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# *Miranda*'s Fall?

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THE FALL. By *Albert Camus*. New York: Vintage Books. 1991 (Justin O'Brien trans., 1956). Pp. 147. $9.

## I.

If one wishes to revisit a classic, Albert Camus's *The Fall* is a riskier choice than Harper Lee's *To Kill a Mockingbird*,[1] which Steven Lubet eloquently discussed last year in these pages.[2] It is not only that Camus's work will be less familiar to legal audiences than Lee's, despite the fact that *The Fall* is becoming recognized through critical "revisitation" as perhaps Camus's greatest novel.[3] It is also that the legal protagonist of *The Fall*, Jean-Baptiste Clamence, does not have Atticus Finch's immediate appeal. Finch is idealistic, Clamence is existential; Finch is pious, Clamence is debauched; Finch is hopeful, Clamence is mordant; Finch is American, Clamence is French; Finch is a lawyer, Clamence is an ex-lawyer who is now a judge-penitent.[4] Indeed, "the fall" of the title describes Clamence's fall from being an idealistic attorney much in the mold of Finch to being the urbane, dissolute, and strangely knowing expatriate he is at the time he tells his story. At least regarding the question of whether it is possible to live greatly in the law, *The Fall* is a much darker and more disturbing work than *To Kill a Mockingbird*. It is a less charismatic classic — a song of experience rather than one of innocence.

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1. HARPER LEE, TO KILL A MOCKINGBIRD (1960).

2. Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339 (1999) (book review).

3. *See, e.g.*, PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 163 (2000) (noting that *The Fall* "has only slowly won recognition as possibly the greatest of [Camus's] novels"); BRIAN T. FITCH, *THE FALL*: A MATTER OF GUILT 8-9 (1995) (noting that, while *The Fall* is less well-known than Camus's other fiction, it is "his most successful creation"); ROSEMARIE JONES, CAMUS: *L'ETRANGER* AND *LA CHUTE* 91 (1st ed. 2d prtg. 1994) (noting that, in her view, *The Fall* is Camus's "major work of fiction").

4. The term "judge-penitent" is not a reference to an existing legal role, but one that describes Clamence's self-conception. Here I follow Clamence, who throws out the term early in the novel without defining it as a means of encouraging his interlocutor to keep listening for the answer. P. 8. He writes: "What is a judge-penitent? Ah, I intrigued you with that business." P. 17.

Yet like many songs of experience, Camus's novel has a polyphony that simpler stock narratives about the law — or the simpler stock narratives that *are* the law — do not possess. Clamence is too urbane (to repeat the adjective that best describes him) to be a lawyer. He has seen too far into the world, and too deeply into himself, to believe, or even to pretend to believe, in the particularized determinations of guilt or innocence that the law requires. His urbanity causes him to leave his Finch-like career to adopt a hermit-like existence. He shifts from going to court (p. 17) to holding court in seedy bars (p. 3), from having many possessions (p. 120) to having little more than stewardship over a stolen van Eyck painting (p. 128), from arguing other people's cases (p. 3) to ritually confessing his own sins (p. 139).

So what can we learn from Clamence's urbanity? In my view, it most starkly illuminates the nature of confessions. Among literary characters, Clamence is perhaps unsurpassed in his grasp of what confessions mean and how they work. To see this, we might begin by noting that the entire novel appears to be a monologic confession on Clamence's part. At the novel's inception, Clamence strikes up a conversation with a stranger in an Amsterdam bar. That conversation leads to a series of others over five days, in which Clamence reveals more and more about himself. While we discern Clamence responding to (and sometimes repeating) the stranger's questions, we never hear any voice in the novel other than Clamence's own. At the end of the novel, Clamence tells his interlocutor that he is engaged in ritual confession (p. 139) — like Coleridge's Ancient Mariner, he finds listener after listener to whom to tell his life story.[5]

But while Clamence's confession appears monologic, it is actually dialogic in at least two senses. First, the confession is not the same confession every time, but is tailored to the listener. "I don't accuse myself crudely, beating my breast," Clamence says, "No, I navigate skillfully, multiplying distinctions and digressions, too — in short I adapt my words to my listener . . . " (p. 139). In an important sense, then, the monologue is guided by the interlocutor, as captured by commentary that seeks to reconstruct the stranger's half of the conversation.[6] Second, the confession is framed to elicit, and, if we are to believe Clamence, always does elicit, a counterconfession from the listener. The purpose of tailoring his words to the listener, Clamence reveals, is to "lead him to go me one better" (p. 139). At one point during his confession, Clamence says to the stranger: "Search your memory and perhaps you will find some similar story that you'll tell me later on" (p. 65). And at the end of the novel, Clamence says to

5. *See* Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, *in* THE NORTON ANTHOLOGY OF POETRY 431, 445 (Margaret Ferguson et al. eds., 4th ed. 1970) (1817).

6. *See, e.g.*, FITCH, *supra* note 3, at 75-96.

his interlocutor: "Now I shall wait for you to write me or come back. For you will come back, I am sure!" (p. 141).

Clamence has a theory for why confessions can be so generative. Confessions can elicit counterconfessions because everyone is guilty, because everyone has something to confess (p. 110). This insight enables an artful individual making a confession to "construct a portrait which is the image of all and of no one" (p. 139). When such a portrait of guilt is painted, it pricks the conscience of others who recognize themselves within it — in Clamence's words, "the portrait I hold out to my contemporaries becomes a mirror" (p. 140). That conscience seeks absolution in a confession of its own, which may in turn stimulate other confessions. The strange fecundity of confessions reflects the universality of the guilt that prompts them.

This urbane view of confessions suggests why Clamence left the legal profession. In the law, confessions are not meant to demonstrate universal guilt. To the contrary, the confession is meant to demonstrate that only the confessant (the individual making the confession) is guilty. A confession by one suspect is usually seen to exonerate, rather than to implicate, the others. Just as the urbane view situates the confession within a generalizing discourse of guilt (the confession shows that all are guilty), the legal view situates the confession within a particularizing discourse of guilt (the confession shows that some, but not others, are guilty). An actor as fully committed to the urbane view as Clamence will have difficulty remaining a traditional legal actor.

Short of following in Clamence's footsteps and leaving the law, what might a legal audience do with the urbane understanding of the confession? In this Review, I first more fully describe the urbane view by engaging in a close reading of Camus's novel. I then draw on Peter Brooks's recent groundbreaking book, *Troubling Confessions: Speaking Guilt in Law and Literature*,[7] to consider the difficulties that the law has in incorporating the urbane view. In so doing, I turn to a classic text — the *Miranda*[8] warning — that the Supreme Court just "revisited" this Term,[9] to argue that the *Miranda* warning is a legal attempt to contend with the urbane view.

## II.

The state of grace from which Jean-Baptiste Clamence falls is not so different from that imaginatively occupied by Atticus Finch. Clamence tells his interlocutor that only a few years before their con-

7. BROOKS, *supra* note 3.

8. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

9. *See* Dickerson v. United States, 120 S. Ct. 2326 (2000).

versation he was a lawyer in Paris specializing in "noble cases" (p. 17) — cases involving widows, orphans, and alleged murderers. He was, he claims, "truly above reproach in [his] professional life" (p. 19) and, more generally, one of the happy few who are born knowing how to live (p. 27). As such, he evaded all unfavorable judgment: "You would really have thought that justice slept with me every night. I am sure you would have admired the rightness of my tone, the appropriateness of my emotion, the persuasion and warmth, the restrained indignation of my speeches before the court" (p. 17). Judgment was always directed toward others: "The judges punished and the defendants expiated, while I, free of any duty, shielded from judgment as from penalty, freely held sway bathed in a light as of Eden" (p. 27).

Yet Clamence sees in hindsight that his Eden always contained the seeds of its own dissolution. First, he comes to recognize the sinister aspect of his appetite for good deeds. That aspect is evident even in a simple recitation of his incommensurate emotional responses to such acts: Clamence describes his love of helping blind people across the street (p. 20), his exultation at the approach of a beggar (p. 21), and his joy at driving strangers home during transportation strikes (p. 22). But Clamence only gradually comes to identify the problem: that he gives not out of altruism but to demonstrate his own superiority. He recognizes that he has always "needed to feel *above*" (p. 23). This is a literal need — when Clamence says that he has "never felt comfortable except in lofty places," he means that he prefers "the bus to the subway, open carriages to taxis, terraces to closed-in places" (p. 23). Yet it is not only a literal need, for as Clamence notes, his "profession satisfied most happily that vocation for summits" (p. 25). And at least in its figurative manifestation, the need for heights calls his altruism into question. Clamence's virtue ostensibly permits him to attain "more than the vulgar ambitious man" and to ascend "to that supreme summit where virtue is its own reward" (p. 23). But is virtue truly its own reward if the virtuous man takes so much pleasure in surpassing the vulgar ambitious one? Clamence comes to answer this question in the negative — "When I was concerned with others, I was so out of pure condescension . . ." (p. 48).

Clamence also believed in his own perfection because of his unmediated access to life — "wasn't that Eden, *cher monsieur*: no intermediary between life and me?" (p. 27). That aspect of Eden, too, is ultimately interrogated. Clamence arrives at the insight that his relationship to his life is mediated through forgetting — "I had always been aided by an extraordinary ability to forget. I used to forget everything, beginning with my resolutions" (p. 49). He cannot remember the issues that are ostensibly so important to him: "Fundamentally, nothing mattered. War, suicide, love, poverty got my attention, of course, when circumstances forced me, but a courteous, superficial attention . . . . Everything slid off — yes, just rolled off me"

(p. 49). Yet he does not forget quite everything. The only thing that he remembers — the only thing that provides coherence — is himself: "I lived consequently without any other continuity than that, from day to day, of I, I, I" (p. 50). The selectivity of his memory thus again suggests his narcissism.

If Clamence's forgetfulness reflects his narcissism, it also reinforces it. Clamence's conception of himself as perfect is secured only through the elision of uncomfortable details. His "fall" from Eden therefore occurs as he begins to remember. In describing the primary catalyst for the return of his memory, Clamence speaks of an evening he spent gazing at the river from the Pont des Arts. He was filled with well-being: "I felt rising within me a vast feeling of power and — I don't know how to express it — of completion, which cheered my heart" (pp. 38-39). Then he heard laughter behind him, traveling downstream as if emanating from a boat (p. 39). His heart began to beat rapidly, although "there was nothing mysterious about that laugh; it was a good, hearty, almost friendly laugh" (p. 39). He walked home, feeling dazed, breathing with difficulty, and buying cigarettes he did not need (p. 39). At home, he heard laughter again from the street, opened the windows, and saw some youths saying goodnight. "I went into the bathroom to drink a glass of water. My reflection was smiling in the mirror, but it seemed to me that my smile was double . . . " (p. 40).

When he initially tells the story, Clamence does not reveal why the laughter disturbed him so much. Laughter can imply ridicule and judgment, to which Clamence would clearly be sensitive, but the laughter was so innocuous, and had so little to do with him, that something else was obviously in play. But we are forced to wait, as Clamence himself may have been forced to wait, for the resurfacing of the memory that freighted the laughter with such significance. It is only later, in the middle of the novel, that Clamence divulges it.

The earlier memory is one of crossing the river on a different bridge on a night two or three years before the night on the Pont des Arts (p. 69). One of the few people in view was a thin young woman dressed in black, leaning over the railing of the bridge. The nape of her neck caught Clamence's erotic attention. But only momentarily — he passed on (pp. 69-70). When he had walked fifty yards, he heard the sound of a body striking the water, and then "a cry, repeated several times, which was going downstream" (p. 70). The sound then suddenly stopped. Clamence froze. "I wanted to run and yet didn't stir. I was trembling, I believe from cold and shock. I told myself that I had to be quick and I felt an irresistible weakness steal over me. I have forgotten what I thought then" (p. 70). Finally, he made a decision. "Then, slowly under the rain, I went away. I informed no one" (p. 70). Over the next few days, he did not read the papers.

The laughter on the Pont des Arts presumably stirred up this earlier repressed memory because of similarities in the setting, the time, and the sound of a human voice getting fainter as it traveled downstream. That sound, however, had changed from a cry of anguish to laughter. It is easy to read that laughter, and easy to think Clamence read it, as laughter about his hypocrisy. Clamence's twin flaws of self-absorption and forgetfulness are simultaneously indicted — to preserve his narcissistic belief in his own perfection, he actively sought to forget the incident and his feelings about it.

Once this memory surfaces, Clamence radically revises his entire self-conception. Clamence maintains that the moment an individual opens himself to negative judgment, there is no stopping point — "We are forced to take the same precautions as the animal tamer. If, before going into the cage, he has the misfortune to cut himself while shaving, what a feast for the wild animals!" (p. 77). Clamence casts his friends in the roles of the animals, who come to ravening judgment at the slightest show of weakness (p. 78). Yet it is clear that he is his own harshest judge. Under his relentless self-scrutiny, memory begets memory, and confession begets confession. Clamence confesses to the brutal betrayal of a mistress (pp. 63-65), to cowardice when his honor is insulted (pp. 51-53), and to more daily forms of pettiness (p. 85). Besides not going to the drowning woman's aid, Clamence's greatest sin occurs while he is interned in a German camp in Tunisia during the war: "Let's just say I closed the circle when I drank the water of a dying comrade" (p. 126). The events on the evening at the Pont des Arts were thus evocative of his two greatest sins — he heard the voice moving down the river, then returned to his home and drank a glass of water. It is thus unsurprising that, as we will see, water becomes an important trope for the guilty conscience throughout Clamence's confessional narrative.

After accepting his own guilt, Clamence becomes unable to carry on the profession of a lawyer. Fleeing to Amsterdam, he assumes the name of Jean-Baptiste Clamence (pp. 8, 17).[10] The name is reminiscent of John the Baptist, the last prophet "clamans in deserto."[11] That

10. Clamence divulges early in the novel that he is using a pseudonym (p. 17) and reminds us of this fact again (p. 125). He never reveals his real name.

11. *See* BROOKS, *supra* note 3, at 165; JONES, *supra* note 3, at 58. Clamence makes repeated references to himself as a prophet in the wilderness. He observes: "In solitude and when fatigued, one is after all inclined to take oneself for a prophet. When all is said and done, that's really what I am, having taken refuge in a desert of stones, fogs, and stagnant waters — an empty prophet for shabby times . . ." (p. 117). Similarly, after describing how he "made up [his] mind to leave the society of men," Clamence says, "No, no, I didn't look for a desert island; there *are* no more" (p. 98). While Clamence at one point compares himself to Elijah (p. 117), it is clear that he most identifies with John the Baptist. Jones notes parallels between Clamence and John the Baptist other than their shared name. For example, Clamence, like the Baptist clothed in his camel's hair, wears a camel-hair coat (p. 9). *See* JONES, *supra* note 3, at 65. Similarly, Clamence pictures his own death as one in which his head is displayed to the people (p. 146), as was the Baptist's own head. *See id.*

association is developed by Clamence himself, who speaks of "the bitter water of [his] baptism" (p. 108), which presumably refers to his baptism into the consciousness of his own guilt. We might initially interpret his rejection of the legal profession as arising from a fear of hypocrisy: How can Clamence, who is culpable himself, participate in decisions about the guilt or innocence of others? That interpretation finds support in Clamence's repeated comments about how he will never be able to evade his own guilt. Building on the symbolic link between water and guilty conscience, Clamence stresses the inescapable nature of each. Boating on the Zuider Zee, Clamence tells his interlocutor that he now realizes that the cry of the drowned woman has "never ceased, carried by the river to the waters of the Channel, to travel throughout the world" (p. 108). He understands that it will wait for him "on seas and rivers, everywhere, in short, where lies the bitter water of my baptism" (p. 108). Longing to escape "this immense holy-water font," he asks whether it is "credible that [they should] ever reach Amsterdam" (p. 109). Yet Amsterdam offers no escape from the water of guilt — as Clamence observes at the novel's inception, "Amsterdam's concentric canals resemble the circles of hell" (p. 14).

In speaking of the inescapability of guilty conscience, however, Clamence is not speaking only of his own personal predicament. His self-conception as John the Baptist suggests that he has not only been baptized himself, but that he also baptizes others into a consciousness of guilt. That "bitter water" surrounds all who inhabit the atmosphere of the novel. Clamence explains that "this country inspires [him]," in part because water is so obviously ubiquitous — Holland's people are "wedged into a little space of houses and canals, hemmed in by fogs, cold lands, and the sea steaming like a wet wash" (p. 12). Moreover, throughout the work, there is a "damned humidity" (p. 111) which makes it "hard to breathe; the air is so heavy it weighs on one's chest" (p. 43). There is also constant rain (p. 12), which only lets up to become snow. The transformation delights Clamence, as he thinks of the snow as the feathers of doves flying over Amsterdam.[12] The change from the transparency of water to the opacity of snow is a momentary return from the lucid knowledge of guilt to the blank forgetfulness of innocence. But it is, of course, a transient metamorphosis, and one that is always ultimately reversed (p. 145). In the end, Clamence concludes that "we cannot assert the innocence of anyone, whereas we can state with certainty the guilt of all" (p. 110). Clamence's rejection of the lawyer's traditional role thus does not arise out of a simple

12. P. 145. Earlier in the novel, Clamence makes cryptic references to millions of invisible doves flying over Amsterdam (pp. 73, 96). As Lucy Melbourne suggests, the doves recall the dove that descended to mark Christ as the Redeemer at the time of his baptism. *See* LUCY L. MELBOURNE, DOUBLE HEART 175 (1986). As the feathers of the doves descend upon all, they may be read as announcing the innocence and divinity of all.

sense of personal disqualification. He believes that no one is innocent enough to perform that role.

Clamence's conclusion that all are guilty again both reflects and reinforces his narcissism. Clamence's acknowledgement of his own guilt might be seen as a repudiation of his old hubris. But Clamence's transcendence over his old self is only partial, as he relinquishes the idea of his perfection but not of his superiority. We can see this in the quickness of his move from the belief that he is guilty to the belief that all are guilty. In this implicit logic — that if even he is guilty, all must be guilty — we see something of the old Clamence's narcissism. Moreover, Clamence's belief in universal guilt actually reinforces his belief in his own superiority, for while all are guilty, only some are honest enough to confess their guilt. By doing penance, Clamence achieves the moral superiority that permits him to judge his fellow human beings. For Clamence is now not simply a penitent, but a judge-penitent (p. 8) — he is not only a confessant, but also a confessor. Indeed, he sees the two roles as inextricably linked. He notes that ordinary people judge others to protect themselves: "People hasten to judge in order not to be judged themselves" (p. 80). Clamence, on the other hand, once again aims to surpass the "vulgar ambitious man" (p. 23). He seeks "to travel the road in the opposite direction and practice the profession of penitent to be able to end up as a judge" (p. 138).

The doubleness of Clamence's role shifts in signification in his mind from an avoidable hypocrisy to a necessary one. Clamence originally speaks of his doubled nature with some derision, speaking of his sign as that of "a double face, a charming Janus" (p. 47), expressing disquiet at his "double" smile, and saying that he lived his whole life under "a double code" (p. 88). But he ultimately comes to peace with his double role — "I have accepted duplicity instead of being upset about it. On the contrary, I have settled into it and found there the comfort I was looking for throughout life" (p. 141). The double role is necessitated by the two sides of confession — there must be one to hear, and one to speak. But because of the universality of guilt, all must assume both roles. This is the urbane view of confession into which Clamence baptizes us.

## III.

After embracing the urbane view of confessions, Clamence leaves the law. This is unsurprising, as the law seems uncongenial to the view that confessions demonstrate the guilt of us all. To the contrary, legal confessions are meant to demonstrate the guilt only of the individual who is making the confession. Indeed, the confession is seen today, as in the medieval period, as the "queen of proofs," the dispositive mark

of individual guilt.[13] Thus, those who would wholly embrace the urbane view will not be comfortable within legal discourse.

Not all who embrace the urbane view, however, have the ability or inclination to leave the law. For us, the question remains of how to reconcile the legal understanding of the confession with a more urbane cultural one. In answering this question, I advert to Peter Brooks's new book on confessions in law and literature.[14] This exemplary work contextualizes the legal confession within the broader cultural practice of confession, not only as it is conducted in literature, but also as it is conducted in religion and psychoanalysis. By doing so, it illuminates the necessary reductions that law must make to other cultural understandings of confessions in order to function as "the law."

Brooks posits that the legal treatment of confessions is, in many ways, an outlier from their treatment in broader culture.[15] This thesis certainly holds with regard to the urbane view, which is much more robustly represented in the literary, psychoanalytic, and religious contexts than in the legal one. We have already seen in the literary realm that Clamence shifts from confessant to confessor. We can also situate Camus's novel within a long literary tradition — extending from *The Canterbury Tales*[16] to *The Crucible*[17] — in which the lines between confessants and confessors are blurred. In the religious realm, the Catholic tradition has required annual confession of the faithful since 1215, which means that priests taking confessions must also make them.[18] Finally, in the psychoanalytic realm, concerns about the transferential dynamic have led to the requirement that psychoanalysts undergo analysis as part of their training.[19] In each of these realms, it is recognized that everyone has something to confess, something to work through, something about which he feels, or should feel, guilty.[20]

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13. *See* BROOKS, *supra* note 3, at 4. Legal commentators have emphasized that confessions play a crucial role in securing guilty convictions in criminal trials. *See, e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 435-36 (1996) (collecting commentary).

14. *See generally* BROOKS, *supra* note 3.

15. *See id.* at 4-5.

16. GEOFFREY CHAUCER, THE CANTERBURY TALES (Nevill Coghill trans., 1986) (c. 1400).

17. ARTHUR MILLER, THE CRUCIBLE (1953).

18. *See* LÉON-JOSEPH CARDINAL SUENENS, CORESPONSIBILITY IN THE CHURCH 108-09, 118 (Francis Martin trans., 1968).

19. *See* 1 RALPH R. GREENSON, THE TECHNIQUE AND PRACTICE OF PSYCHOANALYSIS 364-65 (1967).

20. As I have learned from considering confessions in my law-and-literature class, the term "confessant" (the individual making the confession) and the term "confessor" (the individual listening to the confession) are easily mistaken for each other. I believe that this confusion arises not only out of the similarity between the two words, but also out of the similarity between the two roles.

In its rejection of the urbane view, the law emerges as the exception rather than the rule. Because the law must make ultimate decisions about guilt and innocence, it does not have the same institutional license as literature, religion, or psychoanalysis to let confessions demonstrate the universality of guilt.[21] Rather, it must promulgate the view that confessions may, at least in some circumstances, stand as the definitive utterance of individual guilt. This is why Clamence's profession of judge-penitent sounds so paradoxical: in Shakespeare's celebrated words, "to offend and judge are distinct offices, [a]nd of opposed natures."[22] To distinguish this conception of particularized guilt from the urbane one, I will call it the "pragmatic conception."

Because law may never be entirely unmoored from culture, however, the pragmatic conception will always have to reckon with the pull of the urbane one.[23] Indeed, the urbane view often appears to be a better description of how confessions work, even in the law. Camus's profession of "judge-penitent" seems paradoxical, but it is surely no surprise that legal confessors may also have sins of their own to confess. While there are many such sins, I will focus in the remainder of this discussion on perhaps the most infamous one. This is the sin of coercing the confession from the confessant. When such coercion exists, the confession may speak less to the suspect's guilt in committing a crime than to the interrogator's guilt in extorting the confession. Guilt in the legal realm can thus be as transitive and as ambiguous as guilt in the literary one. We might say that the urbane conception is not so much absent in the law as repressed by it.

American constitutional law is thus faced with a dilemma — how does it recognize the accuracy of the urbane conception but still sustain the viability of the pragmatic one? The jurisprudence concerning the admissibility of confessions may be read as an attempt to give each conception its due.[24] The urbane view is represented in the fact that

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21. *See* BROOKS, *supra* note 3, at 4-5.

22. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 2, sc. 9, ll. 61-62 (John Russell Brown ed., 7th ed., Methuen & Co. 1959).

23. *See, e.g.*, Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (noting that the law is "but a small part of the normative universe that ought to claim our attention," and therefore cannot be understood in isolation "from the narratives that locate it and give it meaning").

24. The Supreme Court has relied on a number of separate constitutional provisions to determine the admissibility of confessions:

(1) From 1936 to the present, the due process clauses of the Fifth and Fourteenth Amendments have been used to exclude involuntary confessions.

(2) From 1964 to the present, the Sixth Amendment right to counsel has been applied in determining the admissibility of a confession obtained from a defendant who has been formally charged with a crime.

(3) Since 1966, the Fifth Amendment's privilege against self-incrimination has been applied to statements made during custodial interrogation; a waiver analysis has

courts have entertained the possibility that the suspect's confession may not (only) represent the guilt of the suspect, but may (also) represent the guilt of the interrogator.[25] The pragmatic view is represented in the fact that the courts entertain that ambiguity only to resolve it — if admitted, the confession is always held to redound to the guilt only of the suspect, rather than testifying to the guilt of both parties (or the guilt of us all). Thus, the jurisprudence of confessions recognizes the urbane view, but ultimately reduces it to the pragmatic one. I wish to suggest that the various phases of the jurisprudence regulating confessions — the pre-*Miranda* phase, the *Miranda* phase, and the proposed post-*Miranda* phases — may all be seen as different approaches to this reduction.[26]

Until shortly before the landmark *Miranda* decision in 1966, the question of whether the confession testified to the guilt of the suspect or to the guilt of the interrogator was framed almost exclusively as a question of voluntariness under the due process clauses.[27] Voluntariness was not determined formulaically, but rather by looking at "the totality of all the surrounding circumstances."[28] If the suspect confessed "voluntarily," then the confession was admissible as the ultimate proof of the suspect's guilt. If the suspect did not confess voluntarily, then the confession was inadmissible. The voluntary/involuntary distinction was thus used to counter the transitive nature of confessions, assigning entire responsibility for the confession to one party or the other.

The voluntariness standard, however, merely displaced the indeterminacy inhering in the practice of confession onto the analogous indeterminacy inhering in the concept of agency. Thus, it was unsur-

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prevailed, and the privilege must be shown to have been effectively waived before a confession is admissible.

*See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 511 (5th ed. 1996).

25. *See infra* notes 27-55 and accompanying text.

26. I acknowledge that these distinctions are very rough, insofar as significant changes that occurred within each of these phases will go largely unattended here. *See, e.g.*, Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies of Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 407 (1999) (noting that "*Miranda* itself has changed" over the "past thirty-three years," such that it "is no longer one case, but rather a body of safeguards that impose less strict safeguards than the original decision").

27. The first Fourteenth Amendment coerced confession case was *Brown v. Mississippi*, 297 U.S. 278 (1936), in which the Supreme Court excluded a confession as involuntary. The Supreme Court decided thirty-five "voluntariness" cases between 1936 and 1964. In these cases, the Court determined on a case-by-case basis how the voluntariness of a confession was affected by such factors as the personal characteristics of the accused, circumstances of physical deprivation or mistreatment, and psychological influences. *See* SALTZBURG & CAPRA, *supra* note 24, at 512-14.

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

prising that the more subtly the pre-*Miranda* opinions addressed the question of volition, the more they approached the urbane view. In the 1944 case of *Ashcraft v. Tennessee*,[29] Justice Jackson wrote in dissent that "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional."[30] This is because "[i]t is probably the normal instinct to deny and conceal any shameful or guilty act."[31] Jackson thus pointed out that the mere fact that the confession was made suggests that the confessant's will was overborne. This analysis is consonant with Clamence's teaching that all confessions are effectively co-written by confessant and confessor.

To the extent that the voluntariness standard tacks close to the urbane view, we should expect it to be unworkable. Brooks focuses on *Culombe v. Connecticut*,[32] one of the major cases leading up to *Miranda*, to make the point that sophistication in this realm can be impractical.[33] In *Culombe*, Justice Frankfurter wrote a sixty-seven page "treatise" on the voluntariness standard, which sets forth a three-part test. The courts are to determine "the crude historical facts," then to engage in the "imaginative recreation, largely inferential, of internal, 'psychological' fact," and finally to apply "to this psychological fact . . . standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances."[34] Merely articulating this version of the test should vindicate Justice Warren's criticism in his *Culombe* concurrence that lower courts and law enforcement agencies would receive little guidance "from the treatise for which this case seems to have provided a vehicle."[35] In 1985, the Court offered a retrospective of scholarly critiques of the voluntariness test, noting that "[t]he voluntariness rubric has been variously condemned as 'useless,' 'perplexing,' and 'legal 'double-talk.' "[36] "Voluntariness" was thus a false rescue from the urbane view of confession.

Because of the incoherence of the voluntariness standard, it " 'seemed inevitable that the Court would seek 'some automatic device by which the potential evils of incommunicado interrogation

29. 322 U.S. 143 (1944).

30. *Id.* at 161 (Jackson, J., dissenting).

31. *Id.* at 160 (Jackson, J., dissenting).

32. 367 U.S. 568 (1961).

33. *See* BROOKS, *supra* note 3, at 65-87.

34. *Culombe*, 367 U.S. at 603 (Frankfurter, J., plurality opinion).

35. *Id.* at 656 (Warren, C.J., concurring).

36. Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985) (citations omitted) (collecting commentary).

[could] be controlled.' " "[37] Five years after *Culombe*, the Court found its automatic device in *Miranda v. Arizona*.[38] The holding of *Miranda* was that the famous four-part warning (or a legislatively written equivalent) had to be recited for a confession to be deemed voluntary.[39] Yet it was entirely predictable that the warning would shift from being a quasi-necessary condition[40] for the admissibility of a confession to becoming a quasi-sufficient one.[41] The rule's distinction between warning and nonwarning tracks the desired distinction between volition and coercion so closely that it is unsurprising that legal actors often intuit a close correlation between them.[42] And, relative to voluntariness, the presence or absence of the *Miranda* warning is easily verifiable — it is not an interior state, but a public utterance.

*Miranda* thus successfully disrupts the dynamic described by the urbane view of confessions. The urbane view suggests that confessions describe a guilt beyond that of the speaker, provoking a counter-confession by the individual who hears the confession regarding his own guilt. Reading the criminal confession into this paradigm conjures up the image of a police officer forcing a confession from a suspect, and then being required in a pre-*Miranda* voluntariness inquiry to confess his own bad deeds in extorting the confession.[43] In

37. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 458 (8th ed. 1994) (alteration in original) (quoting Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 103 (quoting WALTER V. SCHAFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINE 10 (1967))).

38. 384 U.S. 436 (1966).

39. The four warnings are: (1) that the suspect has the right to remain silent; (2) that any statements he makes can be used against him; (3) that he has the right to the presence of an attorney during questioning; and (4) that he will be provided with an attorney if he cannot afford one. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

40. Cases following *Miranda* have narrowed its protections such that the warning is not strictly necessary to use the confession in certain ways. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) (creating a general "public safety" exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433, 433 (1974) (holding admissible the testimony of a witness whose identity had been learned by questioning the defendant without a full *Miranda* warning); Harris v. New York, 401 U.S. 222, 222 (1971) (holding that statements obtained without a full *Miranda* warning may be used to impeach the defendant's credibility).

41. The *Miranda* warning does not exempt police officers from further scrutiny as to the voluntariness of the confession. *See* KAMISAR ET AL., *supra* note 37, at 458 n.c. The warning, however, has been described as providing them with a "safe harbor." *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRST-HAND ACCOUNT 45 (1991) (noting author's impression as Solicitor General that "most professional law enforcement organizations had learned to live with *Miranda*, and even to love it, to the extent that it provided them with a safe harbor").

42. *See, e.g.*, Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 123 (1998) (arguing that *Miranda* created an isomorphism between warning/nonwarning and volition/coercion).

43. In contrast to the literary model, of course, the compulsion on the part of the interrogator to confess his bad deeds will usually not be internal. Rather, that compulsion will come from the legal proceedings themselves. Yet the very fact that those proceedings direct

Camusian fashion, the original confessor becomes the confessant. After *Miranda*, however, the link between the suspect's confession and the officer's confession is broken. So long as the police officer is canny enough to mouth the words of the *Miranda* warning, the suspect's subsequent confession is much more likely to be deemed voluntary, and the police officer's own acts may go unconfessed.

In this sense, the *Miranda* warning may be seen as a form of *anti*-confession, a circuit breaker that disrupts the generativity of the confession. This is true not only for the officer, who can be protected by the warning from many forms of subsequent scrutiny, but also for the suspect. For the suspect, the warning *by itself* is unlikely to prompt the suspect to make a confession. This is because it formalizes the relationship between officer and suspect. A set text that reveals nothing about its individual speaker, it informs the suspect of his substantive rights. This has the effect of reminding the suspect that the officer is not a sympathetic confessor, and that the legal modality of confession is in this way an outlier from many other models of confession extant in our culture. It also prevents the officer from entirely tailoring his narrative to the individual suspect in a Clamence-like manner. Think how much less likely the stranger of *The Fall* would have been to make his confession if Clamence had administered the warning at the beginning of his artful narrative! Conversely, think of the cases in which suspects are encouraged to make confessions because the interrogator tells exactly this kind of a narrative.[44]

In this Term's *Dickerson v. United States*,[45] the Supreme Court preserved the *Miranda* framework from a 1968 Congressional statute that sought to reinstate the pre-*Miranda* status quo.[46] In reaching its result, the Court first had to determine whether *Miranda* had announced a constitutional rule, which Congress could not supersede, or a nonconstitutional rule, which Congress could alter at will.[47] After deciding

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themselves at the potential guilt of the interlocutor suggests that the confessional scene is being read through the urbane paradigm.

44. *See, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977). In *Brewer*, a police officer drove a man suspected of murdering a ten-year-old girl from Davenport, Iowa to Des Moines with the understanding that the suspect would not be questioned until he met with his lawyer at his destination. *See id.* at 390-91. While the officer did not ask the suspect any questions, he told a vivid narrative about how the heavy snow forecasted for that evening would cover the body of the girl by the time they reached their destination. *See id.* at 392. The officer went on to suggest that the suspect, whom he knew to be deeply religious, was the only individual who could enable the parents to find the girl in time to give her a Christian burial. *See id.* at 393. The suspect broke down and led the officer to the body. *See id.* The Supreme Court found that this process had violated the defendant's Sixth Amendment right to counsel, noting that the detective's narrative sought "to elicit information from [the suspect] just as surely as — and perhaps more effectively than — if he had formally interrogated him." *Id.* at 399.

45. Dickerson v. United States, 120 S. Ct. 2326 (2000).

46. 18 U.S.C. § 3501 (1994).

47. *Dickerson*, 120 S. Ct. at 2332-33.

that the *Miranda* framework had a constitutional dimension, the Court then considered whether the statute actually sought to supersede that framework. This question was slightly complicated by the fact that *Miranda* itself accorded Congress and state legislatures some power to develop alternatives to its four-part warning. *Miranda* stated that its framework was not intended to be a "constitutional straitjacket"[48] and that its holding permitted legislatures to replace the warning with "procedures which are at least as effective."[49] The *Dickerson* Court quickly dispensed with this potential complication by observing that the statute sought to reinstate the framework that pre-dated *Miranda*, in which a judicial finding of voluntariness in light of the totality of the circumstances was not only necessary, but also sufficient, to render a confession admissible.[50] Reasoning that the *Miranda* Court had already rejected this framework as constitutionally inadequate, the *Dickerson* Court struck down the statute.[51]

It bears emphasis that the *Dickerson* Court did *not* hold that the words of the *Miranda* warning were constitutionally required. *Dickerson* did not overrule the portion of *Miranda* that suggested that its constitutional requirement could be satisfied by "procedures which are at least as effective" as the four-part warning. It simply noted that the pre-*Miranda* voluntariness paradigm did not provide such a procedure. Thus, while *Dickerson* bars a return to the pre-*Miranda* regime, it theoretically permits an advance to some third regime in which the warning is retired.[52]

But while the *Dickerson* Court did not formally require the words of the warning, it strongly suggested that they are here to stay. Toward the end of its opinion, the Court noted that the doctrine of *stare decisis* also supported its holding. It stated: "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."[53] As part of that analysis, the Court described the reliance interest that had developed around the words of the warning, stating that "*Miranda* has become embedded in

48. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

49. *Id.*

50. *Dickerson*, 120 S. Ct. at 2335.

51. *Id.*

52. Academic commentators have suggested alternatives to the *Miranda* warning other than the voluntariness paradigm. *See, e.g.*, Akhil Reed Amar & Ren e B. Lettow, *Fifth Amendment — First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 909 (1995) (suggesting, *inter alia*, "a prophylactic rule that no police-station confession by a defendant is ever allowed in, unless volunteered by a suspect in the presence of an on-duty defense lawyer or ombudsman in the police station"); Cassell, *supra* note 13, at 496-97 (suggesting, *inter alia* that a modified warning be given that eliminates the offer of counsel, and that confessions be videotaped).

53. *Dickerson*, 120 S. Ct. at 2336.

routine police practice to the point where the warnings have become part of our national culture."[54] Literary scholars have posited that Shakespeare named his Miranda to draw on the name's associations to the words "admiration" and "wonder."[55] The Court's *stare decisis* analysis maintained that whether we admire the *Miranda* warning or not, we should give weight to the fact that its uptake in our culture has been wondrous.

What the Court implied, then, is that the longevity of the *Miranda* warning may be less assured by the Constitution (which does not require the words of the warning) than by the warning's status as a cultural icon.[56] Elaine Scarry elegantly observes that "[s]ometimes it may even happen that a just legal principle has the good fortune to be formulated in a sentence whose sensory features reinforce the availability of the principle to perception."[57] While she focuses on the opening cadences of the Declaration of Independence as her example,[58] the *Miranda* warning also bears out her claim. This easily memorized quatrain has been immensely successful in making our constitutional rights available to perception: It has been observed that "[s]chool children are more likely to recognize *Miranda* warnings than the Gettysburg Address."[59] Indeed, the *Miranda* warning might make us wonder why we do not frame more of our laws in a form that would facilitate their dissemination. If this seems fanciful, recall that the Greeks deliberately embodied law-like mores in poetry to ensure their broad dissemination in a primarily oral culture.[60] As a popular poem that serves as a legal mnemonic, the *Miranda* warning can be read as a serendipitous throwback to this tradition. And while the Court obviously did not endorse such a practice, it did recognize that deference was due to formulations of legal rules that had found broad uptake in

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54. *Id.*

55. When Ferdinand first learns Miranda's name in *The Tempest*, he calls her "Admir'd Miranda! / Indeed the top of admiration! worth / what's dearest to the world." WILLIAM SHAKESPEARE, THE TEMPEST act 3, sc. 1, ll. 37-39 (Frank Kermode ed., 6th ed. Harvard Univ. Press 1958). In his annotation to this passage, Frank Kermode notes that "[h]ere Shakespeare plays upon the name he has invented for his last heroine." *Id.* at 74. In his commentary to a different edition, Robert Langbaum points out that in Latin, "Miranda" means "wonderful." *See* WILLIAM SHAKESPEARE, THE TEMPEST 83 (Robert Langbaum ed., Signet Classic 1964).

56. *Cf.* Akhil Reed Amar, *OK, All Together Now: "You Have the Right to . . . ,"* L.A. TIMES, Dec. 12, 1999, at M1, M6 (contending, prior to the Supreme Court's decision in *Dickerson*, that because of the popularization of the *Miranda* warning through television, the warning is "here to stay, in our heads if not our lawbooks").

57. ELAINE SCARRY, ON BEAUTY 102 (1999).

58. *See id.* at 102-03.

59. THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING xv (Richard A. Leo & George C. Thomas III eds., 1998).

60. *See* M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW 25-27 (1989).

the culture. Once such uptake is taken into account, we might ask whether *any* alternative could be "at least as effective" as the warning.

Here an ironic conclusion leaps to the eye of the law-and-literature scholar. One truism in the law-and-literature field is that law is coercive, while literature is merely persuasive.[61] In the context of confessions, however, literature appears to wield greater force than the law in at least two ways. First, it is the literary (or more broadly, the cultural) conception of the confession — in which the confession generates more and more guilt — that the law is desperately, and oftentimes unsuccessfully, attempting to cabin. Second, the most successful way to date in which the law has been able to restrain the literary fecundity of the confession has been through the *Miranda* warning, which is itself a kind of literary form — a poem. The jurisprudence of confessions, then, doubly inverts the traditional hierarchy of law over literature. The great literary power of the confession is being tamed by the great literary power of the *Miranda* warning. One literary form has generated another in a way of which even the urbane Clamence might approve.

61. *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609, 1610 (1986).