated the conviction, it did so over two dissenting opinions. *See Linscott II*, 500 N.E.2d at 424 (Clark, C.J., dissenting); *id.* at 428 (Simon, J., dissenting). As this suggests, not all appellate judges in all cases (or, for that matter, all prosecutors, juries, and trial courts) assume confessions to be true and allow that assumption to distort their analysis. My argument asserts only that this happens too often, not that it happens uniformly.

79. *Linscott II*, 500 N.E.2d at 421.

80. *Id.* at 421, 424. The court also relied on virtually meaningless forensic evidence to buttress the dream. *Id.* at 428 (Clark, J., dissenting) (The forensic evidence "was so weak as to lack all probative value. The expert testified to a 4000 to 1 probability of a match but then admitted that this probability would need testing of 40 characteristics. He tested only 10 to 12, and could not remember which. In addition, the victim's apartment also contained hairs of another unidentified male, not the defendant.").

81. *Id.* at 424 (majority opinion).

82. *Id.* at 427 (Clark, J., dissenting) ("The description of any of the details as 'unusual' or 'strangely coincidental' defies common sense.").

83. *Id.* at 428 (Simon, J., dissenting).

84. *Id.* at 429 ("More striking than the similarities between the dream and the real murder are the differences.").

85. At least one appellate judge not only found the verdict defensible (i.e., held that a reasonable jury could convict), but seemed to think it was an easy case. Dissenting from the reversal of the conviction by the intermediate court of appeals, Justice McNamara declared the evidence "inconsistent with any reasonable hypothesis of innocence." *People v. Linscott (Linscott I)*, 482 N.E.2d at 408 (McNamara, J., dissenting). Yet, as noted, Linscott was subsequently cleared by DNA tests. Secter, *supra* note 77.

86. *People v. Lloyd*, 454 Mich. 869 (1997).

87. The Innocence Project, Eddie Joe Lloyd, <http://www.innocenceproject.org/Content/>

(Lloyd was a diagnosed schizophrenic⁸⁸ and medicated at the time of his confession,⁸⁹ in which he supplied no details or new information about the crime),⁹⁰ Lloyd appealed.⁹¹ Michigan's Supreme Court dismissed the appeal on a technicality: It was filed late.⁹² However, the relevant Michigan statute permits a late appeal if the court finds a "significant possibility" of the defendant's innocence.⁹³ The court would not grant Lloyd the extension.⁹⁴ As there was no evidence against Lloyd apart from the confession, the court implicitly considered the questionable confession decisive proof of guilt.

We have seen that some appellate judges, like jurors and prosecutors, are prone to assume confessions to be true. Moreover, some of the situations in which appellate courts have erred are analogous to situations where judges decide whether the wrongful admission of a confession was harmless. However, the cases discussed above did not involve actual harmless-error analysis. The case for automatic reversal is strengthened by direct evidence of judges' failure to engage in such analysis properly.

III. THE HIDDEN PREMISE CHALLENGED DIRECTLY

Evaluating fifteen years of case law since the Supreme Court's *Fulminante* decision leads inescapably to one conclusion: Courts have not exercised "extreme caution" before finding harmless error, as Justice White proposed.⁹⁵ In both state and federal cases, courts have held the improper admission of confessions to be harmless error in a substantial number of cases.⁹⁶ Many holdings are impossible to evaluate because the analysis consists of a perfunctory sentence or two to the effect that, 'in light of other evidence, any error was harmless.'⁹⁷ However, there are quite a few cases in which the

201.php (last visited on Aug. 31, 2007).

88. David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1138–39 (2007). It is no coincidence that a number of the cases discussed in this Article involved mentally retarded or mentally ill defendants. These are populations vulnerable to false confessions. See Drizin & Leo, *supra* note 19, at 971, 973 (In a study of 125 proven false confessions, at least twenty-eight cases involved defendants who were mentally retarded and twelve in which defendants were mentally ill.).

89. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 43 n.30 (2005).

90. The Innocence Project, *supra* note 87; Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1.

91. *Lloyd*, 454 Mich. at 869.

92. *Id.*

93. MICH. CT. R. 6.508(D)(3)(b)(iv).

94. *Lloyd*, 454 Mich. at 869. Lloyd was eventually exonerated and released. Jodi Wilgoren, *Man Freed After DNA Clears Him of Murder*, N.Y. TIMES, Aug. 27, 2002, at A10.

95. See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (White, J., joined by Marshall, Brennan, Stevens, Kennedy, JJ.).

96. Precise figures are unavailable, but computerized research reveals a finding of harmless error in numerous cases that found confessions to be improperly admitted.

97. See, e.g., Cooper, *supra* note 7, at 344 ("[T]he unpublished opinion that affirms on the

court's discussion of harmless error ought to give us serious pause.

Below are seven such cases.⁹⁸ In evaluating them, one should keep in mind the proper standard of review: To find harmless error, the court of appeals must, essentially, find 'beyond reasonable doubt squared,' i.e., beyond a reasonable doubt that the jury would have found the defendant guilty beyond a reasonable doubt.⁹⁹ These cases suggest that appellate judges have difficulty conducting meaningful harmless-error analysis because they are tainted by their awareness that the defendant confessed.

*Haynes v. State*¹⁰⁰

In this recent case, the Mississippi Supreme Court affirmed a conviction for murder, sexual battery, and arson.¹⁰¹ When firefighters responded to a call about a house in flames, they discovered a dead woman inside.¹⁰² The next day, a man approached police, told them he knew who killed her and named the alleged culprit.¹⁰³ But under questioning later that day (which the court found was in violation of his *Miranda* rights), he confessed that he was the killer.¹⁰⁴

Besides this confession—which the defendant later recanted—the evidence consisted primarily of the following: a note found in the woman's driveway, which contained the defendant's handwriting; the presence of the defendant's semen in the victim's body; and a burnt spot and odor of smoke on his jacket.¹⁰⁵ This evidence certainly established that the defendant had known the victim, indeed had had sexual relations with her, but as the court acknowledged, "without Haynes' confession, the State submitted only circumstantial evidence establishing that Haynes' [sic] actually set the fire which led to Nowell's death."¹⁰⁶ The court further acknowledged that the man the defendant claimed committed the crime had given inconsistent testimony,

basis of harmless error is essentially opaque because it tends to do so in the most summary fashion, with little or no analysis of why it is that the evidence is so overwhelming that no reasonably jury could help but convict."). Many of these opinions are unpublished.

98. While such an approach is no substitute for an exhaustive study, it should suffice to demonstrate certain recurring problems, and it has the advantage of putting a human face on the problem. With regards to the particular choice of cases, I focus on reasonably recent cases where the court explained its harmless-error reasoning sufficiently to permit evaluation, with a preference for cases that illustrate a clear error. For example, the courts in *Rios* and *Taylor* overvalued eyewitness evidence; in *Williams* and *Dupont*, the courts implicitly made credibility determinations; in *Haynes*, the court gave improper weight to the quantity of evidence; in *Lipsey*, the court failed to consider innocent explanations for physical evidence; and in *Rockette*, the court explicitly applied the wrong standard.

99. See Cooper, *supra* note 7 at 335.

100. 934 So. 2d 983 (Miss. 2006).

101. *Id.* at 993.

102. *Id.* at 985.

103. *Id.* at 986.

104. *Id.* at 987–88.

105. *Id.* at 991.

106. *Id.*

and that the police had barely investigated this man's possible guilt.¹⁰⁷ Nevertheless, because of the "large amount of evidence establishing Haynes' culpability,"¹⁰⁸ the wrongful admission of his confession was deemed harmless.¹⁰⁹

This decision is difficult to justify. First, the Court erred in relying on the quantity ("large amount") of evidence. A large quantity of evidence does not mean one can say with certainty (or near certainty) that the jury would have convicted without the defendant's confession.¹¹⁰ The case lacked anything resembling conclusive proof. As the dissent explained, "absent the constitutionally forbidden confession, honest and fair-minded jurors might very well have arrived at not-guilty verdicts."¹¹¹ The very fact that one of the judges viewed the evidence this way belies the suggestion that the evidence was sufficiently overwhelming and clear-cut as to justify a finding of harmless error.

*State v. Rockette*¹¹²

A Wisconsin appellate court found that the defendant's confession should have been excluded at trial because police failed to give him adequate *Miranda* warnings.¹¹³ The defendant had pleaded guilty after the trial court declined to suppress his confession.¹¹⁴ However, the court found the error harmless because, even without the confession, "the State had an extremely strong case."¹¹⁵ That case consisted of two eyewitnesses to the crime (whose credibility was disputed) and two witnesses who claimed the defendant gave

107. *Id.* at 991–92.

108. *Id.* at 992. In addition to the evidence adduced, the court cited "Haynes' knowledge of the crime . . . [the fact] that Haynes' grandmother served as [the victim's] caretaker; bullets taken from [the victim's] home were found in the floorboard of the car belonging to Haynes' grandmother; a piece of cloth found at [the victim's] home was similar to a piece found in the car; Haynes had possession of his grandmother's car keys the night of the crime; and [a man's] testimony that Haynes sold him a gun that was registered in [the victim's] name and was taken from her home." *Id.* The court is right to characterize this as a "large amount" of evidence, *id.*, but it ranges from barely relevant to mildly probative. Or, at any rate, so a reasonable jury could have found. To find harmless error, the court must find beyond a reasonable doubt that the jury would have convicted even without the confession. *See* Cooper, *supra* note 7 at 335.

109. *Haynes*, 934 So. 2d at 992.

110. *See, e.g.,* Vick v. Lockhart, 952 F.2d 999, 1004 (8th Cir. 1991) ("[T]he quantity of evidence supporting the verdict is but one factor in a harmless error review."); *People v. Schaeffer*, 438 N.E.2d 94, 97 (N.Y. 1982) (explaining that, in harmless-error analysis, the "court must focus on the reliability and persuasiveness of the untainted matter"); *see also* *People v. Goldstein*, 843 N.E.2d 727, 737 (N.Y. 2005) (Read, J., dissenting) ("[A] court engaging in harmless error review should center its analysis not on the quantity of the evidence adduced, but rather on its quality.").

111. *Haynes*, 934 So. 2d at 995 (Dickinson, J., dissenting).

112. 704 N.W.2d 382 (Wis. Ct. App. 2005).

113. *Id.* at 384.

114. *Id.* at 386–87.

115. *Id.* at 389.

them a jailhouse confession.¹¹⁶ Perhaps recognizing the fallibility of such evidence, the court noted “other circumstantial evidence of guilt”: the defendant’s flight from police and alleged attempts by the defendant’s friends to intimidate witnesses.¹¹⁷

The court acknowledged potential weaknesses in some of this evidence and further acknowledged intimations that the defense would have plausibly argued an alibi defense had the case gone to trial.¹¹⁸ However, the court opined that the evidence supporting the alibi was weak and vulnerable to impeachment.¹¹⁹ The court cited “the comparative strength of the State’s case versus Rockette’s defense” as supporting its finding of harmless error.¹²⁰

It should be apparent that the court engaged in an improper harmless-error analysis. The State offered no evidence, physical or otherwise, from which a rational jury would necessarily have found guilt. At best, the court explained the *likelihood* that a jury would have found guilt without the confession, which falls far short of the standard needed for harmless error.¹²¹ Yet, as we shall see, when it comes to skewed harmless-error analysis regarding an improperly admitted confession, this case is far from extreme.

*United States v. Williams*¹²²

One of two defendants convicted of arson sought reversal, claiming his confession was involuntary and should have been excluded from the trial.¹²³ The United States Court of Appeals for the Fourth Circuit held that, if the confession was improperly admitted, any error was harmless: “Williams argues that the only evidence against him—other than testimony regarding his confession—was [the co-defendant’s] testimony implicating him in the charged offenses, which Williams contends was not credible. . . . [But because he] clearly implicated Williams in the charged offenses, we conclude that the jury would have returned a guilty verdict, and therefore, that any error in the admission of Williams’ statements was harmless.”¹²⁴

The court’s reasoning is remarkable. The only evidence against the defendant was the testimony of a single witness, his co-defendant.¹²⁵ The determination that, beyond a reasonable doubt, the jury would have believed this single witness is so bizarre that it suggests that the court applied the wrong

116. *Id.* at 387.

117. *See id.* at 389.

118. *Id.*

119. *Id.*

120. *Id.*

121. *See Cooper, supra* note 7 at 335.

122. 61 F. App’x 847 (4th Cir. 2003).

123. *Id.* at 848.

124. *Id.* at 849.

125. *Id.*

standard.¹²⁶ However, the court cited the correct standard, as well as the Supreme Court case that established it, just a few sentences before stating that any error was harmless.¹²⁷ Thus, it seems reasonable to infer that the court, in applying the harmless-error analysis, was influenced by its knowledge that the defendant had confessed. If the court felt certain of the defendant's guilt, it may have erroneously found damaging error to be harmless.

*People v. Matthews*¹²⁸

A California appellate court found that an improperly admitted confession to robbery was harmless error because "even without Lipsey's statements, there was strong physical and circumstantial evidence of his guilt."¹²⁹ That evidence, in its entirety, was as follows: "[The victim's] blood was found on Lipsey's shoe. Victim Steve Willett identified Lipsey's shoes as having been worn by one of the robbers. Lipsey's shoe was also consistent with a shoe print at the crime scene."¹³⁰

Can we say beyond a reasonable doubt that the jury would have convicted based on that evidence? The testimony of a victim as to a robber's shoes seems weak; absent some particular reason (and none is given in the opinion), a robbery victim would not normally observe with care the robber's shoes. Moreover, the court's earlier recitation of the facts suggests that the 'consistency' between Lipsey's shoe and the print at the crime scene borders on irrelevant: A police department criminalist "compared defendant Lipsey's shoes to partial prints found inside the restaurant and concluded that Lipsey's shoes could have made the prints."¹³¹ Without more, the witness's "could have" requires a leap even to qualify as relevant evidence. Ergo, the only meaningful evidence of guilt cited by the court is the contention that investigators found the victim's blood on Lipsey's shoes. Again, searching the court's recitation of the facts for elucidation, we find a single sentence: "DNA analysis matched blood on Lipsey's shoes to [the victim]." The court did not further elaborate on that match.¹³²

126. As noted, the reviewing court may find harmless error only if it concludes, beyond a reasonable doubt, that the jury would have found guilt even without the error in question. *See Cooper, supra* note 7 at 335. At times, the Supreme Court has suggested a different approach, asking whether the confession could have affected deliberations. *Id.* On the latter inquiry, too, the finding of harmless error in this case seems bizarre. Given the paucity of other evidence, not only could the confession have affected deliberations, but the jury likely focused on it.

127. *Williams*, 61 F. App'x at 847 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967), for the proposition that "[b]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt").

128. 2003 WL 1923544 (Cal. Ct. App. Apr. 23, 2003).

129. *Id.* at *12.

130. *Id.*

131. *Id.* at *5.

132. The notion of a DNA 'match' is often used sloppily to cover vastly different findings, ranging from 'DNA shows with virtual certainty that the defendant's blood was found on the

Equally important, it does not tell us whether the victim knew the defendant or offer any possible basis for an innocent explanation for the blood. To be certain that a jury would convict solely on the basis of blood on a shoe requires, at a minimum, more of a discussion than the court provides. Given that the jury itself faced a reasonable-doubt standard, with the government's burden to establish guilt, the blood on the shoes might well not have sufficed.¹³³

*People v. Rios*¹³⁴

Often, the untainted evidence cited to justify a finding of harmless error is eyewitness testimony. In a recent robbery case, the principal non-confession evidence was an eyewitness identification of the defendant in a photographic line-up and in court.¹³⁵ The only other evidence was as follows: "Two witnesses testified that defendant did have a goatee at the time of the offenses. Defendant was a neighbor and acquaintance of Adam Newhouse, who was also identified as a perpetrator and who was in possession of stolen property from the victim's house. Defendant was present when the police were searching Newhouse's apartment, and he was acting suspiciously."¹³⁶

This may seem like a powerful case, but it is debatable whether it proves guilt beyond reasonable doubt. Can we be *sure* that a jury would have found such evidence sufficient to convict? The fact that the defendant was at the home of someone involved in the crime does not make him an accomplice. Even if he "act[ed] suspiciously"¹³⁷ (which, without elaboration, is a highly subjective judgment of limited import), that behavior might reflect his knowledge of his friend's guilt, not his own. It might reflect nothing more than nervousness around police who have come to search a private home, a reaction shared by many law-abiding citizens. The fact that the defendant and one of the perpetrators both had goatees is hardly conclusive.

So, if there is guilt beyond a reasonable doubt, it must be primarily because of the eyewitness identification. Ample evidence suggests the unreliability of eyewitness testimony,¹³⁸ and here the defendant's goatee cuts both ways: It could account for a misidentification, unless one regards it as inconceivable that both a perpetrator and the innocent friend of a co-perpetrator sported goatees. Perhaps the jury was swayed by the eyewitness's confidence, but social scientists have found that such confidence does not correlate with

shoe' to 'DNA tests cannot rule out the possibility that the blood on the shoe was the defendant's.'

133. See, e.g., *People v. Gomez*, 574 N.E.2d 822, 827–28 (Ill. App. Ct. 1991) (holding that defendant's fingerprint in victim's kitchen was insufficient to support murder conviction).

134. 2002 WL 31424298 (Cal. Ct. App. Oct. 25, 2002).

135. *Id.* at *6–7.

136. *Id.* at *7.

137. See *id.*

138. See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979).

accuracy.¹³⁹ Granted, jurors may not have been aware of such data, but it is certainly possible that, during deliberations, one or two jurors would have cautioned against putting excessive weight on the testimony of one eyewitness. At any rate, someone might have done so had their perceptions not been skewed by an involuntary confession.

*Taylor v. Lafler*¹⁴⁰

A recent federal court decision on a habeas petition also reflects the tendency to over-credit eyewitness testimony when determining the harm or harmless-ness of an improperly admitted confession. At trial, the defendant conceded that he had killed the victim, but denied premeditation and claimed that, at most, he was guilty of second-degree murder.¹⁴¹ He claimed that when his confrontation with the victim became heated, he felt threatened and panicked, fatally shooting the victim.¹⁴² Assuming, *arguendo*, that his confession prior to trial was wrongly admitted, the appellate court found the error harmless because “the evidence against petitioner was overwhelming and virtually one-sided.”¹⁴³ That evidence, however, consisted exclusively of three eyewitnesses who, while all claiming that the defendant initiated the attack unprovoked, gave somewhat conflicting accounts.¹⁴⁴

The court acknowledged that “[i]t is improper to focus on the sufficiency of the untainted evidence when making a harmless-error analysis.”¹⁴⁵ The court did not elaborate, but its statement was correct: The question is not whether the untainted evidence suffices to support a conviction, but whether it essentially *guaranteed* a conviction.¹⁴⁶ Unfortunately, the court ignored its own correct statement of the standard. The testimony of three eyewitnesses can support a finding of premeditation, but it is also possible that a jury faced with that evidence alone, especially when the accounts involved inconsistencies, would have concluded that events were too fast-paced to reconstruct with confidence, and thus would have convicted the defendant of something short of premeditated murder.¹⁴⁷

139. See, e.g., Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691, 691–92 (1987).

140. 2003 U.S. Dist. LEXIS 17652 (E.D. Mich. 2003).

141. *Id.* at *5.

142. *Id.* at *7–8.

143. *Id.* at *32.

144. *Id.* at *31.

145. *Id.*

146. See Cooper, *supra* note 7 at 335.

147. See *United States v. Guerrero*, 169 F.3d 933, 942 (5th Cir. 1999) (holding the “eyewitness testimony alone cannot sustain [the defendant’s] conviction”); *United States v. Lane*, 1990 U.S. Dist. LEXIS 5876, at *16 (N.D. Ill. 1990) (granting writ of habeas corpus because “there was insufficient evidence [to support conviction] given the oft-cited unreliability of uncorroborated eyewitness testimony”).

*State v. Dupont*¹⁴⁸

In this state supreme court case, the defendant appealed his conviction of felonious sexual assault of his stepdaughter.¹⁴⁹ The New Hampshire Supreme Court found that the trial court improperly admitted parts of a tape-recorded confession (where other parts of the interrogation were not recorded), but found the error harmless because of the strength of other evidence.¹⁵⁰ However, the only evidence remaining was the complainant's testimony and the contention of two officers that the defendant had confessed.¹⁵¹

It may be likely that the jury would have found these witnesses credible and convicted the defendant even without the tape-recorded confession. But, again, the harmless-error standard requires virtual certainty, not mere likelihood.¹⁵² False accusations of sexual abuse do occur,¹⁵³ as does false testimony by police officers,¹⁵⁴ and there is no way to be sure that jurors would have found the defendant guilty beyond a reasonable doubt based solely on these witnesses and without any corroborating physical evidence.

The above cases converge on a theme: Courts presume that a confession is true. In each case, unless the court is reasoning backwards from a conclusion, it engages in oddly facile fact-finding. These cases involve little or no physical evidence. Instead, they turn on credibility determinations (which are usually considered inappropriate in a harmless-error context)¹⁵⁵ or eyewitness testimony (sometimes supported by questionable circumstantial evidence, with the court failing to address alternative explanations for the evidence or other plausible theories of the crime).

Skeptics may assert that all this establishes only the obvious: Judges are human and make mistakes. In a sense, that is exactly the point. Appellate judges, like the rest of us, are susceptible to the intuition that only the guilty confess. That intuition explains the outcome and reasoning of these cases, which otherwise reflect a lapse in judicial competence to engage in harmless-error analysis.¹⁵⁶

148. 816 A.2d 954 (N.H. 2003).

149. *Id.* at 957.

150. *Id.* at 958–60.

151. *Id.*

152. See Cooper, *supra* note 7 at 335.

153. Kathleen M. Quinn et al., *Resolved: Child Sex Abuse Is Overdiagnosed*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 789, 793 (1989) (“No competent professional disputes the fact that some small proportion of sexual abuse reports are fictitious.”).

154. See, e.g., Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996) (suggesting police perjury is widespread).

155. See Roy Wasson, *The Appellate Process: The Riddling of the DiGuilio Harmless-Error Standard: Whether Error “Contributed” to the Verdict*, 5 BARRY L. REV. 57, 62 (2005) (arguing that for “appellate courts to weigh all the evidence from a cold record and to make factual findings of likely guilt or innocence as a condition of determining the reversibility of error . . . [has] long been recognized as inappropriate”).

156. Two informal studies reach different conclusions about the ability of judges to disregard

It may be countered that the ‘tainted harmless-error analysis’ problem I have identified proves too much. The problem is not limited to confessions; there are other situations where an appellate judge will be convinced of the defendant’s guilt by the very evidence that was improperly admitted. For example, when a convicted murderer challenges the introduction of an improperly seized murder weapon bearing his fingerprints and found in his home, the appellate court’s harmless-error analysis may be influenced by certainty of his guilt.

However, my argument does not commit me to calling for automatic reversal in the case of these other trial errors.¹⁵⁷ This is because not all improperly admitted evidence resembles an improperly admitted confession. First, most evidence simply lacks the power of a confession. For example, while a court of appeals could conceivably be tainted by knowledge of the defendant’s prior criminal record, this is arguably knowledge judges are adequately conditioned to disregard. Second, the improperly admitted confession will tend to be unreliable. As a rule, a circumstance compromising reliability (e.g., a coercive interrogation or the failure to inform a suspect of his rights) is precisely the reason a court of appeals finds that a confession should have been excluded.¹⁵⁸ The same is not true in many other situations involving

an improperly admitted confession. One of them actually involved the very scenario discussed here: judges’ application of harmless-error analysis. See Harry Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated*, 70 N.Y.U. L. REV. 1167, 1206–07 (1995). Judge Edwards’s findings support my argument, i.e., in a hypothetical scenario involving an improperly admitted confession and other evidence that was strong but not overwhelming, 82% of judges surveyed (as compared to 6% of public defenders and 72% of prosecutors) deemed the error harmless. I do not lean heavily on his findings, however, because an informal and unscientific study with a small sample size is too unreliable. For the same reason, I put little faith in the opposite findings in Wistrich et al., *supra* note 29, which tested whether judges would convict in a case with some evidence and an inadmissible confession, and found that they “appeared able to ignore the evidence of the improperly obtained confession.” *Id.* at 1321. Even apart from limited sample size, the authors conceded “serious questions about the applicability of [their] results to the real world.” *Id.* at 1322.

157. Alternatively, one may wonder whether, in presenting the issue as automatic error versus harmless error, I have posited a false dichotomy. Might it be that in cases involving improperly admitted confessions, courts of appeals should apply a heightened standard of harmless-error review rather than scrapping harmless error altogether? There are two problems with such an approach. First, the standard is already supposed to be very high—as noted, a determination of harmless error is warranted only if a court finds ‘reasonable doubt squared.’ See text accompanying note 99. Second, a version of heightened standard is precisely what was proposed in *Fulminante*, i.e., some Justices opined that findings of harmless error should be rare in cases of improperly admitted confessions. See *supra* text accompanying notes 25–27. Yet that has not transpired, for reasons developed throughout this article.

158. A confession extracted without *Miranda* warnings or using improper interrogation techniques may be excludable on grounds unrelated to reliability. See, e.g., WRIGHTSMAN & KASSIN, *supra* note 16, at 27 (noting that fairness, individual rights, and deterring police misconduct also come into play). However, reliability is undeniably central in confession admissibility law. See James Dowden, *United States v. Singleton: A Warning Shot Heard Round the Circuits?*, 40 B.C. L. REV. 897, 932 (1999) (“[I]n several landmark decisions . . . the Court has held that coerced confessions are constitutionally impermissible because they are inherently

improper admission of evidence. For example, in the above hypothetical involving a murder weapon, the court of appeals is surely correct to assume the defendant's guilt. While it is improper to base the harmless-error analysis on that certainty (when it derives from the very evidence that should have been excluded), there is little risk that the impropriety results in the conviction of an innocent man. The situation is very different with improperly admitted confessions, which are often unreliable and yet inherently over-valued.¹⁵⁹

IV. THE PRIOR PROBLEM: THE ADMISSIBILITY STANDARD

Even if appellate courts were to revert to an automatic reversal rule, there would still be a practical roadblock to achieving justice. I have argued that harmless-error analysis is tainted by judges' awareness that the defendant confessed. However, if we eliminate the harmless-error inquiry, we do not eliminate this taint—we merely shift the point at which it comes into play.

Under current law, appellate courts determine the admissibility of a confession, secure in the knowledge that any error can (and often will) be deemed harmless.¹⁶⁰ Under an automatic-reversal approach, evaluation of whether to admit the confession becomes more critical. Knowing the defendant confessed, and is therefore guilty (the intuitively compelling but invalid inference), courts may tend to find that the confession was properly admitted, even if it was not.¹⁶¹ In other words, elimination of harmless error alone will not do any good if it merely leads appellate courts to deny *any* error, harmless or otherwise.

Accordingly, automatic reversal will not achieve its principal purpose unless judicial discretion is reduced in a second respect: through change in the standard for admissibility. Indeed, commentators have recommended this

unreliable . . .").

159. That said, just as there is no reason to assume that my argument applies to all improperly admitted evidence, there is no *a priori* reason to limit the argument to confessions. I have advanced a number of reasons why we should be suspicious of harmless error in the context of improperly admitted confessions, particularly the universal intuition about confessions, their actual unreliability, the performance of judges in cases involving confessions we now know to be false, and their performance applying harmless-error analysis in these areas. If all those reasons are also present in the case of other improperly admitted evidence, we should indeed consider application of the automatic error rule to such errors.

160. Even so, there are some highly dubious findings that admissibility was appropriate. For example, in *Purvis v. Dugger*, 932 F.2d 1413 (11th Cir. 1991), the United States Court of Appeals for the Eleventh Circuit, looking at the totality of the circumstances, upheld the admissibility of a confession even though at one point in the interrogation "a detective pushed Purvis into a chair and told him that the police were going to put him in the electric chair." See *id.* at 1415. Purvis was subsequently exonerated. *Man Imprisoned 9 Years in Killing Is Freed as 2 Suspects Are Found*, N.Y. TIMES, Jan. 17, 1996, at 26.

161. This, in turn, may have the additional harmful effect of distorting doctrine governing the standard of admissibility. See Cooper, *supra* note 7, at 314 ("[U]ltimately judges might come to adjust their view of both substantive and procedural law—to alter the content of the law so as to make errors less common and thus lower the number of reversals.").

measure, albeit for other reasons. Case law requires a court faced with a challenged confession to look at the “totality of the circumstances” to determine whether the defendant confessed freely.¹⁶² Professor Albert Alschuler observed that this approach, and any other that involves assessing the mental state of defendants, is “incoherent in concept, unadministerable in practice.”¹⁶³ Alschuler proposed that courts “abandon the search for ‘overborne wills’ and attempts to assess the quality of individual choices.”¹⁶⁴ Instead, he argues, “[c]ourts should define the term coerced confession to mean a confession caused by offensive government conduct, period.”¹⁶⁵ Most promising, Alschuler would not base this inquiry on the totality of the circumstances—a vague and subjective standard that provides little guidance to the police as to proper interrogation practice—but rather on clear “categorical rules.”¹⁶⁶

Such an approach is made possible by significant advances in knowledge about which kinds of interrogation tactics create a high risk of false confessions.¹⁶⁷ We have ample basis to ban various practices: lengthy interrogations,¹⁶⁸ threats of punishment and promises of leniency,¹⁶⁹ and misrepresentations about the evidence against the suspect.¹⁷⁰

I support this approach, but would add one important argument to support Alschuler’s analysis, derived from my arguments in Parts II and III above. We must reduce judicial discretion with respect to the admission of confessions because the subjective approach, involving a case-by-case inquiry into the defendant’s state of mind based on the totality of the circumstances, cannot reliably be performed by judges who are prejudiced by awareness that the defendant confessed.

Some commentators have proposed a third path. Rather than look solely

162. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 285–86 (1991) (White, J., joined by Marshall, Brennan, Stevens, Scalia, JJ.).

163. Albert Alschuler, *Coerced Confessions: Constraint and Confession*, 74 DENV. U. L. REV. 957, 959 (1997).

164. *Id.* at 957.

165. *Id.*

166. *Id.* at 972. Similarly, Welsh White has proposed a ban on interrogation practices proven likely to produce false confessions. White, *supra* note 16, at 135–36.

167. See GUDJONSSON, *supra* note 64, at 2 (noting “that during the past 20 years or so there have been major advances” in this area).

168. See White, *supra* note 28, at 2046–49 (proposing a six-hour limitation, based on data about the correlation between length of interrogation and risk of false confession).

169. Traditionally the Supreme Court banned confessions elicited by threats or promises of leniency. See *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (holding that a confession cannot be obtained by “any direct or implied promises, however slight”). But the Court has since retreated from that position. See *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) (White, J., joined by Marshall, Brennan, Stevens, Scalia, JJ.) (noting that the holding from *Bram* “under current precedent does not state the standard for determining the voluntariness of a confession”); see generally Alan Hirsch, *Threats, Promises and False Confessions: Lessons from Slavery*, 49 HOW L.J. 31 (2005).

170. See White, *supra* note 28, at 2053–56.

at the circumstances of interrogation, or the quasi-metaphysical question of the defendant's freedom, courts should concern themselves with "a particularized examination of each confession's trustworthiness,"¹⁷¹ excluding a confession if the court finds a "likelihood of unreliability in [the] particular case."¹⁷² However, this approach encounters the same problem as any subjective test: It ignores the serious risk that judges will overestimate the reliability of the confession. Since judges are not immune from the intuition that innocent people do not confess, any subjective determinations in this area are likely to be skewed. For that reason, we ought to reduce as much as possible the discretion of courts, thus limiting the occasions in which that intuition can lead them astray.

V. THE TRIAL ERROR/STRUCTURAL ERROR DISTINCTION

Automatic reversal in the case of wrongly admitted confessions raises a tangential issue that does not affect my overall argument but is worth addressing: the distinction between trial error and structural error. I will not attempt to resolve this issue here, but will touch on how this distinction plays out in the context of confessions.

Fulminante was rooted in the distinction between "structural defects," which require automatic reversal, and mere "trial errors," which are subject to harmless-error analysis.¹⁷³ The Court placed the erroneous admission of confessions in the latter category.¹⁷⁴ A return to automatic reversal, however, does not necessarily eviscerate the underlying trial error/structural error dichotomy.¹⁷⁵ Instead, the Court could leave the dichotomy untouched and declare that the mistake in *Fulminante* lay in placing wrongly admitted confessions on the wrong side of the divide, i.e., in finding them to be trial error when they are really structural error.¹⁷⁶

Chief Justice Rehnquist explained that a trial error is an error that

171. *Id.* at 2021 (characterizing approach others have recommended).

172. Joseph Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 921 (1979).

173. *See Fulminante*, 499 U.S. at 306–12 (Rehnquist, C.J., joined by O'Connor, Kennedy, Souter, Scalia, JJ.).

174. *Id.* at 310.

175. In the recent case of *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), applying automatic reversal to denial of counsel of one's choice, both the majority and dissent evinced discomfort with the distinction. *See id.* at 2564 n.4; *id.* at 2570 (Alito, J., dissenting). The dissent actually denied that *Fulminante* makes such a bright-line distinction. *Id.* at 1570. The majority responded that "it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories," but then opted to eschew reliance on this distinction. *Id.* at 2564 n.4 (majority opinion).

176. Another option, at least theoretically, would call for automatic reversal of *all* errors. But given "the virtually inevitable presence of immaterial error" in trials, such an approach would wreak havoc on the criminal justice system. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

“occurred during the presentation of the case to the jury,”¹⁷⁷ whereas a structural error is one present during and affecting “[t]he entire conduct of the trial from beginning to end.”¹⁷⁸ So defined, improper admission of a confession might seem to be precisely that which Justice Rehnquist termed a “classic ‘trial error.’”¹⁷⁹ It is unlike structural errors such as absence of counsel and presence of a biased judge, which permeate every moment of the trial.

As a chronological matter, the decision to admit a contested confession is generally made pre-trial. Of course, that is not what the Court had in mind in differentiating between ‘during trial’ errors and ‘entire trial’ errors. The actual decision may be pre-trial but its influence begins at a particular point and only lasts for the duration of the error itself, i.e., during the presentation of evidence of the confession.¹⁸⁰ Important parts of the trial will take place before and after the relatively little time consumed by presentation of confession evidence. By contrast, the absence of counsel or presence of a biased judge matter at every moment of trial. They are part of the “framework” within which the entire trial proceeds.¹⁸¹

That distinction, however, subordinates reality to technicality. A wrongly admitted confession does indeed affect the entire trial from beginning to end. Confession evidence is so powerful that the presence of the confession may affect attorneys’ strategy vis-à-vis voir dire, opening arguments, presentation of witnesses, and closing arguments.¹⁸² Because “[t]he trial becomes skewed”¹⁸³ by its admission, a wrongly admitted confession arguably meets the definition of a structural error.¹⁸⁴

177. *Fulminante*, 499 U.S. at 307 (Rehnquist, C.J., joined by O’Connor, Kennedy, Souter, Scalia, JJ.).

178. *Id.* at 309.

179. *See id.* at 310.

180. Even so, the Court’s distinction based on duration is problematically vague. *See* David McCord, *The “Trial/Structural” Error Dichotomy: Erroneous, and Not Harmless*, 45 KAN. L. REV. 1401, 1414 (1997) (“First, what is the beginning point of the duration—the start of voir dire, the moment the jury is sworn in, or the beginning of the prosecution’s opening statement? Second, what is the end point of the duration—the end of the jury instructions or the return of the verdict (either at the guilt phase, or at the sentencing phase if the jury as a role in sentencing)? Third, whatever the starting and ending points, is every moment in between included, or only the times when court is in session?”).

181. *See Fulminante*, 499 U.S. at 310 (Rehnquist, C.J., joined by O’Connor, Kennedy, Souter, Scalia, JJ.).

182. *See* Ogletree, *supra* note 12, at 166 (An improperly admitted confession “distorts the trial process and unduly restricts the defense counsel’s entire approach to the case.”).

183. *Id.*

184. The strength of this argument is enhanced by consideration of the rationale underlying *Fulminante*’s trial error/structural error distinction. The rationale was essentially advanced in a single sentence by the Chief Justice: An error that occurs in the course of the trial, unlike those that permeate the trial from beginning to end, can “be quantitatively assessed in the context of other evidence” to determine its harm or harmlessness. *Fulminante*, 499 U.S. at 307–08 (Rehnquist, C.J., joined by O’Connor, Kennedy, Souter, Scalia, JJ.). There are two reasons to doubt the applicability of this rationale to confessions. The first we have already noted: One cannot isolate confession evidence from all the other evidence in a case, because the decision

Current understanding of the trial error/structural error distinction, then, does not support categorizing a wrongly admitted confession as a mere trial error subject to harmless-error analysis. Whether we call it a structural error or an exceptional trial error that warrants automatic reversal is a matter of taxonomy beyond the scope of this essay. In either case, wrongful admission of a confession warrants automatic reversal.

By all means, the Court and commentators should reexamine the trial error/structural error dichotomy, whether it needs replacing, and, if so, what should replace it. One can perhaps view the above as a case study of the weakness of the trial error/structural error distinction, and how that distinction becomes blurred when applied to certain kinds of errors.¹⁸⁵ However, to address the problem of wrongly admitted confessions, we need not jettison the distinction; we need only recognize that, one way or another, wrongly admitted confessions warrant automatic reversal.

VI. CONCLUSION

The unexamined premise of *Fulminante* is that judges are immune from the tendency to assume confessions true.¹⁸⁶ This premise proves unjustified. I have canvassed many cases, in a variety of circumstances, marked by dubious

whether to admit or exclude the evidence can importantly affect what other evidence is presented. The second reason restates the primary point of this essay: Judges *cannot* accurately assess the respective importance of the confession and other evidence, because they will be tainted by their awareness of the confession.

185. See Ogletree, *supra* note 12, at 164 (“Ultimately, the classification of an error must rest on some empirical assumptions about whether, in the real world, errors of this kind are susceptible to harmless error analysis and how often they are clearly harmless.”). The dichotomy, Ogletree argues, fails to survive its own stated rationale—the notion that harm/harmlessness can reasonably be assessed in the case of trial errors but not structural errors. *Id.* at 162–64. One can easily imagine cases of structural error where the harmlessness of the error is beyond dispute, e.g., a case where the defendant is apprehended with smoking gun in hand. Suppose the judge had a conflict of interest and therefore should have recused himself (a structural error). Can we reasonably say that the harmlessness of the error cannot be assessed? That is not to say that a finding of harmless error should be permitted in such a case. As Professor Ogletree argues, values transcending accuracy may support an automatic reversal regime with respect to certain errors. *Id.* at 164–70. Professor Ogletree’s critique of *Fulminante* has been bolstered by later commentators who had the benefit of subsequent case law and concluded that the trial/structural dichotomy has proven unworkable and counterproductive. See, e.g., McCord, *supra* note 180, at 1408–53.

186. Welsh White has observed: “If confessions are likely to be given disproportionate weight by jurors in determining a suspect’s guilt, they may also skew the determination as to whether a guilty verdict should be . . . determined to be inaccurate. . . . [O]bservers assessing the likelihood of a miscarriage of justice may also overemphasize the importance of the confession,” believing that it “minimizes the possibility of a wrongful conviction.” White, *supra* note 28, at 2034. In context, though, White was not talking about appellate judges assessing harmless error but scholars trying to determine the number of confessions leading to false convictions. *Id.* at 2021. To his credit, White noted that judges are not immune from over-valuing confessions, and that this must be taken into account when crafting the standard for admissibility of confessions. White, *supra* note 28, at 2023–24. He did not, however, apply this insight to the issue of harmless error versus automatic reversal.

rulings related to confessions. Appellate courts find improper admission of confessions to be harmless error in many cases, some of which evince a manifestly misguided finding.¹⁸⁷ Restoring the automatic reversal rule repealed by *Fulminante* would provide a key safeguard against the faulty intuition that innocent persons do not confess.

However, insulating appellate courts from the harmless-error inquiry would not, by itself, solve anything—it would merely shift the problem to the prior determination of admissibility. Accordingly, courts should also change the admissibility inquiry to one based on objective characteristics of interrogations rather than the mental state of the defendant.

This two-fold shift—an objective standard for admissibility, and automatic error in the case of wrongful admission—would have several advantages, including steering courts away from murky determinations about defendants' and jurors' mental states, and providing clearer guidance to police and better deterrence of improper interrogations. The most important advantage would be the additional safeguard against punishment of the innocent.¹⁸⁸ Because of the unique nature of confessions, permitting appellate courts to find harmless error creates too great a risk that the innocent will be punished.¹⁸⁹

We will never eliminate false confessions¹⁹⁰ or the wrongful convictions that sometimes result, but we can take prudent steps to reduce the incidence of

187. Defending *Fulminante*, one commentator remarks that he sees “no reason why a coerced confession might not be deemed harmless, while recognizing that it will be a rare case in which harmlessness beyond a reasonable doubt can be established.” Daniel Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 39 n.15 (1994). He is correct that some coerced confessions are indeed harmless in the sense that, even without the confession, conviction was inevitable. However, allowing judges to uphold convictions in such rare cases also allows them to uphold convictions in less obvious cases as well. For reasons adduced above, the risk is too great that they will find harmless error improperly, and thus inevitably punish some innocent persons. Indeed, Meltzer’s belief that error is demonstrably harmless only in the “rare” case has not been shared by the courts. See *supra* note 96.

188. While automatic reversal would lead to some needless reversals in cases where guilt was proven beyond all doubt, that result is part of an inevitable tradeoff. See Cassell, *supra* note 28, at 1123 (1997) (Policy in this area requires “striking a balance between the competing concerns of protecting suspects and securing public safety.”). Absent the automatic reversal rule, the convictions of some innocent defendants will be upheld. See Ogletree, *supra* note 12, at 167 (An inaccurate finding of harmless error “sentences potentially innocent people to jail or death.”). In short, while we cannot avoid some trade-off between unnecessary re-trials and wrongful convictions, we have good reason to doubt that the harmless-error approach can be trusted to achieve the optimal trade-off. See *id.* at 164 (Harmless-error review is appropriate where “the costs of letting guilty people go free in all the cases in which automatic reversal would have happened despite a clearly harmless error . . . outweigh the costs of individualized judicial inquiry” whereas automatic reversal is indicated where the error in question “is rarely susceptible to harmless error analysis or if the error is rarely harmless . . .”).

189. It should be noted that the automatic reversal rule does not exonerate anyone—it means only a new, fair trial, untainted by the most prejudicial evidence.

190. This is especially true given that some people come forward voluntarily to confess falsely. See, e.g., GUDJONSSON, *supra* note 64, at 218–24.

such tragedy.¹⁹¹ We have failed to do so partly because of an oversight: Where confessions are concerned, appellate judges, like everyone else, falsely intuit that a confession virtually guarantees guilt.

191. For a range of other measures to ameliorate the problem of false confessions, see The Truth About False Confessions, <http://www.truthaboutfalseconfessions.com> (last visited on Aug. 31, 2007).