Criminal Procedure--Self-Incrimination--Harmless Error--Application of the Harmless Error Doctrine to Violations of Miranda: The California Experience

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CRIMINAL PROCEDURE—SELF-INCORPORATION—
HARMLESS ERROR—Application of the
Harmless Error Doctrine to Violations
of Miranda: The California Experience

Because it is impossible to make all criminal trials totally free
from error, all jurisdictions accept the doctrine of harmless error as
it applies to ordinary evidentiary mistakes committed at trial. All
fifty states and the federal courts have harmless error statutes or rules.
Although they vary somewhat, the general theme of these statutes
and rules is that a defendant's conviction will be reversed only if
he was prejudiced by the mistake.¹ The saving of judicial resources
is considered an advantage that outweighs the burden put on the
defendant of arguing that he would not have been convicted in the
absence of error.² Difficulties arise, however, when the error com­
mitted at trial involves a violation of the defendant's constitutional
rights. While the policy of judicial economy still applies, the danger
of undermining the effectiveness of a constitutional guarantee, by
treating its violation as harmless error, must be considered. As will
be discussed, the Supreme Court has fashioned special rules to
handle this issue of harmless constitutional error.³

Using decisions of the appellate courts of California that have
applied the federal harmless error rule to violations of Miranda v. Arizona⁴
and Escobedo v. Illinois,⁵ this Note will examine the logic
and effects of the California application.⁶ However, the California

¹. Chapman v. California, 386 U.S. 18, 22 (1967). CALIF. CONST. art. VI, § 4½ reads:
No judgment shall be set aside, or new trial granted, in any case, on the ground
of misdirection of the jury, or of the improper admission or rejection of evidence,
or for any error as to any matter of pleading, or for any error as to any matter
of procedure, unless, after an examination of the entire cause, including the
evidence, the court shall be of the opinion that the error complained of has
resulted in a miscarriage of justice.

². See generally Mause, Harmless Constitutional Error: The Implication of Chap­

³. See notes 8-26 infra and accompanying text.


⁶. Many of the cases examined in this Note are post-Escobedo but pre-Miranda.
However, since the limited Escobedo warnings of the right to counsel and right
to remain silent as interpreted in People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal.
Rptr. 169 (1965), were subsequently incorporated into Miranda, the Escobedo and
Miranda cases can be legitimately treated as a single entity. In all these cases, the issue
under consideration is the same—how did the California courts apply the harmless
error rule to confessions that were invalid because of some defect in the constitutionally
required warnings?
experience can only be understood by first briefly describing the United States Supreme Court's decisions regarding harmless constitutional error and then showing the approaches taken by other states in their application of the harmless error rule to *Miranda* violations. Not only will this analysis put the California experience in its proper perspective, but it will also show the feasibility and difficulties of implementing any harmless error rule.

I. BRIEF HISTORY OF HARMLESS CONSTITUTIONAL ERROR

Until the 1967 decision of *Chapman v. California*, the Supreme Court, with one exception, had consistently held that a violation of a constitutional right of a defendant in a criminal trial resulted in automatic reversal of his conviction and the ordering of a new trial. In *Chapman*, the Court applied the federal harmless error rule to uphold the conviction of the defendants despite adverse comment to the jury by the prosecutor concerning the defendant's failure to testify. The Court had earlier held that such adverse comment violated a defendant's right not to be compelled to be a witness against himself, as guaranteed by the fifth amendment. In cases after *Chapman*, the Court extended the applicability of its harmless error rule.


9. Motes v. United States, 178 U.S. 458 (1900), in which the Court held that evidence received in violation of the defendant's sixth amendment right to be confronted by witnesses against him was harmless because of the defendant's own confession of guilt.


to certain violations of the sixth amendment's right to counsel\^12 and confrontation.\^13

The Court in \textit{Chapman} first held that the issue whether a conviction could stand when a constitutional right had been violated is a federal question to be decided under a federal harmless error rule.\^14 The Court attempted to give content to this rule by distinguishing between "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"\^15 and "constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless . . . .\"\^16 The Court exemplified what it meant by basic constitutional rights by citing cases dealing with confessions, the right to counsel, and the right to have an impartial judge.\^17 In devising a standard to deal with those errors that in a particular case are sufficiently insignificant to be considered harmless, the Court referred to the test it had applied in the earlier case of \textit{Fahy v. Connecticut}\^18 in requiring "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."\^19

The \textit{Chapman} test, directly descended from \textit{Fahy}, came under heavy criticism by commentators as being ambiguous and unworkable, and thereby giving little effective guidance to lower federal and state courts.\^20 With these difficulties clearly in mind,\^21 the Supreme Court

\begin{itemize}
\item 14. Justice Harlan dissented, maintaining that the federal courts should be concerned only with whether the state harmless error rule comports with the due process requirements. 396 U.S. at 51. \textit{See also} Mause, \textit{supra} note 2, at 527-37; \textit{The Supreme Court, 1966 Term}, 81 Harv. L. Rev. 69, 208-09 (1967); \textit{Note, Constitutional Law—Judicial Power—Harmless Error}, 19 Case W. Res. L. Rev. 157, 160-67 (1967); \textit{Note, Harmless Constitutional Error}, 20 Stan. L. Rev. 83 (1967); \textit{Recent Case}, 20 Vand. L. Rev. 1157 (1967).
\item 15. 396 U.S. at 23.
\item 16. 396 U.S. at 22.
\item 17. 396 U.S. at 23. It is difficult to understand why, as in \textit{Chapman}, freedom from intentional adverse comments by the prosecutor, when the defendant is legitimately exercising his right against self-incrimination, is not basic to a fair trial and therefore subject to the automatic reversal rule. \textit{See} Justice Stewart's concurring opinion in which he advocated a rule of automatic reversal for \textit{Griffin} violations. He stated:
\begin{quote}
The adoption of any harmless error rule . . . commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.
\end{quote}

396 U.S. at 45.
\item 18. 375 U.S. 85, 86-87 (1963).
\item 19. 396 U.S. at 24.
\item 20. Not only is the Court's failure to specify those additional constitutional rights that are immune from the harmless error rule confusing, the standard itself is dif-
in *Harrington v. California*, despite its insistence to the contrary, committed itself to the traditional overwhelming-evidence test. In *Harrington*, a codefendant's inculpatory confession was introduced into evidence against the petitioner in violation of his sixth amendment right to confrontation, as interpreted in *Bruton v. United States*. The Court concluded that the case against the petitioner was "so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave the state conviction undisturbed." Thus, the focus of inquiry under this test is on the amount of untainted evidence rather than on the effect that the tainted evidence had on the particular fact finder's decision.

II. HARMLESS ERROR AND MIRANDA—THE VARIOUS APPROACHES

In *Miranda*, the Supreme Court determined that in order to neutralize the inherently coercive atmosphere of custodial interrogation, it was difficult to implement. See, e.g., *People v. Ross*, 67 Cal. 2d 64, 429 P.2d 606, 60 Cal. Rptr. 254 (1967), which also dealt with a *Griffin* violation. While referring to the *Chapman* test, the majority in *Ross* relied on the overwhelming-evidence test and ruled that the error was harmless, essentially balancing the magnitude of the error against the extent of the untainted evidence. In his dissent, Chief Justice Traynor argued that the references to *Fahy* in *Chapman* "can be explained only on the theory that a substantial error that might have contributed to the result cannot be deemed harmless regardless of how clearly it appears that the jury would have reached the same result by a correct route . . . ." 67 Cal. 2d at 85, 429 P.2d at 621, 60 Cal. Rptr. at 269. To the Chief Justice, applying *Chapman* is a two-step process. First, the state must show beyond a reasonable doubt that the result would not have been different absent the error. If this is demonstrated, then the state must prove that the error did not play a substantial part in the jury's verdict, the guide being the magnitude of the error, not the amount of untainted evidence. See also L. Hall, Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 628 (3d ed. 1969); Thompson, *Search and Seizure and The Myth of Harmless Error*, 42 Notre Dame Law., 457, 467 (1967); Note, *Harmless Constitutional Error*, 83 *Harv. L. Rev.* 819 (1970).


24. 391 U.S. 123 (1968). The Court held in *Bruton* that the introduction of a codefendant's confession at a joint trial violated the defendant's sixth amendment right to cross-examination.

25. 395 U.S. at 254. But see Justice Brennan's dissenting opinion in which he accused the majority of overruling *Chapman*. As he stated, *Chapman*, then, meant no compromise with the proposition that a conviction cannot constitutionally be based to any extent on constitutional error. The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of *Chapman* and makes that compromise.

26. That the verbal formulation of the harmless error rule is not finally settled is indicated by Justice Blackman's concurring opinion in *Dutton v. Evans*, 400 U.S. 74, 99 (1970), in which he used the "beyond a reasonable doubt" standard of harmlessness, citing to both *Chapman* and *Harrington*. 400 U.S. at 95.
tions, certain warnings must be given to preserve the accused's fifth amendment privilege against self incrimination. The Court explicitly stated that a primary purpose for requiring the warnings was to deter police from using "third-degree" techniques, whether of a physical or psychological variety. However, even in those cases in which such specific coercion was absent, the Court found that custodial interrogation without prior warnings would be per se coercive. One desired effect of this determination was to relieve the courts of the time-consuming process of deciding whether the statement was involuntary under traditional due process criteria. Basically, if the warnings are not given, any statement resulting from custodial interrogation is necessarily involuntary.

The Supreme Court has not yet considered whether Miranda violations are subject to the harmless error rule—although it does not seem that the Court can avoid deciding that issue indefinitely. Thus, while the state courts must follow the federal harmless error standard, in the absence of definitive Supreme Court opinions they are free to expand the areas in which the standard applies. Accordingly, some states do regard violations of Miranda as harmless error.

The common approach in most state courts is to divide constitutionally invalid confessions between (1) coerced or involuntary confessions—those in violation of the due process clause and which subject a conviction to automatic reversal—and (2) "voluntary" confessions—those inadmissible solely because the Miranda warnings have not been given and which therefore make a conviction amenable to an application of the harmless error rule. The inconsistency of this approach with the premises underlying Miranda is readily apparent: if statements obtained during custodial interrogations without the required Miranda warnings are inherently coerced, they cannot be termed "voluntary."

That the voluntary-involuntary distinction is tenuous is exemplified by the reasoning of the Pennsylvania supreme court in Commonwealth v. Padgett, the case in which that court first applied the harmless error doctrine to a Miranda violation. In focusing on the

27. 384 U.S. at 466. See also L. Hall, Y. Kamisar, W. LaFave & J. Israel, supra note 20, at 626.
28. 384 U.S. at 446-55.
29. 384 U.S. at 455-56.
30. 384 U.S. at 457.
31. For example, in addition to applying the harmless error rule to Miranda violations, the California courts have applied it to violations of Mapp v. Ohio, 367 U.S. 643 (1961). See People v. Parham, 60 Cal. 2d 378, 384 P.2d 1001, 38 Cal. Rptr. 497 (1963), cert. denied, 377 U.S. 945 (1964).
32. See cases cited in note 7 supra.
33. See text accompanying notes 27-29 supra.
effect that a constitutional rule has on the reliability of the guilt-determining process, the court said, "When contrasted with the inherent unreliability of a conviction procured . . . on the basis of a coerced confession, a conviction obtained through use of an Escobedo or Miranda violation does not go to the very roots of fact-finding reliability, for such a statement may well be voluntary." This analysis not only avoids the "inherently coercive" language of Miranda, but also fails to take into account the pre-Miranda cases in which confessions obtained by objectionable police methods were excluded without regard to their trustworthiness. For example, in finding the defendant's confession involuntary under traditional due process grounds, the Supreme Court in Spano v. New York stated:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

In deciding whether to apply the harmless error rule, the court in Padgett placed great reliance on whether the Supreme Court had applied the constitutional right retroactively. The court argued that a retroactive application of a particular constitutional right was indicative of the Supreme Court's evaluation of the effect of that right on the reliability of the fact-finding process. The Padgett court reasoned that, since the Supreme Court had not applied Miranda retroactively, the harmless error rule was appropriate. That this logic cannot withstand close scrutiny is indicated by Harrington, in which the Supreme Court held as harmless error a violation of the defendant's right to confrontation as interpreted in Bruton—a decision to which the Court had given retroactive effect. Thus it seems clear that harmless error and lack of retroactivity do not always coincide.

Finally, the Pennsylvania procedure of distinguishing between voluntary and involuntary confessions may not accomplish a savings of judicial resources, which is the primary justification of the harmless error rule. This is so because the Pennsylvania courts must determine both whether the statement introduced at trial is inadmissible solely on Miranda grounds, and if so, whether it is still "involuntary"
under the multi-factor due process analysis that *Miranda* supposedly replaced. Thus, in Pennsylvania, the analysis does not stop once a *Miranda* violation is found, but must continue in order to discover whether the traditional due process standard has been violated. If the court then deems the statement involuntary on the basis of the second step of this analysis, it must order a new trial. If the Pennsylvania courts are to be consistent with the last of the pre-*Escobedo* involuntary-confession cases, which emphasized deterring the police from using illegal or coercive means of interrogation, reversals will be frequent, with the result that judicial resources will be further expended. In contrast, should the courts interpret *Miranda* violations to demand automatic reversal, there would be no need for the due process analysis; and the trial courts, prosecutors, and police would know with certainty that when a statement is obtained and used in violation of *Miranda*, the defendant’s conviction will be subject to automatic reversal. Not only would this interpretation deter the police from violating *Miranda*, but it would also force the trial courts and prosecutors to analyze rigorously any doubtful confession. Thus, the protections of *Miranda* would be assured, and the possibility of error would be diminished.

In an effort to avoid the difficulties of the voluntary-involuntary distinction, as exemplified by the approach taken in Pennsylvania, the California appellate courts have devised an alternative approach. Despite *Miranda*, which expressly rejected the distinction between an admission and a confession, the California courts have continued to recognize this distinction in applying the harmless error rule to *Escobedo-Miranda* violations. Although the *Escobedo-Miranda* warnings must be given before either admissions or confessions may be admitted at trial, the California courts have held that any defect in administering these warnings demands automatic reversal if the statement erroneously introduced in evidence was a confession.

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42. As the California supreme court stated in *People v. Fioritto*, 68 Cal. 2d 714, 717, 401 P.2d 625, 626, 68 Cal. Rptr. 817, 818 (1965):

A principle objective of that decision [*Miranda*] was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions or confessions.

See also L. HALL, Y. KAMISAR, W. LAFAYE & J. ISRAEL, supra note 20, at 639; Mause, supra note 2, at 519.


44. 373 U.S. at 519; see also text at note 37 supra.

45. 384 U.S. at 476-77.

46. There is one exception to California’s rule of automatic reversal of confessions obtained without proper *Escobedo-Miranda* warnings. This is the multiple-confessions situation, i.e., where the same defendant has confessed to the same crime a number of times. Before this exception can be applied, it must appear that (1) the inadmissible confession did not contain details significantly different from the other confessions; (2) the prosecution placed no undue emphasis on the erroneously admitted confession; and (3) the confessions improperly obtained did not induce those legally obtained—which
but that if the statement was an admission, the harmless error rule applies. In order to be considered a confession, a statement must include every essential element of the alleged crime. An admission, however, "is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt." The rationale for this distinction is that a confession, but not an admission, constitutes such persuasive evidence of guilt that it "operates as a kind of evidentiary bombshell which shatters the defense," thereby making automatic reversal appropriate.

The results of this distinction are illustrated by the case of In re Shipp. Petitioner had been convicted of a felony-murder charge arising out of a robbery, and the principal evidence against him was a tape-recorded statement, obtained without the proper Escobedo warnings, in which he admitted both the robbery and a connected assault which left the victim injured but alive. While the court in Shipp classified the statement as a confession to the crime of robbery, that court, as well as California courts in subsequent cases, interpreted it as only an admission to the charge of murder, thereby making the statement susceptible to the harmless error rule.

While California's approach is unique, it deserves careful consideration for several reasons. First, it illustrates the general difficulties requires in effect that the legal confession must be the first obtained. The basis for this exception is that the presence of these three factors assures that there was a reasonable probability that the improperly obtained confession did not contribute to the verdict and that therefore the harmless error rule is appropriate. See People v. Valencia, 257 Cal. App. 2d 620, 73 Cal. Rptr. 303 (1968); People v. Jacobson, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965). See also Recent Development, 65 Mich. L. Rev. 563 (1967). See also notes 90-91 infra and accompanying text.


53. See, e.g., People v. Powell, 67 Cal. 2d 82, 429 P.2d 137, 59 Cal. Rptr. 817 (1967); In re Cline, 255 Cal. App. 2d 115, 63 Cal. Rptr. 233 (1967). The California supreme court has occasionally acknowledged the difficulties in implementing this distinction. In two cases, People v. Doherty, 67 Cal. 2d 9, 429 P.2d 177, 59 Cal. Rptr. 857 (1967), and People v. Powell, 67 Cal. 2d 32, 429 P.2d 137, 59 Cal. Rptr. 817 (1967), the court simply applied the harmless error rule to the introduction of statements obtained without the Escobedo warnings, without determining whether the statement was an admission or a confession. By avoiding the distinction, the court was in effect following the practice of those states that apply the harmless error rule to all Escobedo-Miranda violations. In the two cases referred to—Doherty and Powell—the court found prejudice, and therefore the failure to make the distinction did not adversely affect the defendant. Even if the statements were in fact confessions, thus making the convictions subject to automatic reversal, the result in both instances would have been the same—the ordering of a new trial.
that any court must face in deciding whether the harmless error rule applies to *Miranda* violations. Like Pennsylvania, California applies the *Harrington* overwhelming-evidence test to statements obtained in disregard of *Miranda*, the only difference being California's distinction between admissions and confessions. Once a statement is considered an admission, the analytical process in both states is the same. Second, because California's courts hold that a confession received in violation of *Miranda* requires that a conviction be automatically reversed, California offers more protection to the *Miranda* guarantees than those states that employ the voluntary-involuntary distinction. Thus, if the potentially moderate California practice severely restricts the effectiveness of *Miranda*, a greater restriction on its effectiveness can be anticipated from those states that apply the harmless error rule to all "voluntary" statements obtained in violation of *Miranda*. Third, the primary concern of the California courts, even before *Harrington* and despite their constant references to the *Chapman* test, has been with the amount of untainted evidence presented at trial. As such, the California experience can be viewed

54. In the area of admissions, it would seem that the California courts should also have to make the voluntary-involuntary distinction. In order to avoid making this distinction, they would have to apply the harmless error rule to all coerced (in the sense of violations of the due process clause) admissions. Such an application would be contrary to the Supreme Court's decision in *Watts v. Indiana*, 338 U.S. 49 (1949), in which the Court held that if the means of acquiring evidence violates due process guarantees, then automatic reversal is appropriate. The Court stated:

In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken.

338 U.S. at 55.

With the one exception of *People v. Gardner*, 266 Cal. App. 2d 19, 71 Cal. Rptr. 568 (1968), the California appellate courts, when confronted with an admission obtained in violation of *Escobedo* or *Miranda*, have avoided the difficulty by simply stating the general rule that admissions are subject to the harmless error rule and not recognizing any voluntary-involuntary distinction.

55. See, e.g., *People v. Milton*, 270 Cal. App. 2d 438, 75 Cal. Rptr. 803 (1969), in which the court ruled that the admission obtained after the petitioner had invoked his right to silence violated *Miranda*. But the court did not consider this harmless error because the inconsistencies between these admissions and the defendant's subsequent testimony at the trial, which was also excluded, were integral parts of the prosecution's case and all other evidence was purely circumstantial. See also *In re Shipp*, 66 Cal. 2d 721, 726, 427 P.2d 761, 764, 59 Cal. Rptr. 97, 100 (1967), in which the California supreme court found that the failure to advise petitioner of his right to counsel or his right to remain silent was prejudicial because "[e]xcept for the tape recording [where defendant described in detail how he had robbed and 'restrained' the victim] the prosecution did not introduce evidence of a persuasive nature that connected Shipp with the crime." *People v. Webster*, 254 Cal. App. 2d 743, 62 Cal. Rptr. 476, (1967), in which the court, after ruling that the defendant's admission was made without the *Escobedo* warnings, stated:

In view of the circumstantial nature of the other evidence against the defendant, the evidence of his statement in which he said that he had choked Mrs. Harley [the charge was murder and therefore the statement was classified as an admission] was bound to be very damaging to the defendant in the event that the jurors
as an indication of the direction in which the state courts will go on the issue of harmless error now that the overwhelming-evidence test is the law. Finally, not only does California have sufficient case law in point, but the high regard accorded its courts gives their decisions strong precedential value. Thus, the Supreme Court will no doubt consider the California approach seriously when it finally decides whether, and in what way, to apply the harmless error rule to Miranda.

III. THE LESSONS FROM CALIFORNIA

A common practice of the California appellate courts is to use the harmless error doctrine as a means of avoiding the more difficult determination of whether a constitutional error has been committed. For example, in People v. Cox,56 rather than determining the sufficiency of the Miranda warning, a California court of appeals declared that, even assuming that the police officer's warnings were inadequate, the introduction at trial of the defendant's admission was not prejudicial.57 Similarly, in People v. Williams,58 the California supreme court declared that even if the "arguably technically insufficient" warning did not satisfy the Escobedo requirements, the effect of the defendant's statements at most was to impeach his credibility.

believed the testimony of Officer Welch. There is no reason to assume that the jurors found that testimony to be incredible.

The problem with this type of analysis is that the court seems to be implying that if there had been stronger untainted evidence against the accused, the error would have been harmless. See People v. Talley, 65 Cal. 2d 830, 433 P.2d 564, 66 Cal. Rptr. 422 (1967), and In re Cline, 255 Cal. App. 2d 115, 63 Cal. Rptr. 235 (1967). It should also be noted that the California courts employed a variety of additional methods of circumventing Chapman when that decision was the law. For example, the Chapman test was expressly misquoted in a line of cases. See, e.g., People v. Coffey, 67 Cal. 2d 204, 430 P.2d 15, 60 Cal. Rptr. 457 (1967). See also People v. Haston, 69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968), in which the California supreme court, after deciding that the petitioner's confessions to crimes with which he was not charged were obtained without the proper Escobedo warnings, declared that their introduction into evidence for the purposes of establishing a modus operandi was harmless error. The court stated what it considered the Chapman test to be:

That standard "requires reversal if, upon an examination of the entire record, it appears reasonably possible that the error might have materially influenced the jury in arriving at its verdict, and the error must be considered harmless if the likelihood of material influence is not within the realm of reasonable possibility."


at trial, and their introduction into evidence was harmless, due to other overwhelming evidence of guilt.  

This avoidance of the constitutional issue is contrary to the underlying assumption of Chapman and Harrington that in order to apply the harmless error rule, a court must first discover an error.  
The rule was not intended by the Court to serve as a method of avoiding necessary decisions on constitutional issues. As a practical matter, the substantive content of the Miranda protections will never be adequately developed if the courts are allowed to refrain from deciding the tough, but necessary, constitutional issues.  

Even more important is the way in which the California courts have used the overwhelming-evidence test to negate the policies and protections of Miranda. The opinion in In re Cline illustrates this point. In Cline the wounded defendant, who had lost much blood and was in a state of shock, was interrogated in a hospital without any prior warnings. Under these circumstances, the defendant admitted that he had shot at police deputies. The court interpreted this acknowledgment as an admission because it did not indicate that the defendant was aware that his targets were police—an essential element of the alleged crime.  
The court then decided that since the admission “had heavily incriminatory quality,” it might have motivated the defendant to testify at trial, where he was impeached by four prior felony convictions. The court concluded, therefore, that the introduction both of the admission and of the prior convictions must be considered errors. However, the court considered them harmless errors due to “the massive, immovable, independent evidence of guilt,” consisting entirely of the eyewitness accounts of two police officers, one of whom was wounded at the time of the alleged crime. The court stated:

Relative to the massive weight of independent proof, Cline's extra-judicial incrimination was not an evidentiary bombshell but only a popgun. Neither his inadmissible statement nor an adverse jury reaction to his courtroom testimony could damage a case lost beyond repair.  

Even if one accepts the court's questionable assertion that the

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59. 71 Cal. 2d at 622, 456 P.2d at 687, 79 Cal. Rptr. at 69.
60. 386 U.S. at 20-21.
61. For a discussion of the many aspects of Miranda that are still undefined, see L. HALL, Y. KAMISAR, W. LAFAYE & J. ISRAEL, supra note 20, at 533-52.
63. The defendant was charged with assault with a deadly weapon on a police officer, under CAL. PENAL CODE § 245(b) (West 1968).
64. 255 Cal. App. 2d at 124, 63 Cal. Rptr. at 240.
65. 255 Cal. App. 2d at 124, 63 Cal. Rptr. at 240.
66. 255 Cal. App. 2d at 125, 63 Cal. Rptr. at 240.
untainted evidence was overwhelming, the fact remains that in spite of all this legitimate evidence, the police interrogated a wounded man who was not only weak from loss of blood, but also was still in a state of shock. In describing the need for the *Miranda* warnings, the Supreme Court in that case pointed to interrogations which "trade[s] on the weakness of individuals."67 Surely Cline's interrogation should be included within that category. Indeed, the police conduct involved there might have been so offensive as to violate even the traditional due process involuntary test.68 Yet, the court, by mechanically employing the harmless error rule, never reached the question whether the admission violated the due process requirements. Nor did the court consider the possible unreliability of statements elicited from the defendant while he was wounded and in shock. Thus, under the guise of avoiding reversal on account of inconsequential error, the court not only sterilized the *Miranda* decision, but also nullified any due process protection outside *Miranda*. Even if intentional bad faith by the police is partially discounted,69 police practices such as in *Cline*—which are no more than a careless and senseless disregard of the law—are strong evidence that a rule of automatic reversal is needed in order to deter official misfeasance.70 It is submitted that to dismiss this type of flagrant disregard of *Miranda* as harmless error would amount indirectly to overruling that decision and depriving an accused of his legitimate rights.

The fact that *Cline* is not an isolated case is demonstrated by *People v. Tally*,71 in which two brothers were charged with burglary and both made extrajudicial statements without having been given any warnings by the police. In deciding that one defendant's admission, in which he declared among other things that "his brother was a better burglar," was harmless, the court said:

**Although his inconsistent statements regarding the stolen articles found in his home might be viewed as showing a consciousness of guilt . . . and other of his statements might be viewed as having a**

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67. 384 U.S. at 455-57.
69. See L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 20, at 444-46, for a statement of the position that much of the official misbehavior is indeed intentional. See also Project, Interrogations in New Haven: The Impact of *Miranda*, 76 YALE L.J. 1519 (1967).
71. 65 Cal. 2d 830, 423 P.2d 564, 56 Cal. Rptr. 492 (1967).
slight tendency to incriminate him, the statements added little to the prosecution's strong case against him.\textsuperscript{72}

Thus in spite of the complete disregard by the police of their duty to give the Escobedo warnings, the court concerned itself only with the "slight" incriminatory tendency of the defendant's statements. The Tally case, like Cline, illustrates the extent to which the California courts will go to uphold a conviction by use of the inherently subjective overwhelming-evidence rule. A determination whether a defendant is entitled to the constitutional protections of Miranda that is based on whether the judge characterizes the inadmissible statement as "a popgun" or considers it as adding "little to the prosecution's case" seriously undermines the defendant's constitutional rights under the fifth amendment.

A final indication of the extent to which some California courts will go to avoid a finding of prejudice in situations in which the dictates of Miranda have not been followed is their practice of finding harmless error because a defendant's invalid admissions were consistent with his subsequent defense. In People v. Hooper,\textsuperscript{73} the court ruled that the introduction of the defendant's admissions—which had been obtained without the Escobedo warnings—was harmless error because those admissions were no more than a repetition of the defendant's alibi to which he and his witnesses had testified at the trial. At no point in its opinion did the court consider the influence of the invalid admission on the defendant's decision to use the alibi defense or on his decision to take the stand.

In People v. Alesi,\textsuperscript{74} the California supreme court at least acknowledged that it would be illogical to rule that the introduction into evidence of the invalid admission was harmless error because it was consistent with the accused's defense—that he did not make the illegal sale—when that defense was in fact influenced by the invalid admission.\textsuperscript{75} The court decided, however, that even if the defense presented at trial was influenced by the illegally obtained admission, it was the only meaningful defense available and, therefore, the error was harmless.\textsuperscript{76} The practical effect of this analysis, therefore, is that after finding that the defense was influenced by the admission, the court is required to engage in the questionable and time-consuming process of identifying and evaluating all the possible defenses in each particular case in order to be sure that the one actually presented by the defendant was the only meaningful one available. Furthermore,

\textsuperscript{72} 65 Cal. 2d at 840, 423 P.2d at 571-72, 56 Cal. Rptr. at 499-500 (emphasis added).
\textsuperscript{73} 250 Cal. App. 2d 118, 58 Cal. Rptr. 100 (1967).
\textsuperscript{74} 67 Cal. 2d 856, 434 P.2d 360, 64 Cal. Rptr. 104 (1967).
\textsuperscript{75} 67 Cal. 2d at 862, 434 P.2d at 364, 64 Cal. Rptr. at 108.
\textsuperscript{76} 67 Cal. 2d at 862, 434 P.2d at 364, 64 Cal. Rptr. at 108.
this procedure will offer little protection to defendants if the court, in determining whether a defense was meaningful, insists that the defense and admission be consistent with each other. In People v. Shepard,\textsuperscript{77} for example, the defendant's three conflicting admissions, all obtained without the Escobedo warnings, were introduced at trial to demonstrate the defendant's consciousness of guilt and his ownership of the gun that, after two previous denials, he finally admitted owning in the third admission. In determining that the error in receiving the admissions in evidence was harmless, the court first reasoned that if the jury had believed the defendant's alibi witness, it would not have had to concern itself with the conflicting admissions. Apparently, the court did not consider that the witness' credibility may have been affected by the conflicting admissions. Second, the court found that defendant's admission that he owned the gun was consistent with his subsequent defense. The court stated:

Nor was the story told at the trial induced by the original denial of ownership; the final version was impelled by the testimony that defendant owned the gun—a fact which the police would and could have developed even if defendant had exercised his right to remain silent.\textsuperscript{78}

Thus, the court not only admitted that the defendant's admissions "impelled" his defense, but also assumed and stated that the admission was true, even though it was never proven at trial.

IV. Observations

While the California approach demands automatic reversal when confessions obtained in violation of Miranda are introduced at trial, and therefore represents a more moderate approach than that taken in those states that apply the harmless error rule to all Miranda violations, its distinction between admissions and confessions in applying the harmless error rule is illusory and untenable.\textsuperscript{79} As the Supreme Court said in Miranda, "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degree of incrimination."\textsuperscript{80}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77} 250 Cal. App. 2d 736, 58 Cal. Rptr. 814 (1967).
\item \textsuperscript{78} 250 Cal. App. 2d at 738, 58 Cal. Rptr. at 816.
\item \textsuperscript{79} See R. Traynor, The Riddle of Harmless Error 59-64 (1970), in which Justice Traynor, retired Chief Justice of the California supreme court, states that although he formerly supported the confession-admission distinction, he now views it with some reservation "in the light of additional reflection on the many post-Miranda problems that confront state courts." He argues, however, that an "appropriate"—albeit limited—harmless error test should be applied to both confessions and admissions. His method of determining the harmlessness of an error that involves the admission into evidence of statements obtained in violation of Miranda is to examine the nature and number of issues that the statements resolve against the defendant. Id. at 59.
\item \textsuperscript{80} 384 U.S. at 476.
\end{itemize}
\end{footnotesize}
Certainly a defendant's admission that he robbed and assaulted a victim or that he shot at police has as much influence on the trier of fact as does an actual confession of murder or intentional assault of a police officer. Also, there is no reason to doubt that coerced admissions are as unreliable as coerced confessions. Yet, in California, the introduction of the latter into evidence will result in automatic reversal, whereas the introduction of the former will be susceptible to the harmless error rule.

More important than the above considerations, however, the California experience illustrates the extent to which the harmless error rule can nullify the force of Miranda in protecting a defendant's fifth amendment privilege against self-incrimination. The most flagrant abuses of Miranda, when embodied in admissions, will be tolerated so long as the amount of untainted evidence justifies the conviction. The problem remains, of course, to determine exactly what untainted evidence is and how much of this evidence is necessary to justify a conviction. Instead of subjecting a defendant's constitutional rights to analysis under this quantitative standard, it would seem more appropriate to insist on strict adherence to the dictates of Miranda and to require automatic reversal if an inadmissible statement is introduced at trial. In this manner, the police will be deterred from violating the Miranda requirements, and the prosecutors and trial courts, working under the stricture of automatic reversal, will be eager to guard against the introduction of any inadmissible statement. As a result, the frequency of error will be diminished and a savings of judicial resources can be effected. This argument is reinforced by the fact that the Miranda warnings can be given with a minimum of difficulty, and while the exact dimensions of that decision are as yet unclear, there would seem to be little administrative cost in possible over-protection. Thus, the Miranda warnings should be given whenever there is any possibility that the interview could be termed "custodial interrogation." Moreover, the police should insist upon an explicit waiver, and all interrogation should cease once an accused expresses that desire. Adherence to this strict procedure will result in the admissibility of any significant statement, and the procedure itself is consistent with our tradition as an accusatorial, not inquisitorial, system.

81. See text accompanying notes 52-53 supra.
82. See text accompanying notes 62-66 supra.
83. See note 54 supra.
84. Id.
85. 384 U.S. at 488-86. But see Justice White's dissenting opinion in Miranda, 384 U.S. at 584-86.
87. 384 U.S. at 460.
It has been argued that automatic reversal is especially appropriate when illegally obtained confessions are introduced because of the certainty that the confession will so permeate the proceeding that any effective defense is impossible.\textsuperscript{88} Thus, to fashion a harmless error rule based entirely on those few cases in which prejudice will not be found would result in a greater expenditure of judicial resources because of the necessity of proving prejudice in the vast majority of cases in which it would otherwise be legitimately presumed.\textsuperscript{89}

It is possible that a rule of automatic reversal would have to make an exception for those cases involving either multiple confessions—in which the defendant's first confession was obtained in complete compliance with constitutional requirements while subsequent confessions were not, and yet all were admitted into evidence—or multiple admissions—in which the defendant made precisely the same admission more than once, but only the first admission was elicited constitutionally. Such an exception would be necessary because it is not yet clear that repeated \textit{Miranda} warnings are necessary each time a statement is elicited.\textsuperscript{90} Therefore, there may be no error at all if the proper warnings were given to the defendant initially. Moreover, the degree of prejudice resulting from the introduction of the second statement would necessarily be slight since the fact-finders would have the same information before them in the error-free introduction of the first statement.\textsuperscript{91} Thus, the existence of such a narrow exception to a rule of automatic reversal would probably not result in an undermining of the \textit{Miranda} protections, as is the case under the harmless error rule.

\textbf{V. CONCLUSION}

The lessons learned under California's experience with the harmless error rule reinforce the conclusion that a rule of automatic reversal is needed to ensure that the requirements of \textit{Miranda} are fully complied with. The lack of effective control by the Supreme Court over the state courts' application of the inherently subjective

\textsuperscript{88} Mause, \textit{supra} note 2, at 543.  
\textsuperscript{89} Id.  
\textsuperscript{90} See Maguire v. United States, 396 F.2d 327 (9th Cir. 1968); Miller v. United States, 396 F.2d 492 (8th Cir. 1968); Tucker v. United States, 375 F.2d 363 (8th Cir.), \textit{cert. denied}, 389 U.S. 888 (1967); People v. Hill, 39 Ill. 2d 125, 233 N.E.2d 367 (1968); State v. Magee, 52 N.J. 352, 245 A.2d 539 (1968). \textit{See also} note 46 \textit{supra}.  
\textsuperscript{91} Similarly, it is arguable that the actual prejudice to the defendant at trial may not be great in the situation where the first statement is elicited in violation of \textit{Miranda} but subsequent statements are obtained in compliance with the requirements of that case. However, because the initial statement has such a high likelihood of pressuring the accused to give the subsequent statements—thereby prejudicing him by drawing forth an otherwise constitutionally valid and admissible statement—all the statements should be excluded to encourage the police to comply with the dictates of \textit{Miranda}.  

overwhelming-evidence standard must be recognized. The Court would, of necessity, have to engage in extensive review of trial court proceedings in order to control even the most flagrant misapplications of that standard, and it seems unlikely that the Court has either the time or the inclination to oversee the trial courts in such a manner. This lack of effective control by the Court is especially dangerous in cases involving Miranda violations because of the low regard in which the Miranda safeguards are held generally,92 and specifically in the state courts.93 Thus, a rule of automatic reversal seems to be both the appropriate and necessary solution if the protections and general viability of Miranda are to be retained.