Essay

Storytelling Without Fear?
Confession in Law & Literature

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2. JEAN-JACQUES ROUSSEAU, CONFESSIONS, AUTRES TEXTES AUTOBIOGRAPHIQUES 175 (Bernard Gagnebin & Marcel Raymond eds., Gallimard: Bibliothèque de la Pléiade 1962).

Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority.

Abe Fortas

I have only one thing to fear in this enterprise; that isn’t to say too much or to say untruths; it’s rather not to say everything, and to silence truths.

Jean-Jacques Rousseau
I want to talk about a certain kind of narrative that has long held a particularly problematic status in the law. As a kind of prologue to my remarks, let me mention the record of a criminal case that I stumbled upon in the Yale Law Library. It is from 1819 in Manchester, Vermont, where the disappearance of the cantankerous Russell Colvin led to an accusation that his feuding neighbors, Stephen and Jesse Boorn, had murdered him—to which, after their conviction, they eventually confessed, only to have it discovered that Colvin wasn’t even dead, but merely gone to live in Schenectady, New York. The subtitle of a narrative of the events gives the essential information: “A Full and Veracious Account of the Amazing Events in Vermont: How Stephen and Jesse Boorn, two Brothers, were Accused, Arrested, Indicted, Tried, Convicted and Sentenced to Die by Hanging for the Wilful Murder of Russell Colvin of Manchester, Having confessed the Crime; how, while the Condemned Men Languished in Prison, it was Proved that Colvin had not been Murdered, but was Alive and in Good Health and how He Returned to Manchester and Saved the Unfortunate Doomed Men from a Terrible Fate.”

The confession narrative is a particularly dramatic instance of a story that needs to be told, but needs to be told voluntarily, in the correct context, according to the rules. I want to ask why it is that confession—specifically the context in which confession is acceptable, certifiably voluntary, and thus admissible in evidence—has posed such a problem to the law. I also want to consider whether the long tradition of literary confession may offer any illumination. The encounter between legal and literary discourses on the nature and contexts of the confessional act may help us understand why it has proved so difficult to offer a convincing analysis of the protections accorded self-incrimination.

In Mirando v. Arizona, the Supreme Court, in a 5-4 decision, issued its most far-reaching and controversial ruling on the place and use of confessions in the criminal law. The Court established rules for determining what might be considered a “true confession”—rules that immediately entered the popular consciousness as the “Miranda warnings,” familiar from arrests in almost any TV cop show: You

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3. These essentials of the narrative are presented on the title page of the most recent recounting of the case: John Spargo, The Return of Russell Colvin (1945). See also Leonard Sargent, The Trial, Confessions and Conviction of Jesse and Stephen Boorn, for the Murder of Russell Colvin, and the Return of the Man Supposed to Have Been Murdered (Manchester, VT, Journal Book and Job Office, 1873). Sargent, later Lieutenant Governor of Vermont, was one of the lawyers for the defense at the trial.

have the right to remain silent; any statement you do make may be used as evidence against you; you have the right to the presence of an attorney; if you cannot pay for an attorney, one will be appointed to represent you. In establishing these "prophylactic standards" (as they were later termed) for confession, the Court was attempting to create, for itself and for the police stations of the nation, a set of guidelines that would permit the judgment of whether a confession had been given "voluntarily," or had been "compelled" or "coerced."  

"Voluntary" versus "compelled" had of course long been the Court's major test of the admissibility of confessions at trial. But the due process voluntariness test proved problematic in practice, and the Court found itself presented with more and more petitions for review of individual cases. With Massiah v. United States and Escobedo v. Illinois, the Court moved toward more specific rules—primarily the right to counsel in pretrial questioning—to govern the situation in which confessions could be said to be voluntary rather than coerced. Miranda takes a leap forward in specifying those conditions without which no confession will be admitted as voluntary. A cynical interpretation of the Court's decision in Miranda would say that the Court cut the Gordian knot of the problem of voluntariness by saying to the police: If you follow these forms, we'll allow that the confession you obtained was voluntary. There is considerable post-Miranda evidence indicating that the police quickly learned to play by the new rules, and that they produced as many confessions as before. A more generous interpretation would view the Court's decision as a well-intentioned (if not entirely adequate) attempt to deal with a problem as old as the history of criminal prosecution. What are the criteria that allow us to know whether a confession has been voluntarily

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6. In Culombe v. Connecticut, 367 U.S. 568 (1961), Justice Frankfurter produced a sixty-seven page "treatise" on the subject without reaching a resolution. Chief Justice Earl Warren, concurring, points out that the opinion is going to offer little helpful guidance to police officers (thus necessitating the Miranda decision). Id. at 636.

The most thoughtful discussion of the issues raised by Miranda that I have seen is Louis Michael Seidman, Brown and Miranda, 80 CAL. L. REV. 673 (1992). Seidman considers whether Miranda should be deemed a "rejection of liberal individualism" or a "victory of liberal individualism," effectively bringing out the contradictions that inhabit the decision.

See also the penetrating comments of Robert Weisberg, in Criminal Law, Criminology, and the Small World of Legal Scholars, 63 U. COLO. L. REV. 521 (1992).

For a wealth of additional detail about the Miranda case, see LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983).
made—and therefore that it may be accepted on its face as a reliable confession of the truth? Behind this question may lie another one, implicit rather than explicit in the Court's statements on confession: What is it about confession that makes it such a difficult and slippery notion? Why do we worry about confessions, and their truth value, not only in the law, but also in literature and in daily life?

Chief Justice Warren, writing for the majority, claims that the rules and warnings established by *Miranda* "enable the defendant under otherwise compelling circumstances to tell his story without fear."\(^{10}\) Opposed to this ideal of "storytelling without fear"—an unconstrained context for confession—stands Justice White's comment, in his dissenting opinion, that "it is by no means certain that the process of confessing is injurious to the accused. To the contrary, it may provide psychological relief and enhance the prospects for rehabilitation."\(^{11}\) I detect here two fundamentally opposed views of how confession works, and how it is to be valued—as well as two incompatible views of human nature and volition. White exaggerates only slightly when he argues, "[t]he obvious underpinning of the Court's decision is a deep-seated distrust of all confessions,"\(^{12}\) which he finds in excess of the Fifth Amendment injunction against compelling someone to bear witness against himself. The issue joined here turns on the question as to whether "storytelling," in the confessional mode, should and even can take place "without fear."

Justice Harlan, in his dissenting opinion, allows that the context of custodial questioning never can be wholly without fear:

The atmosphere and questioning techniques, open and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional."... Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.\(^{13}\)

Justice Jackson's view, as quoted in Harlan's opinion, of the "inaccurate but traditional" view of confession as voluntary or uncoerced will need further meditation. To stay with Harlan's opinion, that "tug" on the suspect to confess needs juxtaposition to one of the most effective moments of Warren's opinion: the moment when he invents what one might call the "story of the closed room."

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10. 384 U.S. at 466.
11. Id. at 538 (White, J., dissenting).
12. Id. at 537.
13. Id. at 515 (quoting Ashcraft v. Tennessee, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting)).
Warren begins by founding this story on its inherent resistance to telling. It is essential, he says, to understand what has gone on when the defendant was questioned by police officers, detectives, or prosecuting attorneys “in a room in which he was cut off from the outside world.” But “[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.” After reviewing earlier examples of police use of “third degree” tactics to extort confessions—including beating, hanging, whipping, and prolonged incommunicado interrogation—Warren allows that in modern interrogation, physical brutality largely has given way to psychological coercion, citing Blackburn v. Alabama to the effect that “the blood of the accused is not the only hallmark of an unconstitutional inquisition.” He continues, “Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.” Privacy produces secrecy which produces a gap in our knowledge. As literary scholars know, especially from the work of Wolfgang Iser, a “gap” (Leerstelle) demands to be filled, activating the interpreter’s ingenuity.

To fill in the gaps, Warren, as ingenious interpreter, turns to police interrogation manuals. The tactics preached by these manuals are as chilling as one might imagine. They recommend that interrogation take place in private, so that the suspect, isolated from all familiar surroundings, will “be deprived of every psychological advantage”, that the interrogators assume from the outset that the suspect’s guilt is a fact, and that all they are after is an elaboration of a story the police already know; that interrogation create “an oppressive atmosphere of dogged persistence,” with “no respite from the atmosphere of domination”; that interrogators use the “Mutt and Jeff,” good-cop, bad-cop routine to scare the suspect and suggest

14. Id. at 445.
15. Id.
16. Id., 384 U.S. at 448 (citing Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
17. Id.
19. Miranda, 384 U.S. at 449 n.9 (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962), and CHARLES E. O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956), works which (in various editions) have had a circulation of over 44,000 copies).
Note that Justice Harlan, in his dissent, objects to Warren’s extrapolation of the story of the closed room from police interrogation manuals, which he characterizes as “merely writings in this field by professors and some police officers.” Miranda, 384 U.S. at 499 (Harlan, J., dissenting).
possible leniency if he cooperates; that they establish a context of dependency, so that the suspect feels he must throw himself on their mercy; that tricks be used, such as fake line-ups with the accused identified by fictitious witnesses. The idea, says Warren, is to get the suspect to confirm “the preconceived story the police seek to have him describe.” At this point, one must ask of the confession made: Whose story is it? If confession is in theory the most intimate and personal of statements by a subject, how can this story be supplied by his listener? As Warren concludes, the “interrogation environment is created for no other purpose than to subjugate the individual to the will of his examiner.” From here, he argues the “intimate connection” between custodial interrogation and the Fifth Amendment privilege against self-incrimination.

I have sketched only in brief outline how Warren uses the secrecy of interrogation to create a dramatic story of the closed room, and the dramas of humiliation, deception, and coercion played out behind the locked door, convincing us that compulsion is “inherent” in custodial interrogation. He has effectively responded to Frankfurter’s resigned complaint, in Culombe v. Connecticut, that “what actually happens to [suspects] behind the closed door is difficult if not impossible to ascertain.” The closed room—in American police stations, it is nicely labelled “the interview room”—may remind us of the sealed Paris apartment of Edgar Allan Poe’s The Murders in the Rue Morgue, the first detective story and the model for the genre, where this very closure activates the detective Dupin’s interpretive method. The enclosed, self-contained space, from the English country house to the California villa, becomes a topos in detective fiction precisely because, like that alcove where the young Sigmund Freud was instructed by his mentor to seek the secrets of hysteria, it appears to offer the inner sanctum of a hidden truth.

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21. Id. at 450-52 (citing INbau & Reid, supra note 19, and O’Hara, supra note 19).
22. Id. at 455.
23. In Escobedo v. Illinois, we learn that the police summon “an experienced lawyer who was assigned to the Homicide Division to take statements from some defendants and some prisoners that they had in custody, [who] ‘took’ petitioner’s statement by asking carefully framed questions apparently designed to assure the admissibility into evidence of the resulting answers,” 378 U.S. 478, 483 (1904). In fact, most confessions by criminal suspects traditionally took the form of a statement written by the interrogators, and signed by the suspect.
25. Id. at 458.
26. Id.
Custodial police interrogation as we know it and as *Miranda* attempts to deal with it, historically is consubstantial with the rise of the detective story. There could be no cop stories before the nineteenth century because there were no police forces in the modern sense. Police interrogation at the station house did not take place much before the end of the nineteenth century. Earlier, questioning in other venues—such as the suspect's home, or before a magistrate—was common, and the extension of the right against self-incrimination to the station house simply unnecessary (a historical evolution that the dissents in *Miranda* ignore). The story of the closed room of course has its historical precedents, especially in inquisitorial proceedings. So far as custodial interrogation by the police is concerned, however, it is very much a product of modern, urban crime and the social response to it. It is as if the pathological, closed, and isolated space of the interrogation room had been created to match the closed and isolated pathological space of the crime scene. Warren's creation of the story of the closed room, his opening up to light of its isolation and privacy and secrecy, his filling in of the gaps in our knowledge, stands as an exemplary narrative. Where is voluntariness in such a story? What confession can be trusted?

Yet, since the purpose of police work is to convict suspects and thus protect society, one may feel some surprise, as well as admiration, for the counter-conviction implied in Warren's opinion, that suspects should be freed of the obligation to confess. That there is a right *not* to confess does not seem self-evident. It runs counter to conventional morality, which censures concealment and values the confession of wrong-doing. In many a routine case, confession is necessary to breach concealment and uncover the true story. Commonsensically, we might assume that the evidence against the accused produced from his own mouth is always the most reliable evidence we can have. When someone confesses, his judges may proceed to condemn him with a good conscience.

30. As Judge Friendly argued:
[W]hile the other privileges [for example, husband-wife, attorney-client, doctor-patient, and priest-penitent] accord with notions of decent conduct generally accepted in life outside the court room, the privilege against self-incrimination defies them. No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers, and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not. Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671, 680 (1968). Friendly's comment elides the difference between confessing to benevolent authorities and confession to the police, who are not about to forgive a misdeed—as he partially acknowledges in a footnote. *Id.* at 680 n.48. He makes the important point, though, that the Fifth Amendment privilege is counterintuitive to everyday morality.
The Court’s anxiety, of course, has a history—one that is intricated with religious practices of confession and with the ecclesiastical courts, reaching back at least to the Fourth Lateran Council of 1215, which defined the Christian faith, enjoined once-a-year confession on the faithful, and instituted a vast inquiry into heresy, including use of the oath of *de veritate dicenda*, requiring those under suspicion to answer truthfully, under oath, any question that might be posed.\(^{31}\) As the Holy Office gained power in the fight against heretics, it developed the doctrine that confession to heresy was necessary to save the heretic’s soul and preserve the purity of the Church: One had to stand condemned by one’s own word—even if that word had to be extracted by the rack and pinion, and other ghastly techniques of torture.

Confession and inquisition in fact have close historical links. When the Fourth Lateran Council gave up “ordeal,” divine proofs of guilt or innocence such as putting one’s hand into fire, continental Europe generally adopted rules of evidence, derived from Roman-canon law, which said that in a capital case, only the testimony of two eyewitnes-ses or the defendant’s confession constituted full proof sufficient to condemn. Circumstantial evidence was only partial proof. If partial proofs—*indicia*—were abundant enough, torture was justified to seek full proof by way of confession. A confession made under torture was supposed to be fully repeated a day later without torture in order to be valid (but if not so repeated, the suspect could be tortured again, until he agreed to make the “voluntary” confession).\(^{32}\)

In ordinary capital cases, the facts derived from confessions made under torture were also supposed to be verified by independent means, where possible.\(^{33}\) In cases of religious inquisition—the inquiry into heretical beliefs—this was of course impossible, since the matter being confessed to was entirely internal. Hence the special problem of inquisitorial requirements of confession in cases of religious belief and deeply-held personal conviction: There could be no other source of convicting evidence than that produced by a defendant’s own lips—however extracted from those lips.

In England, the High Commission, the ecclesiastical equivalent of the Star Chamber, imposed what was known as the oath *ex officio*, which, like the oath of the Inquisition, required that one give a full accounting for one’s beliefs even in the absence of any specific charge.

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32. *Id.* at 65; *see John H. Langbein, Torture and the Law of Proof* (1977). *See also Nicolau Eymerich & Francisco Peña, Le Manuel des Inquisiteurs* (Louis Sala-Molins trans. & ed., 1973). Eymerich, a Dominican from Catalonia, composed the *Directorium Inquisitorium* in Avignon in 1376; it was printed in 1503. Peña’s recompilation and updating of the *Directorium* was published in Rome in 1585.
Taking the oath put the religious non-conformist—who, in Elizabethan England, could be either a Catholic or a Puritan—in a double bind. If one confessed to the charge of heretical belief, one was condemned. If one refused to confess, one was also condemned, because in violation of the oath. In this context of inquisitorial proceedings concerning matters of deeply-held religious beliefs and personal conscience, the accused, with increasing frequency under Elizabeth and the Stuarts, began to offer the defense summed up in the Latin phrase nemo tenetur seipsum prodere: "no one is required to bear witness against himself," which eventually became part of the Fifth Amendment to the Constitution. It was originally a claim that there was a reserved domain, concerning matters of personal conscience and belief, on which persons could not be required to speak in proceedings potentially leading to their condemnation for the belief. Gradually, this right was established in English law, in part thanks to the effort of lawyers associated with the Puritan cause to ground the right in the Magna Carta; that is, to see it as entailed by the basic rights of free subjects, in a government where even monarch and church are constrained by the law. By 1609, Lord High Justice Sir Edward Coke could write:

[T]he Ecclesiastical Judge cannot examine any man upon his oath, upon the intention and thought of his heart, for cogitationis poenam nemo emeret [no man may be punished for his thought]. And in cases where a man is to be examined upon his oath, he ought to be examined upon acts and words, and not of the intention or thought of his heart; and if any man should be examined upon any point of religion, he is not bound to answer the same; for in time of danger, quis modus tutus erit [how will he be safe] if everyone should be examined of his thoughts . . . for it hath been said in the proverb, thought is free.

This privilege, originally relating to ecclesiastical courts and to questions of religious belief, came to be recognized as a fundamental right of the accused in any criminal proceeding.

Both Justice Harlan and Justice White argue in their dissents in Miranda that the privilege against self-incrimination and the rule against coerced confessions have separate origins and separate histories. Coerced confessions were originally barred because they were perceived to be unfairly obtained, and thus unreliable. The

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privilege against self-incrimination arose essentially to protect beliefs and matters of conscience. Yet, since the compulsion to self-incrimination could also produce confessions that were untrustworthy, and coerced confessions violated a suspect’s right to refuse to answer under interrogation, an indissoluble connection has developed between the exclusion of coerced confession and the privilege against self-incrimination.\(^\text{36}\) If the “trustworthiness” of a confession seems the more pragmatic, and perhaps useful, test, “voluntariness” may be the more probative one. The “voluntariness” test relates not only to the “content” of the confession (which in some cases can be verified from other sources) but also to how it was produced, its context. This test insists that the involuntary can never be accepted as trustworthy: To coerce a mental state or psychological disposition—the choice to confess—is somehow paradoxical.\(^\text{37}\) Above all, to compel confession may be an ethical violation, somehow an invasion of human dignity. The proposed procedural safeguards of Miranda touch on the relation of individual rights to the state’s power.

In Miranda, Chief Justice Warren briefly evokes the history of the Fifth Amendment privilege as part of the search for “the proper scope of governmental power over the citizen,” and concludes that “our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”\(^\text{38}\) Compulsion, inquisition, and torture lie in the background of the Court’s suspicion of confession. As Abe Fortas, soon to be a justice of the Supreme Court, eloquently summed it up: “Mea culpa belongs to a man and

36. See Levy, supra note 1, at 328.
37. For a probing analysis of this issue, see Louis Michael Seidman, Rubashov’s Question: Self-Incrimination and the Problem of Coerced Preferences, 2 YALE J.L. & HUMAN. 149 (1990). Seidman argues (partially in reference to the permissible compulsion of United States v. Doe, 465 U.S. 605 (1984), in which the defendant was forced to sign a “consent decree”): “The point is not that the government ought not to coerce such statements [regarding internal mental states]. Rather, the government cannot coerce such statements because the application of coercive pressure makes them something other than statements regarding internal mental states.” Seidman, supra, at 158. I will argue later that this may be correct, but the statements may in that case hold another kind of confessional truth. I am not convinced that a “preference coercion theory of the [Fifth Amendment] privilege,” id. at 159, can wholly respond to the root objections to compelled confessions, which seem to me to be ethical. In this context, see the appropriately skeptical remarks of Robert Weisberg:

The jurisprudence of the Fifth Amendment directly raises the question raised indirectly by searches and seizures: What image of the autonomous human being do we believe in? We have no coherent analysis of what it means to be autonomous in the face of the law, and we are left instead with shallow rationalizations about the psychology of volition, abetted in the Sixth Amendment area by hilarious rationalizations about the effects of the invisible formalities of state prosecution on the volition of a poor wretch of a subject.

Weisberg, supra note 9, at 538-39.
38. 384 U.S. at 460.
his God. It is a plea that cannot be exacted from free men by human authority. To require it is to insist that the state is the superior of the individuals who compose it, instead of their instrument."39 The Miranda warnings, then, set the conditions in which the voluntary confessional narrative can unfold—or fail to unfold. The point, as Warren puts it, is that "a knowing and intelligent waiver of these rights [cannot] be assumed on a silent record."40 A "silent record" is another "gap" attributable to the "closed room." Henceforth, the record must speak, precisely of the accused's knowledge of the right not to say anything that might be self-incriminating.

The Court's debates about the contexts in which confession is allowable, in Miranda and other cases—and the continuing debate in legal scholarship about the scope and even the raison d'être of the privilege against self-incrimination—may point, beyond issues of specific legal doctrine, to a more general problem in our thinking about confession. Consider that the law as we know it has elaborated as a most basic right of the accused the protection against involuntary confession, while Western literature, from early in the Romantic era onward, has made the confessional mode a crucial kind of self-expression, one that is supposed to bear a special stamp of sincerity and authenticity, and to bear special witness to the truth of the individual personality. From Jean-Jacques Rousseau to Michel Leiris, from William Wordsworth to Philip Roth, the baring of one's innermost thoughts and desires has been held to be a business as necessary as it is risky. If psychoanalysis is perhaps the most characteristic development of modern thought in the "human sciences," it, too, appears to be predicated on the confessional act, in a secular reinterpretation of auricular confession. Since the Council of Trent (held in 1551), the Catholic Church has taught that confession, exomologesis, is of divine origin and necessary for one's spiritual salvation. Modern cultures have, in their literature and their therapies, adopted some version of this view. In a secularized world, the insistence has come to be placed on truth to oneself. Attaining this truth almost necessarily involves a confessional gesture, a claim to lay bare that which is most intimate in order to know oneself, or to make oneself known.

Jean-Jacques Rousseau is the symbolic fountainhead here. The opening page of his Confessions, where he announces that he will present himself before his creator on the Judgment Day with this book in his hand, captures the transition between religious confession

and the secular writing of one's intimate self into a book: "I have unveiled my inner being as you have seen it yourself," he announces to this "sovereign judge." But readers of Rousseau have long been aware that the act of confession does not offer access to the inner being so straightforward or unproblematic as one might assume. The problem may not be one of error in any simple sense. The study of any autobiographical and confessional text can usually detect some errors of fact, but that does not necessarily invalidate the confession of the "inner being," which has no referential verifiability other than the speech act that makes it known to us. But if that is the case, then what is it that is being confessed to? In what sense is the confession true, if its apparent referent is false? What other kind of truth, what other place of truth, is involved? Herein lies the problem: What is the relation of the act of confessing to the reliability of what is confessed? If Rousseau, and other writers in the modern confessional tradition, are clearly making "voluntary" confessions—in that no other person is coercing them to confess—can we therefore trust the fruits of confession? Indeed, what must we conclude about the very notion of "voluntariness" in confession when we look at the circumstances of the confessional speech act?

One may approach these questions through the famous episode of the "stolen ribbon" that closes Book Two of the Confessions. Following the death of Madame de Vercellis, in whose household the young Rousseau has been a servant, a ribbon is found to be missing. It is discovered among Rousseau’s things. Summoned publicly by the Comte de la Roque (acting as executor), Rousseau is asked where he got the ribbon. He accuses the young kitchen maid Marion of having given it to him. When she denies this calumny, Rousseau persists in his accusation, and the Comte de la Roque, uncertain as to where the truth lies, dismisses them both, with the comment that the conscience of the guilty one will avenge the innocent. This, says Rousseau, has happened every day since the incident. He goes on to imagine the future fate of Marion, dismissed under suspicion of theft, no doubt unable to find another place, condemned to a probable future of prostitution. Rousseau, on the other hand, has continued to suffer nighttime hallucinations in which he stands accused of the crime as if it happened only yesterday. He has never been able to confess the crime, even to his most intimate friends. The weight of the crime on his conscience has been a key motive in his decision to write his confessions.

41. ROUSSEAU, supra note 2, at 5.
Thus far, we seem to be close to Justice White’s view that confession is good for one, that “it may provide psychological relief and enhance the prospects for rehabilitation.”42 We may, however, have some doubts about this result as we read on, for now Rousseau moves from the narrative of what happened to the story of what he calls his “dispositions intérieures,” his inner feelings. Here he tells an entirely different story, one that stands in total contradiction to the external events. He tells us that in fact malice was never farther from his thoughts than in this “cruel moment.” When he accused Marion, it is bizarre but true that his “friendship” for her was the cause. “She was present in my thoughts, I excused myself on the first object that came to hand.”43 This seemingly random accusation is then further specified: “I accused her of having done what I wanted to do and of having given me the ribbon since my intention was to give it to her.”44 Thus we have a problem in desire which, thwarted in its intent, gives way to its apparent opposite, the wish to punish. If only his accusers had given him time to repent, and the opportunity to confess privately, he would have told the truth. But public exposure, the risk of being publicly declared a thief and liar, is too strong for him to perform on the spot the confession he wants to make—and now makes so many years later. Over those years, Rousseau says, he has been so persecuted that Marion has been well revenged. He concludes with the request that he be allowed never to speak of this incident again—a conclusion violated when he returns to the stolen ribbon in the fourth of his Réveries du promeneur solitaire.

Rousseau’s telling of the story of the stolen ribbon is a stunning and troubling performance. Not only does it represent the emblematic confession, where the failure to confess on the spot becomes the motive for the very act of confessing as an accounting for one’s life, it also suggests that confession as a speech act accomplishes something other than the simple revelation of a truth. Confession here permits the staging of a scene of exposure, guilt, and retribution, which is the very motive of confession. Paul de Man, in a classic essay on this episode, effectively underlines the issue:

What Rousseau really wanted is neither the ribbon nor Marion, but the public scene of exposure which he actually gets. . . . The more there is to expose, the more there is to be ashamed of; the more resistance to exposure, the more satisfying the scene, and

42. Miranda, 384 U.S. at 538 (White, J., dissenting).
43. ROUSSEAU, supra note 2, at 86.
44. Id.
especially, the more satisfying and eloquent the belated revelation, in the later narrative, of the inability to reveal.\textsuperscript{45}

In other words, this primal scene of exposure, shame, and guilt is absolutely necessary to the project of making a confession, and if the scene never occurred, one would have to invent something like it in order to motivate and perform the writing of the \textit{Confessions}. \textit{Qui s'accuse s'excuse}, says the French proverb: Self-accusation is a form of self-excuse. As de Man suggests, the speech act of confession is double. In the terms of J. L. Austin's famous distinction, there is a constative aspect, the fault to which one confesses, and a performative aspect, precisely the elusive and troubling action of the statement: "I confess."\textsuperscript{46} When one says, "Bless me Father, for I have sinned," the constative meaning is: I have sinned, while the performative meaning is: Absolve me of my sin. The confessional performance of guilt always has this double aspect. Since it does, it opens the possibility that the performative aspect will produce the constative, as the sin needed in order to permit the act of confession. The law is not without examples of signed confessions that have later been repudiated and sometimes discovered to have been false—as in Manchester, Vermont, in 1819—and there are no doubt other examples where the truth never came to light.

How can someone make a false confession? Precisely because the false referentiality of confession may be secondary to the need to confess, a need produced by the coercion of interrogation or the subtler coercion of the need to stage a scene of exposure as the only propitiation of accusation, including self-accusation for being in a scene of exposure.\textsuperscript{47} Or, as Talmudic law has recognized for millennia, confession may be the product of the death-drive, the production of incriminating acts to assure punishment or even self-annihilation, and hence inherently suspect because it is in contradic-

\textsuperscript{45} \textit{Paul de Man, Excuses (Confessions)} [chapter 12], in \textit{Allegories of Reading} 285 (1979).

\textsuperscript{46} \textit{J. L. Austin, How To Do Things With Words} (1962).

\textsuperscript{47} This is consonant with the psychoanalytic model of confession developed in \textit{Theodor Reik, The Compulsion to Confess} 208 (1959). For Reik, confession expresses a desire for punishment, and to the extent that it is made to a father-figure—representative of the superego—it is perfectly consonant with the dependency model of police interrogation. Reik says of the confession that takes the form of “acting out” in psychoanalysis:

This confession is often not an end in itself. It has the meaning of an appeal to the parents or their substitutes, which is what makes necessary the addition of a concluding sentence: "Please consider those weaknesses! Just because this is how I am, you must forgive me! Punish me, but love me again!" Thus the confession becomes an eloquent plea for absolution.

\textit{Id.}
tion to the basic human instinct of self-preservation.\textsuperscript{48} Or, as Freud would have it, unconscious guilt may produce crime in order to assure punishment as the only satisfaction of the guilt.\textsuperscript{49} Guilt can in any event always be produced to meet the demand for confession, since there is always more than enough guilt to go around, and its concealment can itself be a powerful motive for confession. One might want to say that confession, even if compelled, is always in some sense "true" as a performative, indeed as a performance, but this does not guarantee that it is not false as a constative, as a relevant "fact."

Furthermore, the French proverb I cited can also be turned around: \textit{Qui s'excuse s'accuse}, or self-excuse serves to incriminate one. "Excuses generate the very guilt they exonerate," writes de Man, and "there can never be enough guilt around to match the text-machine's infinite power to excuse."\textsuperscript{50} De Man concludes (using the term "cognitive" where I would use Austin's "constative"): 

Since guilt, in this description, is a cognitive and excuses a performative function of language, we are restating the disjunction of the performative from the cognitive: any speech act produces an excess of cognition, but it can never hope to know the process of its own production (the only thing worth knowing).\textsuperscript{51} That is, the performative aspect of the speech act is not itself the object of cognition.

To restate this in simpler terms: The confessional rehearsal or repetition of guilt is its own kind of performance, producing at the same time the excuse of guilt (by the fact of confessing it) and the accumulation of more guilt (by the act of confessing it), in a dynamic that is potentially infinite. The more you confess, the more guilt is produced. The more the guilt produced, the more the confessional

\textsuperscript{48} Consider the Talmudic rule that in a criminal case, a person can be condemned only on the testimony of two witnesses, and that his or her own confession, even if voluntarily given, cannot be admitted as evidence. In the commentary by Maimonides:

\textit{It is a scriptural decree that the court shall not put a man to death or flog him on his own admission [of guilt]. . . . For it is possible that he was confused in mind when he made the confession. Perhaps he was one of those who are in misery, bitter in soul, who long for death, [who] thrust the sword into their bellies or cast themselves down from the roofs. Perhaps this was the reason that prompted him to confess to a crime he had not committed, in order that he be put to death. To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.}

\textbf{MAIMONIDES, THE CODE OF MAIMONIDES: BOOK FOURTEEN, THE BOOK OF JUDGES 52:53 (Abraham M. Hershman trans., 1949), cited in LEVY, supra note 1, at 438. As Levy pertinently comments, in this view "confession was a form of suicide, which was sinful and violative of the instinct of self-preservation." LEVY, supra note 1, at 438.}

\textsuperscript{49} SIGMUND FREUD, CRIMINALS FROM A SENSE OF GUILT [chapter 3], in 14 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS 332-33 (1916).

\textsuperscript{50} DE MAN, supra note 45, at 299.

\textsuperscript{51} \textit{Id.} at 299-300.
machine functions. The very act of confessing necessarily produces guilt in order to be functional. As a speech act, "I confess" implies and necessitates guilt, and if the guilt is not there in the referent, as an object of cognition, it is in the speech act itself, which simultaneously exonerates and inculpates. One typical way in which this doubleness of confession operates in criminal law is recorded in the predecessor to *Miranda, Escobedo v. Illinois.* In Escobedo, suspect Danny Escobedo is told that his associate Benedict DiGerlando has pinned the shooting on him, then he is taken to the room where DiGerlando is undergoing interrogation; there he accuses DiGerlando of lying, exclaiming: "I didn't shoot Manuel, you did it." Here Escobedo's attempt to exculpate himself involves an admission of direct knowledge of the shooting that inculpates him as at least an accomplice to the crime. David Simon's detailed account of police interrogations in Baltimore indicates that such self-incrimination through attempted self-exculpation is very common. Rousseau's confession of the stolen ribbon is of course more complex, and more akin to the sins of conscience aimed at by inquisitorial proceedings; yet he, too, may inculpate himself while ostensibly seeking exculpation.

Rousseau's example is different also, it may be claimed, since he wants to confess. Yet his voluntary confession comes under the compulsion of writing his *Confessions,* in a generic constraint to reveal all his guilty secrets; indeed, he could not confess without guilty secrets, which the act of confession would have to invent (and may in fact invent) if they did not already exist. Conversely, can we be sure that suspects in criminal cases themselves don't want to confess, especially when they have been told, over hours, days, and nights of intensive interrogation that it is only by confessing that they can be released from the obligation to confess—that their guilt is certain and its corroboration alone will release them from the extreme duress in which they find themselves? And that the refusal to confess is itself an admission of guilt?  

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53. *Id.* at 483.
54. See David Simon, *Homicide: A Year on the Killing Streets* 200 (1991). See also Stephen J. Schulhofer, *Reconsidering Miranda,* in OCCASIONAL PAPERS FROM THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO 23 (1987) (declaring that Miranda warnings have not significantly reduced number of confessions because "suspects agree to talk without the need for pressure or deception (often because they think they can talk their way out of trouble)"). The attempt to "talk their way out of trouble" often involves unwitting confessions to incriminating knowledge.
55. Schulhofer quotes the pre-Miranda edition of *Criminal Interrogation and Confession,* in which the interrogator is instructed to say to the suspect: "Joe, you have the right to remain silent. That's your privilege. . . . But let me ask you this. Suppose you were in my shoes and I were in yours . . . and I told you, 'I don't want to answer any of your questions.' You'd think
Confession alone will bring release from the situation of accusation and allow reintegration with normal social existence and community. We return to some of the deep-seated suspicions of confession that Justice White detected, I think correctly, in the majority opinion in *Miranda*. There is something inherently unstable and unreliable about the speech act of confession, about its meaning and its motives. You may, as in Rousseau’s case, be confessing simultaneously to avoid punishment (to obtain absolution) and to assure punishment (to produce the scene of shame and guilt). Even without the oath *de veritate dicenda*, you may be in a situation of damning yourself if you do confess or if you don’t confess. Or you may be confessing to the wrong crime, that is, producing what you think your interrogators want in order to avoid confessing to something for which you feel more guilty. Or, more generally, you may be confessing to *something else*, something other than what you think is the referent of your confession.

This brings us back to the question of “voluntariness.” In what sense can we say that a confession is voluntary? In the case of *Brewer v. Williams*, Justice White, dissenting, writes: “Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent’s decision to talk was anything but an exercise of his own free will.”56 In another dissent in the same case, Chief Justice Burger states: “The human urge to confess wrongdoing is, of course, normal in all save hardened criminals, as psychiatrists and analysts have demonstrated.”57 While both White and Burger disagree with the Court’s conclusion that suspect Williams confessed involuntarily, they offer somewhat different views of confession. For White, statements are utterances


57. *Id.* at 421 (Burger, J., dissenting). Burger refers his reader here to Reik, without understanding the full implications of Reik’s argument, which suggests that the need to confess may have little to do with the crime committed. Indeed, Reik argues that crime may be the result of guilt, rather than vice versa:

Freud has shown that, in the criminals at whom criminal legislation is really directed, a powerful unconscious feeling of guilt exists even before the deed. . . . It is hence not the consequence of the deed, but its motive. . . . As a result, punishment, according to accepted views, the most effective deterrent against crime, becomes, under certain psychological extremely common conditions in our culture, the most dangerous unconscious stimulus for crime because it serves the gratification of the unconscious feeling of guilt, which presses toward a forbidden act.

THEODOR REIK, THE COMPULSION TO CONFESS 473-74 (1959). This understanding of the relation of guilt, crime, and punishment is fully consonant with what we have seen in Rousseau. Technically, *Brewer* is not a “voluntariness” case since it was decided on Sixth Amendment, not Fifth Amendment, doctrine, but it does turn on whether Williams voluntarily waived his right to counsel (for which there are a special set of rules).
from which one can generally infer the intention to make them. Intention and utterance line up in an unambiguous manner. For Burger, the intention of the confessional statement is slightly displaced; it lies elsewhere, in the urge to confess. This urge may, as Rousseau’s case so well demonstrates, be aberrant, the product of a need for exposure and punishment, and thus may not fully coincide with White’s kind of intentionality, a point which the two Justices do not confront.

Let me try to press harder on this question of the kind of voluntariness at issue in confession. First, a quotation from Dean Wigmore concerning the decision whether or not to confess:

The situation is always one of choice between two alternatives—either one disagreeable, to be sure, but still subject to a choice. . . . All conscious verbal utterances are and must be voluntary; and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions.58

Wigmore appears to confirm White’s hard-headed doctrine that everything one says—if conscious, not under the influence of drugs, or whatever—is necessarily voluntary, though it does leave open the important and troubling escape-hatch that circumstances may make the confessional utterance false rather than true.

Now, here is a quotation from Justice Jackson’s dissent in *Ashcraft v. Tennessee*, already mentioned in Justice Harlan’s dissent in *Miranda*:

It probably is the normal instinct to deny and conceal any shameful or guilty act. Even a “voluntary confession” is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him. The term “voluntary” confession does not mean voluntary in the sense of a confession to a priest merely to rid one’s soul of a sense of guilt. “Voluntary confessions” in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial. To speak of any confessions of crime made after arrest as being “voluntary” or “uncoerced” is somewhat inaccurate, although traditional.

A confession is wholly and uncontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is

58. 3 JOHN WIGMORE, EVIDENCE § 824 (3d ed. 1940).
"inherently coercive." Of course it is. And so is custody and detention for one hour. Arrest itself is inherently coercive, and so is detention.\textsuperscript{59}

Jackson's dissent from the finding that Ashcraft's confession was coerced unfolds as a narrative of how Ashcraft dug a hole for himself during his interrogation, attempting to implicate an accomplice in a way that eventually pointed to his own guilt, and obliged him to confess: again, inculpation by way of attempted exculpation. Jackson's seems to me one of the most honest and accurate statements on confession from the Supreme Court, even though he uses it, in my view, to support the wrong conclusions. He effectively evacuates the issue of "voluntariness" in our usual understanding of the term. He makes us understand that if we can say, with Wigmore and White, that all confessional statements are somehow intentional, in another sense they are all unintentional—or rather, correspond to some intention other than that which we usually associate with intentional statements. To be put in a situation where one is made dependent on one's interrogators and asked to confess—pressured to confess—would always seem to create the possibility that the motive of the confessional statement will be different from that of normal intentional statements. Its intentions will be aberrant, which, at worst, may make it a false confession, or, at least, a confession whose truth is not in its referent, a confession that is not constative but performative.

In Brewer,\textsuperscript{60} the suspect's confession and what produces it are particularly interesting. The suspect, Robert Williams, a recent escapee from a mental hospital, has surrendered to the police in Davenport, Iowa, on the advice of the Des Moines lawyer whom he has telephoned, and has been charged with abducting a nine-year-old girl in Des Moines. The Des Moines police set out to bring Williams back to Des Moines, but not before agreeing with his Des Moines lawyer, in an arrangement confirmed by a Davenport lawyer, that Williams will not be interrogated during the ride in the police car (a ride from which the Davenport lawyer is excluded). During the drive, Detective Leaming does refrain from an "interrogation" of Williams, in the traditional sense. Instead, he makes what has come to be known as the "Christian Burial Speech." Addressing Williams, whom he knows to be a deeply religious person, as "Reverend," he proceeds to discuss the weather conditions, the forecast of several inches of snow, the likelihood that the young girl's body will be buried and un-

\textsuperscript{59} 322 U.S. 143, 160-61 (1944).
\textsuperscript{60} 430 U.S. at 392-93.
locatable. Since Williams must know where the body is, he could take the police officers to it—and then her parents could give her a decent Christian burial. Learing then says to Williams:

I want to give you something to think about while we’re traveling down the road . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.61

Williams eventually directs the police to a service station, where he claims to have left the girl’s shoes, then to a rest area where he claims to have left a blanket in which the body was wrapped, and finally leads them to the body itself.

No one sitting on this case doubts for a moment that Williams is guilty of a horrible crime. His confession is certainly reliable, validated by a corpse. The issue is whether that confession has been obtained in violation of his rights. Warned of his right to remain silent and of his right to counsel—and having additionally obtained a promise from the police that he would not be interrogated in the absence of counsel during the drive—does Williams’ confession indicate a knowing waiver of his rights, making his confession voluntary, or an infringement of his rights, invalidating the confession? The Court, in another 5-4 split decision, concluded that Williams’ confession was invalid. It based that decision not on Miranda, but on the earlier case, Massiah v. United States,62 which established that the right to counsel guaranteed by the Sixth Amendment applied during pre-trial interrogation. The reliance on Massiah rather than Miranda as precedent may represent a choice to use the simplest applicable rule, and perhaps also to avoid the controversies that continue to swirl around the Miranda decision.63

61. 430 U.S. at 392.
63. See Yale Kamisar, POLICE INTERROGATIONS AND CONFESSIONS (1980) (arguing that Brewer should have been decided under a Miranda doctrine, rather than Massiah doctrine).

The question of whether or not Williams voluntarily waived his right to counsel points to a continuing difficulty in Miranda doctrine: How can we know if a waiver is voluntary? If counsel is necessary to avoid unwitting self-incrimination, isn’t counsel necessary knowingly to waive the right to counsel? Note that the statement “I waive [my right to . . .]” is another performative.

https://digitalcommons.law.yale.edu/yjlh/vol8/iss1/2
Deciding whether Williams’ confession was illegally obtained during interrogation in absence of counsel turns in part on whether the “Christian Burial Speech” was interrogation. To Chief Justice Burger, dissenting, the test of an interrogation seems to involve the common-sensical idea that it is followed by a question mark. “I find it most remarkable,” he writes, “that a murder case should turn on judicial interpretation that a statement becomes a question simply because it is followed by an incriminating disclosure from the suspect.”64 Does a statement that elicits a response constitute a question? Burger characterizes Detective Leaming’s speech not as interrogation, but as “statements” intended to prick the conscience of the accused.65 The majority on the other hand claims that the Christian Burial Speech is “tantamount to interrogation.”66 “There can be no serious doubts,” Justice Stewart writes for the Court, “that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him.”67

The “Christian Burial Speech” is in effect like the confession statement prepared by police interrogators for the suspect to sign: his confession written by another, to which, in this case, he responds, not with a signature, but with the revelation of a dead body. Justice Marshall, in his concurrence, characterizes Leaming’s speech as a “charade,” quoting from Blackburn v. Alabama: “The detective demonstrated once again ‘that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of ‘persuasion.’”68 For Marshall, there is torture in the air, whereas for the dissenters, as Justice Blackmun puts it, “persons in custody frequently volunteer statements in response to stimuli other than interrogation.”69

Blackmun’s dissent contains a sentence that strikes one as slightly curious in a Supreme Court opinion, and somehow characteristic of this strange case. He writes: “I am not persuaded that Leaming’s observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams.”70 The evocation of the police car negotiating the icy highway, with Leaming and Williams engaged in their weird and fateful

64. Brewer, 430 U.S. at 419-20.
65. Id. at 419.
66. Id. at 400.
67. Id. at 399.
68. Id. at 408 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
69. Id. at 439.
70. Id. at 1260.
dialogue, seems almost to suggest a classic situation of storytelling on a winter’s afternoon. There is a kind of dreamy atmosphere to it, as if we could never quite recapture the motives of telling and listening, and the way that telling a story—as in the Christian Burial Speech—can elicit the profoundest, and most incriminating, responses from a listener. If Leaming’s story is like Hamlet’s “mousetrap,” the play-within-the-play—“the play’s the thing/Wherein I’ll catch the conscience of the king”—who is to say whether such a play (Marshall’s “charade”) is innocent or not, since it simply reveals a pre-existing guilt? Indeed, it leads to a dead body. Yet, is “pricking conscience” an innocent act? Or a violative one?

Brewer seems to me such an interesting and troubling case precisely because the motive of the confessional act, in that closed police car traversing the snowy and slippery miles, remains so obscure. Why does Williams confess? Should we inquire so closely into the why? In the absence of the rack and the thumbscrew, should we be suspicious of the “charade,” of the well-told story that pricks or traps its listener into self-implication, into signing on to a confession prepared by another? Isn’t this what many good stories attempt to do? Doesn’t confessional literature, precisely of the type associated with Rousseau, with Dostoevsky, with Gide, want to elicit a counter-confession in which the reader admits to complicity? And yet, in that case, whose story is it? Who is the author of the confession, Leaming or Williams? Hasn’t the person who should be the listener to the story, Leaming, become its teller, and he who should be its teller, Williams, its listener? And what authority does the story then have? How can we authenticate a confession as “voluntary” when we know so little about its motives and intentions? And how can the law, which cannot remain within the ambiguities of literature, handle such elusive kinds of speech?

The Court consistently has held that it finds no problem with compelled evidence: A defendant may be compelled to surrender tax documents and bank records, to produce a handwriting sample, even to submit to a blood test. In the case of the compelled blood test,

73. See in particular, FYODOR DOSTOEVSKY, NOTES FROM UNDERGROUND (Richard Pevear & Larissa Volokhonsky trans., Knopf 1993) (1864), and ANDRÉ GIDE, THE IMMORALIST (1902), novels where a first-person confessional narrative makes the listener or reader uneasy through complicity, and suggests that listener and reader needs to confess as well.
Justice Brennan, writing for the Court, argues that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question did not involve compulsion to these ends."

In dissent, Justice Black ripostes that the Court's finding that "compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as an extraordinary feat." While one may be sympathetic to this view, Justice Brennan does touch on a central distinguishing feature of Fifth Amendment history and jurisprudence. It is what a defendant may do with his lips—what may issue from his mouth—that is considered worthy of special protection. It is as if the Court implicitly understood—without ever articulating it as such—that the problem of confession, its voluntariness or its compulsion, is one that concerns a speech act.

What I detect, in cases such as Miranda and Brewer, and in the long, complex history of the right against self-incrimination, is the law's semi-conscious struggle to come to terms with the difficult, layered notion of the speech act that follows from the statement: "I confess." Chief Justice Warren displays a certain awareness of this special aspect of confessions when, in Miranda, he notes of the Court's newly-prescribed warnings: "A warning is a clear-cut fact." If a warning is a "fact," it is so in the mode of a speech act: "I warn you that . . . " constitutes a performative, whatever the content of the warning. It is as if this performative were striving to do justice to the performative conditions of confession. Possibly some of the contentiousness and uncertainty of the debate about the Fifth Amendment protection could be illuminated, if not resolved, by fuller recognition that confession involves a special, and especially complex, form of speech act.

Speech acts, Austin tells us, can "misfire" if the "felicity conditions" are not right. For instance, if you consent to marriage before a priest who is really not a priest at all but your seducer's best friend in priest's clothing (something played out in a number of Gothic novels), your "I do" has no standing. Yale Kamisar produces a hypothetical

by the Fifth Amendment's mandate that no person 'shall be compelled to be a witness against himself.' That mandate does not protect an accused from being compelled to surrender non-testimonial evidence against himself." Id. (O'Connor, J., concurring in part and dissenting in part). I have benefitted here from reading Akhil Reed Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995).

76. Id. at 773.
77. 384 U.S. at 469.
scenario for the law: The suspect asks for a priest, in order to make confession, and is sent a police officer disguised as a priest. What then is the status of his confession? The outrageous example is not unrelated to Brewer, where Leaning addresses Williams as "Reverend," though there is no one present who merits that title. What are the "felicity conditions" in which the voluntary confession can be made, and recognized as voluntary? What are the contexts in which Warren's "storytelling without fear" can go forward? Where confession is concerned, do these questions even make sense, or is the speech act so layered with contradictory intentions that one can never use the term "voluntary" in confidence, and thus never be wholly sure that confession and its intention match in any unambiguous way?

The Court has continued to assert that the acceptable confession must be "the product of a free and rational will," as Justice O'Connor states in Miller v. Fenton. Yet as Justice Frankfurter recognized in Culombe v. Connecticut, "The notion of 'voluntariness' is itself amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes." Frankfurter's opinion offers a cautionary tale about why a traditional philosophical analysis of the problem of voluntariness, couched in terms of free will and responsibility, can never really reach the situation of confession, and why Miranda, in its turn, encounters difficulties, as Louis Michael Seidman puts it, "by transforming an intractable metaphysical doctrine into a bureaucratically administrable test." Rules governing the conditions of confession may never be wholly adequate with respect to the problem, since they address only the context, not the nature of confession. Furthermore, they tend to create an infinite regression in our thinking about the problem: What, for instance, will be our rules for recognizing a "knowing waiver" of the right not to confess?

Robert Weisberg notes that in the wake of Miranda we still have "no coherent analysis of what it means to be autonomous in the face of the law, and we are left instead with shallow rationalizations about the psychology of volition." We are essentially left with ideological rationalizations for a situation in which Supreme Court debates and the realities of the "interview room" have little in common. Citing

78. See Kamisar, supra note 63, at 187. One finds versions of this hypothetical in cases involving jailhouse informants.
82. Weisberg, supra note 9, at 538.
David Simon's evidence from his experience in Baltimore that *Miranda* warnings don’t prevent suspects from talking, Weisberg suggests that *Miranda* offers “a chance for some philosophical excurses on why we have created this amazing ideological rationalization.”

The sense of the individual, and of the individual's rights, implicit in our Constitution generally assumes that the individual is representative of an Enlightenment conception of Man: an essentially rational choice-maker with a free will. In a post-Freudian, post-Foucaultian age (to use a shorthand), we know this conception is inadequate—the ego is no longer master in its house, the subject no longer unitary—yet we don’t know what to substitute for it. The direction to be taken by those “philosophical excurses” is unclear. It may, however, be fair to say that no philosophical excursus will ever quite reach the problem of confession unless it engages the nature of the confessional speech act.

As Abe Fortas seemed to suggest, in that eloquent line which echoes Maimonides, confession may ultimately concern a truth of angels, not of men. Or at least, a truth whose use in the human arena is so fraught with complexities that it had better be set aside. A certain strain in modern literature, descending in direct line from Rousseau, has understood very well the disturbing power of the confession, whether autobiographical or fictional. Think of the self-abasing and self-aggrandizing confessional speeches of Dostoevsky’s Karamazov, or Raskolnikov, or his Underground Man; the original instance of what Mikhail Bakhtin has called “the dialogic.”

These monologues implicate the words and anticipated reactions of their listeners, so that listener, or reader, cannot escape scot-free from having listened to them. Think of a more recent instance, Albert Camus’ *The Fall*, in which the narrator tells his sordid tale to an unidentified listener in an Amsterdam bar, precisely to transmit the taint of guilt, an implication in a story in which none of us can fully proclaim his or her innocence. Consider, finally, the complex version of confession presented in Jorge Luis Borges’ story, *The Shape of the Sword*, where what appears to be the third-person narration of the abject treachery of one Vincent Moon suddenly is revealed as the

83. *Id.* at 540.
84. I allude to various confessional speeches in FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV (Richard Pevear & Larissa Volokhonsky trans., 1990) (1879-80) (speeches of old Karamazov, Ivan, and Dimitri), and in FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Richard Pevear & Larissa Volokhonsky trans., Knopf 1972) (1866) (Raskolnikov’s various approaches to confession, and finally his full confession), and in DOSTOEVSKY, supra note 73. These speeches are “dialogic” in that they are shaped by, and incorporate within themselves, the anticipated reactions, replies, interrogations of others—whether these others are present or not. See MIKHAIL BAKHTIN, PROBLEMS OF DOSTOEVSKY’S POETICS (Carol Emerson trans., 1984).
personal narrative of the speaker: “I am Vincent Moon,” and he concludes his narrative: “Now despise me.”

Confession in this mode is serviceable less as a way to unburden one’s own conscience than to burden another’s—in the manner of Leaming’s Christian Burial Speech. The question, in these instances, is what you do with the confession that has been passed on to you. What seems called for is a confession in return—which is what Rousseau challenges his reader to on the first page of his Confessions. This points toward a possible mass hysteria of confession—and the experience is not unknown—in which the excess of confessional discourse only makes it more difficult to pin down the motive and the referent, the constative or cognitive element, of the aberrant speech act (one could think in this context of some of the troubling cases of mass child-abuse alleged, and rarely proved). Given the obscurity of the motives of confession, it seems to be a mode of discourse capable of producing both the deepest truth and the most damaging untruth.

Rousseau’s desire to bare his soul entirely entails an ethics and an aesthetics that he summarizes in his insistence that he is going to say everything, “tout dire.” “I have only one thing to fear in this enterprise,” writes Rousseau, “that isn’t to say too much or to say untruths; it’s rather not to say everything, and to silence truths.” The enterprise of “saying everything” is not without its frightening aspects. One has only to think of Rousseau’s deviant disciple, the Marquis de Sade, who pushes the tout dire to a kind of paroxysm, cudgeling his imagination to produce every “crime of love” that he can possibly invent, and describing it all in detail over hundreds of pages. The One Hundred and Twenty Days of Sodom, Sade’s archetypal work, becomes a kind of manic encyclopedia of perversity, of the need to speak the unspeakable, to confess to everything that society and repressed sexuality normally hold in check. What transpires in Sade’s closed rooms suggests that the unleashed confessional urge proliferates guilt, and guilty pleasures, that society prefers to censor.

We might think, finally, of the psychoanalytic model of confessional discourse, since it is perhaps our most sophisticated contemporary version of what it means to speak, against one’s conscious intentions, a truth whose value is estimated by its difficulty. The patient with the psychoanalyst of course resembles a secularized version of the

87. ROUSSEAU, supra note 2, at 175.
penitent with the priest. The crucial difference, however, is that the patient does not know the "sin" to be "confessed," but only the disorders, the stumbling-blocks, that have been produced by material that has been repressed. The analyst, like the interrogator, must attempt to uncover what the analyst knows that the patient knows, but knows only unconsciously. In working toward the knowledge of this blocked knowledge, the analyst—relying, like both priest and interrogator, on a certain transferential bond with the patient—must attempt to elicit a confessional mode of discourse. But it is a strange one, since the patient's "confessions" of truth must always be regarded with suspicion, as serving some other motive—guilt, revenge, self-justification, self-abasement. The real truth of the psychoanalytic situation is marked by resistances, by the patient's reluctance to articulate it, to come face to face with it. Consequently, much of analysis is directed to resistances, precisely to the non-confessional or the anti-confessional, on the assumption that this is where the truth is to be sought, the place that the unconscious has marked with its power of censorship. Psychoanalysis in this manner recognizes that the speech act of confession is a dubious guide to the truth, which must rather be sought in the resistance to such speech, which itself may simply fulfill other purposes, be the confession to a kind of dependency on and propitiation of the analyst. The need to confess speaks of guilt, certainly, but it does not speak the guilt itself, does not locate that psychic configuration that needs discovery and healing. It is not the "voluntary" confession that interests the psychoanalyst, but the involuntary one, that which, we can almost say, is coerced from the patient. For psychoanalysis, the claim of confession is necessarily of limited value, not a sure guide to the truth, and the test of voluntariness an utterly misleading criterion. The true confession may lie most of all in the resistance to confession. Chief Justice Warren's "storytelling without fear" appears as a utopian construct.

The psychoanalytic understanding of confession is consonant with that enacted, rather than that proposed, by Rousseau, which is not surprising when one considers how much Freud owes to Rousseau. That is, psychoanalysis displays an awareness of the doubleness of the confessional act, the motivational discrepancy between the constative and performative aspects of confession, a suspicion that the referential matter of the confession—the sin or fault presented—is not necessarily the meaning or the truth of the confession, that which is intended by the speech act. In its understanding that speech, avowal,

89. Rousseau's discovery of the importance of childhood affect and infantile sexuality was an inspiration to Freud, which he explicitly recognizes in 7 Freud, Three Essays on the Theory of Sexuality 193 (1905).
and, eventually, truth are transactional, transferential, and dialogic, psychoanalysis warns us that the situations in which stories are told, the relative positions and the affective relations of tellers and listeners, can make all the difference.

I wonder, then, if the Supreme Court's difficulties in dealing with the concept and the act of confession don't betray a semi-conscious awareness of the problematic, double, perhaps even duplicitous nature of confession as a speech act. It may be that the only true confessions are involuntary, somehow coerced, if only by the fact that their truth is not there where it appears to be. So it is that confession may be inherently unreliable for purposes of the law, and for the policing of society. The story of what goes on in that closed room, where interrogations lead to confessions, always leaves us uneasy, like so many modern narratives proffered by "unreliable narrators," narratives indeed that give us no basis for judging what "reliability" might mean. In the case of confession, that unreliability can be contagious, since it suggests that the more the guilt confessed, the more the guilt there will be to confess, since the act of confession produces further culpability.

As Jean-Baptiste Clamence, the confessional narrator of Camus' The Fall, puts it: "In any case, we can't affirm the innocence of anyone, while we can certainly affirm the guilt of everyone." For Clamence, this generalization of guilt becomes an explicit invitation to his listener to join in the confessional game:

The more I accuse myself the more I have the right to judge you. Even better, I provoke you to judge yourself, which helps to comfort me. O my friend, we are strange and miserable creatures, and to the extent that we look back over our lives, we don't lack for occasions to be astonished and scandalized by ourselves. Try it. Be assured that I will listen to your own confession with a strong sense of fraternity.

It is not certain that we want to join the game, that we want such a reduplication of confession, that we know what to do with it. Justice Harlan may unintentionally make the point when he says in Miranda, "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." The pun on "stories" as architecture and

90. CAMUS, supra note 85, at 119. The translation is my own.
91. Id. at 152.
92. 384 U.S. at 526.
as narrative is no doubt involuntary, but it suggests a perception of the uncontrollable proliferation of narratives produced by confession.