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WHY *MIRANDA* DOES NOT PREVENT CONFESSIONS:
SOME LESSONS FROM ALBERT CAMUS, ARTHUR
MILLER AND OPRAH WINFREY

Timothy P. O'Neill[†]

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INTRODUCTION

On June 26, 2000, the United States Supreme Court’s decision in *Dickerson v. United States* finally told us that *Miranda* warnings are here to stay.¹

Professor Stephen Schulhofer called the decision a “stunning and humiliating defeat” for *Miranda*’s opponents.²

True.

Professor Yale Kamisar called the decision “wondrous.”³

Well, let’s not get carried away.

This was hardly a nail-biter. Let’s recall that both the defense and the government agreed that the Court should re-affirm *Miranda*; the Court was

[†] Professor, The John Marshall Law School. I wish to acknowledge the excellent research provided by Eric Pruitt, J.D. This Essay is dedicated to the memory of my late father, the Honorable William J. O’Neill, whose devotion to law and justice serves as a constant inspiration.

1. 530 U.S. 428 (2000) (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966)).
2. Jan Crawford Greenburg, *High Court Upholds Miranda Warning; Once a Critic Himself, Rehnquist Rebuffs Ruling’s Challengers*, CHI. TRIB., June 27, 2000, at N1.
3. *Id.*

forced to appoint *amicus curiae* to argue against it.⁴

Also, let's do some addition: take Justices Souter, Kennedy, and Stevens who had recently found *Miranda* issues to be constitutional issues cognizable in federal *habeas corpus*;⁵ add Justices Ginsburg and Breyer, the Clinton appointees; and then add Justice O'Connor with her dramatic defense of *stare decisis* in *Planned Parenthood v. Casey*.⁶ That looked like six fairly solid votes to affirm a 34 year-old precedent that both the defense and the government supported. And those six, with Chief Justice Rehnquist assigning himself the opinion, indeed made up the *Dickerson* majority.⁷

The biggest mystery to the public may have been why the government supported *Miranda*, a decision that had triggered a firestorm of prosecutorial and police criticism in the 1960's.⁸

There were several reasons. First, despite *Miranda's* fame, the fact remains that 78% of suspects waive their rights and agree to be interrogated by police without the assistance of a lawyer.⁹ This is not what *Miranda's* critics predicted in 1966.¹⁰

Second, *Miranda* has actually simplified prosecutors' efforts to have confessions declared admissible. Courts have gradually equated observing *Miranda* with obtaining a voluntary confession.¹¹ This is wrong. These should be two entirely separate inquiries. *Miranda* merely deals with *whether* an interrogation should be conducted. The voluntariness test deals with *how* an interrogation should be conducted. To use a baseball metaphor, *Miranda* deals only with the wind-up; the voluntariness rule examines the pitch. But courts have a tendency to assume that if *Miranda*

4. Professor Paul G. Cassell of the University of Utah College of Law was appointed to argue as *amicus curiae*. See Linda Greenhouse, *The Nation: Confessional; Crime, Punishment and the Passions of Miranda*, N.Y. TIMES, Apr. 16, 2000, available at LEXIS, News Library, NYT File; see also Linda Greenhouse, *Clinton Urges Supreme Court to Uphold the Miranda Decision*, N.Y. TIMES, Nov. 2, 1999, available at LEXIS, News Library, NYT File.

5. *Withrow v. Williams*, 507 U.S. 680 (1993).

6. 505 U.S. 833 (1992) (Justice O'Connor, of course, was joined by Justices Souter and Kennedy in the joint opinion).

7. 530 U.S. 428.

8. See, e.g., Fred E. Inbau, "Playing God": 5 to 4 (*The Supreme Court and the Police*), 57 J. CRIM. L. & CRIMINOLOGY 377 (1966), reprinted in 89 J. CRIM. L. & CRIMINOLOGY 1441 (1999).

9. Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

10. See, e.g., Justice White's dissent that predicted a large decrease in the number of confessions. *Miranda*, 384 U.S. at 526 (White, J., dissenting).

11. Timothy P. O'Neill, *One Down, Two to Go—In Top of First*, CHI. DAILY LAW BULL., July 14, 2000, at 5.

is followed, then the analysis is over and the confession is admissible.

This is borne out by the fact that despite the dozens of *Miranda* cases decided by the Supreme Court during the last 35 years,¹² the Court has only twice found a confession involuntary.¹³ In *Dickerson*, the Court repeated an observation it first made in 1984: “[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”¹⁴

There is no reason why this should be true. Assume the police properly obtain a *Miranda* waiver prior to interrogation. They then use electric cattle prods to obtain the confession. The fact that *Miranda* was diligently followed does not make the resulting confession any less involuntary and inadmissible. Again, *Miranda* deals only with the wind-up, not the pitch.

Thus, the federal government in *Dickerson* was happy to accept *Miranda*. Prosecutors have grown to like the fact that following *Miranda*’s formalistic rules almost invariably leads to admission of the confession. Moreover, the vast majority of suspects do not choose to invoke *Miranda*’s protections anyway.

Which leads to the more serious question: why after all these years do suspects persist in waiving *Miranda* and confessing to the police?

An OP-ED article written by a criminal defense lawyer several days after *Dickerson* was decided argued that “the most popular reason for confessing is the Oprah phenomenon.”¹⁵ She stated that of the hundreds of defendants she has represented, every one who was told by police of his right to remain silent waived that right.¹⁶ She credits this to the age of confessional talk shows such as “Oprah Winfrey.”¹⁷

I am not so sure. Blaming Oprah Winfrey assumes that there is a long tradition of silence by suspects in the face of questioning by authorities. This is simply not true.

In trying to understand why so many suspects waive their *Miranda*

12. See, e.g., *Davis v. United States*, 512 U.S. 452 (1994); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Colorado v. Connelly*, 479 U.S. 157 (1986). Justice Scalia, in his dissent in *Dickerson*, states that the Supreme Court has decided “nearly 60 cases” involving *Miranda* issues. 530 U.S. at 463 (Scalia, J., dissenting).

13. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Mincey v. Arizona*, 437 U.S. 385 (1978).

14. *Dickerson*, 530 U.S. at 444 (citing *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984)).

15. Erica S. Perl, *It Feels So Good To Confess*, N.Y. TIMES, July 6, 2000, at A25.

16. *Id.*

17. *Id.*

rights, this Essay focuses on two of the *Miranda* warnings. First, it argues that “the right to remain silent” is a relatively recent gloss on the Fifth Amendment right not to be compelled to be a witness against oneself. Drawing on new scholarship, it shows that remaining silent in the face of accusatory questioning is counter-intuitive. Expecting that a verbal warning perfunctorily given by a police officer will result in a suspect in custody refusing to respond to interrogation is simply *naive*.

Second, it will then examine *Miranda’s* promise of the right to the assistance of counsel. It will consider two modern literary classics that are full-length confessions. Drawing on these works, as well as other literary and psychological sources, it will contend that anyone who confesses is *a fortiori* “making his case,” thus acting in the role of his own attorney. Since every confessant is *by definition acting as his own attorney*, the right to assistance of counsel might appear superfluous to the suspect. Indeed, this Essay contends that police interrogation procedures deliberately play on this fact; police will pretend to help a suspect “make a case for himself,” thus creating the illusion that assistance of counsel is unnecessary.

Miranda is a landmark attempt to level the playing field in the police interrogation room. But defense attorneys now find themselves supporting a prosecution-endorsed set of rights that are waived by 78% of those who are supposed to benefit.

After 35 years, it is time to take a closer look.

I. “YOU HAVE THE RIGHT TO REMAIN SILENT”

Perhaps the most famous of the *Miranda* warnings also happens to be the first: “You have the right to remain silent.”¹⁸ When suspects on television or in the movies are taken into custody, this is the warning you clearly hear as the officer handcuffs the suspect and leads him away.

If educated lay people were polled, I would wager that a majority actually believe that this language is taken verbatim from the Bill of Rights. In fact, I would not be surprised if some lawyers and judges would agree.

The source of the “right to remain silent” is found, of course, in the Fifth Amendment’s guarantee that no person “shall be compelled in any criminal case to be a witness against himself.”¹⁹ This “privilege against self-incrimination” is a concept that goes back several centuries in Anglo-American law.

Yet recent scholarship contends that the “right to remain silent”

18. 384 U.S. at 444-45.

19. U.S. CONST. amend. V.

component of the privilege is of a much more recent vintage.²⁰ This has great significance for understanding the overwhelming number of suspects who choose to talk with the police despite *Miranda* warnings. Remaining silent in the face of accusations is not the centuries—old right some have claimed it to be. Indeed, the fact that 78% of suspects receiving *Miranda* warnings choose to speak may actually suggest that silence in the face of accusation is positively counter-intuitive.²¹ Before blaming Oprah Winfrey for talkative suspects, it is important to examine the historical background of the “right to remain silent.”

A. *The Traditional Story*

The standard account of the development of the “right to remain silent” can be found in the work of John Wigmore²² and Leonard Levy.²³ Ecclesiastical courts in sixteenth century England sought to stamp out religious dissent.²⁴ One tool the courts used was the *ex officio* oath.²⁵ This enabled the religious court to summon a person and force him to take an oath prior to questioning him concerning his religious beliefs.²⁶ No formal charge of heresy was needed to force the person to testify under oath.

This was serious business indeed. Oaths in the sixteenth century possessed an extraordinarily solemn quality which perhaps is somewhat lacking today. A person who took an oath and lied often believed he would lose his immortal soul.²⁷ Conversely, a person who refused to take the oath could be imprisoned for contempt.²⁸

Wigmore credits change in the law to people such as John Lilburne, who spoke out against these courts—including Star Chamber—and their procedures between 1637 and 1641.²⁹ One principle the critics relied on was “*nemo tenetur prodere seipsum*,” translated from the Latin as “no person is to be compelled to accuse himself.” In response, a 1641 statute

20. See *infra* notes 69-98 and accompanying text.

21. Leo, *supra* note 9, at 276.

22. See JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 250 (1940).

23. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1986).

24. R.H. HELMHOLZ, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, THE PRIVILEGE AGAINST SELF-INCRIMINATION 18, 29 (1997).

25. *Id.*

26. *Id.*

27. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, in HELMHOLZ, *supra* note 24 at 187, 191.

28. John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries* in HELMHOLZ, *supra* note 24, at 101.

29. *Id.* at 102.

abolished these courts and the *ex officio* oath.³⁰

Wigmore and Levy contend that the principle that no man should be compelled to accuse himself was then applied to the common law courts as well.³¹ Wigmore states that by 1685 “there is no longer any doubt” that the principle applied to all courts in England.³² Levy agreed, saying that by the early 1700’s the privilege against self-incrimination “prevailed supreme” at the English common law trial.³³

B. *The Revisionist Account*

Revisionist historians have recently taken issue with this account.³⁴ First, they contend that the “*nemo tenetur*” principle has its roots not in England, but rather on the Continent.³⁵ And the value underlying the principle was not the right to silence *per se*, but rather the right not to be interrogated under oath unless there was a sound basis for an accusation.

R. H. Helmholz traces the origin of “*nemo tenetur*” to the *jus commune*, the mixture of medieval canon law and Roman law that dominated legal thought in Europe in the Middle Ages.³⁶ The origin of “*nemo tenetur*” is obscure. Albert Alschuler refers to speculation that it may be related to the switch from public confession to private confession within the Roman Catholic Church.³⁷ As Alschuler notes, “[f]ar from reflecting the notion that wrongdoers have a right to remain silent, the privilege against self-incrimination originally may have reflected only a pragmatic judgment that a sinner’s duty did not include public disclosure that could lead to criminal proceedings against himself.”³⁸

By the seventeenth century, Alschuler writes that the “privilege” in England was actually a “right not to be interrogated under oath in the absence of well-grounded suspicion.”³⁹ English common law courts at that time required that criminal defendants be presented with specific charges; they also forbade placing defendants under oath.⁴⁰ Yet this tradition was challenged by the creation of the Court of High Commission.⁴¹ This court

30. *Id.*

31. *See supra* notes 22-23 and accompanying text.

32. WIGMORE, *supra* note 22, vol. 8, sec. 2250, at 289-90.

33. LEVY, *supra* note 23, at 325.

34. *See generally* HELMHOLZ, *supra* note 24.

35. *Id.* at 17.

36. *Id.* at 17-46.

37. Alschuler, *supra* note 27, at 186.

38. *Id.*

39. *Id.*

40. *Id.*

41. HELMHOLZ, *supra* note 24, at 42.

was founded for the specific task of suppressing religious dissent in England.⁴² Unlike the common law courts, the High Commission was allowed to proceed against individuals without any formal charges.⁴³ Also, individuals were forced to answer under oath.⁴⁴ When those called before the High Commission challenged the procedures, English common law courts ordered that the High Commission could not question individuals without a specific basis for the investigation.⁴⁵ Nevertheless, in 1607 it was held that the High Commission could continue to place individuals under oath, provided that the Commission gave them sufficient notice of the charges.⁴⁶

Note that what was at stake was not some amorphous right to remain silent; rather, it was the right of a person not to be questioned unless the questioner had a clear basis for suspicion. Kent Greenawalt has written on this issue of silence in the face of questioning.⁴⁷ In his article *Silence As a Moral and Constitutional Right*, Greenawalt sharply distinguishes between the legitimacy of the invocation of silence in different factual scenarios.⁴⁸ On the one hand, he posits a situation where a theft has occurred and, with no grounds for suspicion, the victim asks Betty to account for her activities during the time in question.⁴⁹ Greenawalt argues that Betty has a moral right to say, "None of your business."⁵⁰

On the other hand, Greenawalt poses an alternative hypothetical where the victim is told that Betty has been seen wearing a bracelet that looks very much like one that had been stolen from her.⁵¹ In this case, Greenawalt argues, the victim would be on firmer moral ground by asking Betty about this information, and Betty would have reason to respond.⁵² If Betty refused to respond to the victim's questions under these circumstances, Greenawalt contends that the victim would be justified in viewing Betty with increased suspicion.⁵³

Thus, Greenawalt distinguishes silence in the face of a fishing

42. *Id.*

43. Alschuler, *supra* note 27, at 187.

44. *Id.*

45. *Id.* at 188-90.

46. *Id.*

47. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

48. *Id.*

49. *Id.* at 21-22.

50. *Id.*

51. *Id.* at 22-23.

52. *Id.*

53. *Id.*

expedition from silence in the face of well-grounded suspicion.⁵⁴ And, Alschuler notes, this is the distinction that in fact was made during the seventeenth century fight against the High Commission's use of the *ex officio* oath.⁵⁵ The issue was not silence *per se*, but rather the right to remain silent when the interrogator had no well-grounded suspicion.⁵⁶

As to the eighteenth century American experience, Alschuler concedes that the privilege against self-incrimination in the Fifth Amendment was different in scope from the "*nemo tenetur*" principle enforced by the English common law courts against the High Commission.⁵⁷ Yet Alschuler argues that even in the Fifth Amendment the right "not to be compelled" did not mean an actual right to remain silent.⁵⁸ Rather, "compelled" meant just that—the right not to be *forced* to speak.⁵⁹ This meant that torture could not be used; it probably meant that the government could not engage in coercive tactics such as threats of punishment and promises of leniency.

It also meant that a person could not be interrogated under oath. Americans, like the English, treated oaths with great reverence.⁶⁰ The combination of both civil and religious sanctions involved with violating oaths led to the conclusion that placing a person under oath was *per se* compulsion.⁶¹

Again, this should not be equated with some general "right to remain silent." In the eighteenth and continuing well into the nineteenth century, there was no real "right to remain silent" either in American pre-trial criminal proceedings or at the American criminal trial itself.

As to pre-trial proceedings, Eben Moglen has shown that, following English practice, it was common in the colonies to take an arrested person before a justice of the peace for questioning.⁶² At this "preliminary examination," the justice of the peace would ask questions, transcribe the answers, and this information would be passed on for use at the later trial.⁶³ "*Nemo tenetur*" forbade examining the person under oath and forbade the

54. *Id.*

55. Alschuler, *supra* note 27, at 189-90.

56. *Id.*

57. *Id.* at 190.

58. *Id.* at 192.

59. *Id.*

60. *Id.* at 196.

61. *Id.*

62. Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF INCRIMINATION* 109, 114-22 (1997).

63. *Id.* at 117.

use of torture.⁶⁴ But this unsworn, pre-trial interrogation of a criminal defendant—a practice that had its roots in sixteenth century England—was meant to encourage the making of confessions.⁶⁵ A defendant could theoretically remain mute before the questioning of the justice of the peace.⁶⁶ But this meant that his silence would then be reported to the prosecutors and could be used against him at trial.⁶⁷

Moglen describes the concept of a “right to remain silent” at this stage to be a chimera, because “[a]t the center of that system stood the defendant, friendless and alone . . . [a]ny notion of the privilege against self-incrimination was but a phantom of the law.”⁶⁸

The early American criminal trial similarly rejected the concept of a defendant’s general “right to remain silent.”⁶⁹ John Langbein has convincingly argued that the model of a criminal trial in which the defendant confidently remains silent and challenges the prosecution to prove him guilty dates back only to the mid-nineteenth century—some 200 years after Levy and Wigmore claim it took effect.⁷⁰

Before that time, Langbein avers that criminal trials in England and America were very different from the trials we see today.⁷¹ He notes three major differences.⁷² The most significant was that until the mid-eighteenth century defendants in criminal cases were not allowed to have counsel represent them.⁷³ When they were finally allowed, defense lawyers were permitted to examine and cross-examine witnesses.⁷⁴ But it was not until 1836 that legislation was passed allowing defense counsel to address the jury directly.⁷⁵

Secondly, criminal defendants were traditionally restricted in their ability to call witnesses on their behalf.⁷⁶ Through the seventeenth century, English criminal defendants were not allowed to call unwilling witnesses.⁷⁷ And those witnesses the defense called could not be sworn, although

64. *Id.* at 118-20.

65. *Id.* at 117.

66. *Id.* at 117-22.

67. *Id.*

68. *Id.* at 122.

69. Langbein, *supra* note 28, at 82-108.

70. *Id.* at 83.

71. *Id.* at 82.

72. *Id.* at 83.

73. *Id.*

74. *Id.* at 87.

75. *Id.*

76. *Id.* at 88.

77. *Id.*

prosecution witnesses regularly were.⁷⁸

Third, the criminal defendant himself was not allowed to testify under oath.⁷⁹ Indeed it was not until 1864 that Maine became the first state to allow a criminal defendant to testify under oath; it was not until 1898 that England permitted this.⁸⁰

The upshot of this is that for most of our Anglo-American history a criminal defendant on trial *had to speak in his defense*; not doing so would have been, to quote Langbein, “suicidal.”⁸¹ Langbein describes this type of trial as the “accused speaks” trial.⁸² This makes any discussion of the “storied history” of the right to remain silent appear suspect.

Langbein calls the current criminal trial the “testing the prosecution” model.⁸³ This model insists that the prosecution must prove each element of the offense beyond a reasonable doubt;⁸⁴ provides that defense counsel may cross-examine the state’s witnesses and present sworn defense witnesses;⁸⁵ and allows defense counsel to argue directly to the jury.⁸⁶ Only with these changes in criminal procedure could the defendant’s silence at trial become a viable option.

Yet one more change was necessary before the “right to remain silent” could become a reality. Assuming a defendant has a right not to testify at trial, may his silence be considered by the jury in reaching a verdict? Interestingly, as late as 1953, the Uniform Rules of Evidence provided that “[I]f an accused in a criminal action does not testify, counsel may comment upon accused’s failure to testify, and the trier of fact may draw all reasonable inferences therefrom.”⁸⁷

It was not until 1965 that the U.S. Supreme Court held in *Griffin v. California* that it was constitutionally impermissible for the prosecutor or judge to comment on a criminal defendant’s failure to testify.⁸⁸ This, of course, was followed the very next year with the *Miranda* decision that extended the right to silence to police interrogation rooms.⁸⁹ Thus, it was

78. See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

79. Alschuler, *supra* note 27, at 198.

80. *Id.*

81. Langbein, *supra* note 28, at 83.

82. *Id.*

83. *Id.*

84. *Id.* at 89.

85. *Id.* at 88.

86. *Id.* at 86.

87. *Mitchell v. United States*, 526 U.S. 314, 335 (1999) (Scalia, J., dissenting) (citing UNIF. RULES OF EVIDENCE § 23(4)).

88. 380 U.S. 609, 615 (1965).

89. *Miranda*, 384 U.S. at 467-68.

not until the “one-two punch” of *Griffin* and *Miranda* in the 1960’s that the “right to remain silent” became a truly viable alternative.

What does this history have to do with the *Miranda* warnings? It should make us remember that, Law Day rhetoric notwithstanding, the “right to remain silent” is a right of relatively recent vintage. Historically, criminal defendants have had to personally defend themselves in the face of questions and accusations, both before and during trial.⁹⁰ And ethically, as Kent Greenawalt argues, defending oneself in the face of questions based on well-founded suspicion is an understandable reaction.⁹¹ Indeed, for a suspect facing questioning by police in a custodial environment, remaining silent in the face of accusatory questions might be absolutely counter-intuitive.

Thus, contrary to *Miranda*’s assurances, suspects are understandably wary about relying on some broad “right to remain silent.” Under traditional principles of evidence, silence could be damning.⁹² For example, a person’s silence in the face of a statement accusing him of a crime could be construed as a “tacit admission,” admissible against him at trial.⁹³ This is “based on the assumption that human nature is such that innocent persons will usually deny false accusations.”⁹⁴ True, *Miranda* may have changed the law in this area; there is currently a split of authority on whether a defendant’s pre-arrest, pre-*Miranda* silence can be used as substantive evidence of guilt.⁹⁵ But since *Miranda*, even the Supreme Court has held that a defendant can be cross-examined concerning his silence prior to arrest or *Miranda* warnings.⁹⁶ In addition, the Supreme Court has also held that a defendant can be impeached with *post-arrest* silence, as long as it is prior to his receiving *Miranda* warnings.⁹⁷

Thus, historically, remaining silent in the face of questioning is far more problematic—and dangerous—than *Miranda* might suggest. A combination of these factors—and not the popularity of Oprah Winfrey—perhaps has more to do with why 78% of those receiving *Miranda* warnings choose to talk with the police.⁹⁸

But this leads to another question. *Miranda* was groundbreaking in its

90. Langbein, *supra* note 28, at 82-108.

91. Greenawalt, *supra* note 47, at 27-33.

92. Langbein, *supra* note 28, at 83.

93. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 160 (1992).

94. *Id.*

95. See *United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) and cases cited therein.

96. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980).

97. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (*per curiam*).

98. Leo, *supra* note 9, at 276.

provision that those in custodial interrogation have the right to counsel.⁹⁹ Assuming a suspect chooses to talk with the police, why would he not accept the generous offer of an attorney by his side?

II. "YOU HAVE THE RIGHT TO AN ATTORNEY"

Miranda's final right assures a person in custodial interrogation that he has the right to an attorney, and that if he cannot afford one, an attorney will be provided free of charge.¹⁰⁰ Even assuming a suspect wants to respond to police questions, why would he turn down the offer of a lawyer?

To answer this question, let's go back to 1966, the year the Supreme Court issued *Miranda*. Within the decade before *Miranda*, two important works of literature had dealt with confessions: Albert Camus's novella *The Fall*¹⁰¹ and Arthur Miller's play *After the Fall*.¹⁰² Indeed, each work is a full-length confession.

A. *After THE FALL, AFTER THE FALL*

The Fall is a confession told over a series of meetings in Amsterdam.¹⁰³ The narrator, an expatriate Parisian named Jean-Baptiste Clamence, is speaking to an unidentified person he has met one night in a bar.¹⁰⁴ (Although the listener never speaks, Clamence clearly reacts to comments and facial expressions from him.)¹⁰⁵ Clamence's story revolves around an incident that occurred years earlier in Paris.¹⁰⁶ While walking home one night, he heard the cries of a woman who had jumped into the Seine.¹⁰⁷ Clamence's response was to walk away.¹⁰⁸

Unlike religious confessants,¹⁰⁹ Clamence is seeking no forgiveness.

99. *Miranda*, 384 U.S. at 467-68.

100. *Id.* at 473. In reality, the *Miranda* promise of a right to counsel is somewhat illusory. If a suspect asks for counsel, police will usually end all attempts at interrogation. Since the police know that an attorney will simply tell the suspect not to answer questions, it is easier to simply stop attempts to interrogate. Nevertheless, suspects are usually not told this. *But see* Duckworth v. Eagan, 492 U.S. 195 (1989). Thus, this Essay assumes that when a suspect in custody is informed of his right to counsel during interrogation, the suspect believes that an attorney will actually be provided if he requests one.

101. ALBERT CAMUS, *THE FALL* (1956).

102. ARTHUR MILLER, *AFTER THE FALL* (1964).

103. CAMUS, *supra* note 101.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 15-16 (2000).

Clamence sees the world as a place where innocence is not a possibility. As he describes it, "we cannot assert the innocence of anyone, whereas we can state with certainty the guilt of all. Every man testifies to the crime of all the others—that is my faith and my hope."¹¹⁰ Clamence has given up any hope of expiation. Instead, the function of his confession is to taint the listener, to spread the guilt, and to implicate everyone. It is no coincidence that Clamence is ill with "a little fever."¹¹¹ His guilt, like a disease, is contagious and infects all around him. As he explains it, "I stand before all humanity . . . saying: 'I was the lowest of the low.' Then imperceptibly I pass, in my speech, from 'I' to 'we'. When I reach, 'this is the way we are', the trick is turned, I can tell them off . . . [W]e're in the soup together."¹¹² Peter Brooks has characterized Clamence's confession as "clearly a perversion of the traditional intent of confession . . . the outcome of his confession appears to be a generalized abjection that has no value for spiritual renewal."¹¹³

In the early 1960's, Arthur Miller was asked to write the screenplay for *The Fall*.¹¹⁴ Although he turned down the job, it gave him the opportunity to re-read the book.¹¹⁵ Miller felt the book ended too soon, and he had a very different take on Clamence's failure to save the girl:

What if the man, at risk to himself, had attempted her rescue and then discovered that the key to her salvation lay not in him, whatever his caring, but in her? And perhaps even worse, that strands of his own vanity as well as his love were entwined in the act of trying to save her? Did disguised self-love nullify the ethical act? Could anyone, in all truth, really save another unless the other wished to be saved?¹¹⁶

Some time later, while Miller was working on a play about Robert Oppenheimer and the development of the atomic bomb, he became discouraged about his treatment of the issue of guilt.¹¹⁷ He returned to *The Fall*:

It was clearer now why [the book] left me unsatisfied; it seemed to say that after glimpsing the awful truth of one's own culpability, all one could do was to abjure judgment altogether. But . . . was it

110. CAMUS, *supra* note 101, at 110.

111. *Id.* at 119.

112. *Id.* at 140.

113. BROOKS, *supra* note 109, at 165.

114. ARTHUR MILLER, *TIMEBENDS* 483 (1987).

115. *Id.*

116. *Id.* at 484.

117. *Id.*

really possible to live without discriminating between good and bad? . . . [a]nd if we were to lay no more judgments, to what could we appeal from the hand of the murderer?¹¹⁸

Miller began to write a new play, one that would deal with the “dynamics of denial itself.”¹¹⁹ The structure of the new play thus became clear to him. He wrote, “[i]nvariably the form . . . was that of a confession, since the main character’s . . . conquest of denial [was] the path into himself.”¹²⁰ As the play’s themes turned towards Miller’s own life—and his marriage to Marilyn Monroe—he again turned to Camus:

Now the unstated question posed in *The Fall* was . . . [h]ow to find out why one went to another’s rescue only to help in [that person’s] defeat by collaborating in obscuring reality from his eyes. *The Fall* is the book of an observer; I wanted to write about the participants in such a catastrophe, the humiliated *defendants*. As all of us are.¹²¹

His finished play, *After the Fall*, is a confession by Quentin, a man whose relationships with women and politics bear some similarity to Miller’s own life.¹²² The confession is quite different from Clamence’s in *The Fall*. Clamence describes his role as that of a “judge-penitent.”¹²³ He explains this apparent oxymoron by contending that his confession of his own wrongdoing merely shows that he is no better than all the rest of humanity—all are guilty, no one is innocent.¹²⁴ His confession, rather than being a show of humility, shows instead his own “superiority” because he knows he is guilty. As Clamence says, “The more I accuse myself, the more I have a right to judge you. Even better, I provoke you into judging yourself, and this relieves me of that much of the burden.”¹²⁵ And the purpose of all this groveling in guilt is that there is no purpose at all. Forgiveness is impossible. As Peter Brooks observes, Clamence revels in empty confession for the sake of empty confession “since confession, rather than a now impossible absolution, appears as the end of the road.”¹²⁶

Clamence confesses *in order to have the right* to judge everyone else. Quentin, however, is the opposite of Clamence; he has spent a lifetime judging others. His confession comes from the realization that it is now *his*

118. *Id.* at 520.

119. *Id.*

120. *Id.* at 521.

121. *Id.* (emphasis added).

122. *See supra* note 114.

123. CAMUS, *supra* note 101, at 138.

124. *Id.*

125. *Id.* at 140.

126. BROOKS, *supra* note 109, at 165.

turn to be judged. Martin Gottfried has described the core of the play as “Quentin’s recognition that he has been spending his life judging people and now he must judge himself. Or else mankind—we, the audience—must judge him. That is why he has come. *The judge is now on trial.*”¹²⁷

Unlike Clamence, Quentin not only finds forgiveness to be a possibility—he considers it a necessity. Holga, Quentin’s third wife, describes a dream in which her own life appeared to her in the figure of an “idiot” child: “And I bent to its broken face, and it was horrible . . . but I kissed it. I think one must finally take one’s life in one’s arms . . .”¹²⁸ At the play’s conclusion, Quentin concludes that he must confront the “wish to kill” by “look[ing] into its face when it appears, and with a stroke of love—as to an idiot in the house—forgive it; again and again . . . forever?”¹²⁹ To Clamence, forgiveness is an illusion; to Quentin, it is the only way to continue living.

These are two serious works of art describing two very different confessions. Yet one similarity needs to be discussed.

Both Clamence and Quentin are lawyers.

Why?

B. *Why Would a Lawyer Confess?*

In the criminal setting, it is assumed that a “police confession” and the “presence of a lawyer” are mutually exclusive concepts. Over a half century ago, Justice Jackson stated that “[a]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”¹³⁰ Granted, Clamence and Quentin are not technically confessing to crimes.¹³¹ Yet is it just coincidental that these major literary works dealing with confessions should each have a lawyer as a protagonist?

I would suggest that the use of a lawyer-protagonist by both Camus and Miller is significant in understanding the very nature of confession. It may also, ironically, help explain why so many suspects in police custody waive their *Miranda*-guaranteed right to a lawyer during interrogation.

127. MARTIN GOTTFRIED, *OPENING NIGHTS: THEATER CRITICISM OF THE SIXTIES* 299 (1969) (emphasis added).

128. MILLER, *supra* note 102, at 30.

129. *Id.* at 163.

130. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

131. As to Clamence, perhaps a “Good Samaritan” kind of statute might impose some criminal liability on his omission. *But see* GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 46 (1998) (“There is not now and there has never been a separate crime of letting a person drown”). As to Quentin, one can speculate on whether his leftist past ever ran afoul of McCarthy-era statutes dealing with Communists.

Peter Brooks' recent book *Troubling Confessions*¹³² discusses a valuable insight J.L. Austin has made concerning the dual nature of a confession.¹³³ Austin states that each confession has both a *constative* aspect and a *performative* aspect.¹³⁴ The constative aspect is the actual sin or guilt a person is confessing; the performative aspect is the action performed by the statement "I confess."¹³⁵ For example, Brooks states, "When one says 'Bless me Father, for I have sinned,' the constative meaning is: I have committed sins, while the performative meaning is: absolve me of my sin."¹³⁶

The performative aspect of confession reminds us that confession does not exist in a vacuum. It is being "performed" for—and seeks a response from—another. The person Clamence is speaking to in Amsterdam is crucial to Clamence's confession. Letting the girl drown is the constative portion of the confession. But the performative aspect—the very reason Clamence is confessing—is to implicate the listener in universal guilt. So, too, Quentin is presented as actually addressing a Listener, someone who indeed is responding to him throughout the play. Quentin both seeks and needs forgiveness from another.

The performative aspect of every confession suggests why both Camus and Miller chose lawyers as confessants. A confessant—*by definition—is making a case to another*. The confessant wants—indeed, demands—something from the confessor. Who better than a lawyer—someone trained to marshal facts and argument to obtain a specific result—to epitomize this performative aspect of confessions?

Indeed, the fact that Clamence and Quentin are lawyers should put the reader on guard. Clamence brags about his skill as an advocate: "I am sure you would have admired the rightness of my tone . . . the persuasion and warmth, the restrained indignation of my speeches before the court."¹³⁷ He also tells us of his "instinctive scorn for judges in general."¹³⁸ Both the listener and the reader have thus been warned. For example, the only evidence we have that Clamence was both a legendary lawyer and a legendary lover comes from one source—Clamence himself. Let the listener beware.

Likewise, Quentin presents himself as a very successful Wall Street

132. BROOKS, *supra* note 109.

133. *Id.* at 21 (citing J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962)).

134. *Id.*

135. *Id.*

136. *Id.*

137. CAMUS, *supra* note 101, at 17.

138. *Id.* at 18.

lawyer. We are told repeatedly of the brilliant brief he has prepared on behalf of his friend being hounded for his leftist past.¹³⁹ It is true that Quentin tells the Listener, in the beginning, that he has left the firm and no longer practices law. He describes despair as realizing that he looked up one day and realized “the bench was empty;”¹⁴⁰ there was no judge to rule on the value of his life. He says, “All that remained was the endless argument with oneself—this pointless litigation of existence before an empty bench.”¹⁴¹ Yet we should also be wary of Quentin, for he has not left his role of an advocate behind. For all his protestations about “the empty bench,” Quentin is most pointedly not talking to himself. He is talking to—and making his case before—the Listener, an unseen person nevertheless so real that Miller has capitalized the name in the stage directions.¹⁴²

This provides a clue as to why so many suspects decide to talk with the police without *Miranda*'s offer of the assistance of counsel. For the performative aspect of every confession guarantees *that every confessant is indeed acting as his own lawyer*. The intrinsic nature of confession demands that each confessant *must* “present a case” and ask for something from the confessor, whether that is understanding, forgiveness, or leniency.

This is borne out by Richard Leo's study of police interrogation techniques. Leo found that one of the most successful techniques police used in obtaining incriminating evidence from suspects in custodial interrogation was offering the suspect either a moral justification or psychological excuse for his behavior.¹⁴³ This tactic was successful in a staggering 90% of the interrogations in which it was used.¹⁴⁴ In other words, the police obtain the *constative* element by suggesting ways the suspect may improve the *performative* aspect of the confession. The police pretend they are helping the suspect “be his own lawyer” by suggesting ways in which he can “present his own case.”

This is starkly illustrated by David Simon's book *Homicide*.¹⁴⁵ Simon, a reporter for the Baltimore Sun, chronicled the inner workings of the Baltimore Police Department's homicide unit for one year. He describes a typical homicide interrogation in which the officer says to the

139. MILLER, *supra* note 102, at 33, 34, 43.

140. *Id.* at 5.

141. *Id.*

142. *Id.* at 2.

143. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

144. *Id.* at 293-94.

145. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* (1991).

suspect, “[I]ook, bunk, I’m giving you a chance. He came at you, right? You were scared. It was self-defense.” Simon describes this strategy of minimizing the seriousness of the offense:

[T]he majority of those who acknowledge their complicity in a killing must be baited by detectives . . . They must be made to believe that their crime is not really murder, that their excuse is both accepted and unique, that they will, with the help of the detective, be judged less evil than they truly are.”¹⁴⁶

The police try to offer a false “Out;” but, as Simon notes, “The Out leads in.”

Again, the police strategy is to invite a suspect to act as his own lawyer through his confession. A layperson’s ignorance concerning legal doctrines such as accountability¹⁴⁷ and felony murder¹⁴⁸ probably results in many suspects sending themselves to prison. A recent story in Illinois combined both of these factors.¹⁴⁹ Police questioned Leamon Jordan concerning the murder of a 17-year-old girl.¹⁵⁰ Jordan told police that he drove the car for two men who murdered the girl after they abducted her from a bar.¹⁵¹ Jordan said he believed he would get a reward for giving the police this information.¹⁵²

Jordan probably believed that showing he was in the car would mean he could not be found guilty of the murder. If so, he was unaware that principles of “accountability” would make him liable for the murder, even if he did not personally commit it, if a court found that he had aided and abetted the others in the crime. Moreover, principles of “felony murder” could separately hold him liable if the killing occurred in the course of the underlying felony kidnapping.

Jordan was sentenced to 60 years in prison.¹⁵³ The police were never able to determine whether Jordan really knew the other two men or whether the other two men knew each other.¹⁵⁴ The other men were never charged.¹⁵⁵

146. *Id.* at 197.

147. *See, e.g.*, 720 ILCS 5/5-2 (2000).

148. *See, e.g.*, 720 ILCS 5/9-1(c) (2000).

149. William Gaines, *Inmate Who Said He Lied About Death Loses Plea*, CHI. TRIB., July 22, 2000, at A5.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

CONCLUSION

It's very clear—*Miranda* is here to stay. But amid the defense jubilation, there must be time for some sobering thoughts. Seventy-eight percent of all suspects in custodial interrogation waive their *Miranda* rights.¹⁵⁶ True, some of these waivers undoubtedly result from police misconduct. Yet this Essay has shown that there are at least two other reasons that merit attention. First, the *Miranda* warning aside, there is no long-standing Anglo-American tradition in favor of remaining silent in the face of questioning by authorities when the suspect is not under oath. Second, the nature of confession encourages the confessant to “act as his own lawyer” in the performative aspect. Thus, confession by its very nature may militate against suspects taking advantage of *Miranda*'s offer of counsel.

Two cheers for *Miranda*! But after one-third of a century, let's hold off on the third cheer until we seriously consider whether *Miranda* really is achieving all we had hoped it would. Now that *Miranda* is safe, let's move on to the next issue: How can it be improved?

156. Leo, *supra* note 9, at 276.

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