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Speechless: The Silencing of Criminal Defendants

Alexandra Natapoff, *Loyola Law School Los Angeles*

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SPEECHLESS: THE SILENCING OF CRIMINAL DEFENDANTS

ALEXANDRA NATAPOFF*

Over one million defendants pass through the criminal justice system every year, yet we almost never hear from them. From the first Miranda *warnings, through trial or guilty plea, and finally at sentencing, most defendants remain silent. They are spoken for by their lawyers or not at all. The criminal system treats this pervasive silencing as protective, a victory for defendants. This Article argues that this silencing is also a massive democratic and human failure. Our democracy prizes individual speech as the main antidote to governmental tyranny, yet it silences the millions of poor, socially disadvantaged individuals who directly face the coercive power of the state. Speech also has important cognitive and dignitary functions: It is through speech that defendants engage with the law, understand it, and express anger, remorse, and their acceptance or rejection of the criminal justice process. Since defendants speak so rarely, however, these speech functions too often go unfulfilled. Finally, silencing excludes defendants from the social narratives that shape the criminal justice system itself, in which society ultimately decides which collective decisions are fair and who should be punished. This Article describes the silencing phenomenon in practice and in doctrine, and identifies the many unrecognized harms that silence causes to individual defendants, to the effectiveness of the criminal justice system, and to the democratic values that underlie the process. It concludes that defendant silencing should be understood and addressed in the context of broader inquiries into the (non)adversarial and (un)democratic features of our criminal justice system.*

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
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> —Justice Harlan, *Cohen v. California*[1]

The United States's criminal justice system is shaped by a fundamental absence: Criminal defendants rarely speak. From the first

* Copyright © 2005 by Alexandra Natapoff. Associate Professor of Law, Loyola Law School, Los Angeles. J.D. Stanford, B.A. Yale. alexandra.natapoff@lls.edu. This paper won the 2004 Outstanding Scholarship Award from the American Association of Law Schools (AALS) Criminal Justice Section. Many thanks to Stephanos Bibas, Bob Chang, Brietta Clark, Rick Hasen, Don Herzog, Rob Kar, Kurt Lash, David Leonard, John Nockleby, Sam Pillsbury, Peter Tiersma, Robert Weisberg, Lauren Willis, and Ron Wright.

[1] 403 U.S. 15, 24 (1971).

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Miranda warnings through trial until sentencing, defendants are constantly encouraged to be quiet and to let their lawyers do the talking. And most do. Over ninety-five percent never go to trial,[2] only half of those who do testify,[3] and some defendants do not even speak at their own sentencings. As a result, in millions of criminal cases often involving hours of verbal negotiations and dozens of pages of transcripts, the typical defendant may say almost nothing to anyone but his or her own attorney.

Courts and scholars typically treat this silencing as a victory for defendants. In our adversarial system, the right to remain silent and its Siamese twin, the right to have counsel speak on one's behalf, are necessary to permit the defendant to challenge the government's case, primarily because the government has the burden of proof and defendant speech is potentially incriminating. Silence is also one of the principal protective devices standing between defendants and an increasingly unsympathetic criminal justice system in which high conviction rates and heavy punishments make defendant speech risky.[4] The right to remain silent is thus "the essential mainstay of our adversary system."[5] It also reflects the overwhelmingly instrumental outlook of modern criminal practice in which defendant entitlements are evaluated almost exclusively in terms of their ability to help defendants evade punishment.[6]

Defendant speech, however, has personal, dignitary, and democratic import beyond its instrumental role within the criminal case.

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[2] BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbls.5.17 & 5.46 (2002) [hereinafter SOURCEBOOK].

[3] Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329–30 (1991) (describing 1980s Philadelphia study where forty-nine percent of felony defendants and fifty-seven percent of misdemeanor defendants chose not to testify).

[4] *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3–4 (2003) (documenting trend toward harsher punishment); Marc Mauer & Meda Chesney-Lind, *Introduction* to INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 2 (2002) (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter INVISIBLE PUNISHMENT] (describing American criminal policy as one of "mass imprisonment"). In federal court the acquittal rate is less than one percent. SOURCEBOOK, *supra* note 2, tbl.5.22 (noting 723 acquittals out of 83,530 federal cases).

[5] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[6] This approach is exemplified by plea bargaining itself, which assumes that constitutional rights are fungible and therefore can be validly traded away in exchange for lighter punishment. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–65 (2004) (describing dominant approach to plea bargaining as one which treats probable litigation outcomes as bargaining inputs for guilty pleas); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 14–15, 37–40, 59–60 (1997) (criticizing systemic tendency to reduce constitutional rights to bargaining chips).

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From an individual perspective, silent defendants are denied many of the cognitive and participatory benefits of expressive engagement in their own cases. After all, it is through speech that defendants enter into a relationship with the law. Through speech they attain and express their understanding or misunderstanding of legal dictates, their views on the fairness or unfairness of the procedures by which they are adjudicated, and, ultimately, their acceptance or rejection of the process and its outcome. Defendants who remain silent throughout the legal process are less likely to understand their own cases, engage the dictates of the law intellectually, accept the legitimacy of the outcomes, feel remorse, or change as a result of the experience.[7]

Defendant silence also has systemic implications for the integrity of the justice process. In our democracy, individual speech has historically been seen as an antidote to governmental overreaching.[8] Criminal defendant speech is perhaps the quintessential example of the individual defending his or her life and liberty against the state.[9] Yet silent defendants rarely express themselves directly to the government official deciding their fate, be it judge or prosecutor, and are often punished more harshly when they do. The justice system assumes that conversations between counsel and clients, and counsel's own speech on behalf of clients, fulfill the personal needs of defendants as well as systemic requirements that defendants be "heard." Yet most defense counsel are overworked, appointed counsel with insufficient time to spend communicating with their clients or fully exploring their clients' personal stories.[10]

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[7] *See infra* Part III.

[8] Cohen v. California, 403 U.S. 15, 24 (1971).

[9] Gerrard Winstanley, *A Watch-Word to the City of London, and the Army*, *in* THE LAW OF FREEDOM AND OTHER WRITINGS 138, 142 (Christopher Hill ed., 1983) (in which seventeenth-century radical English collectivist demands right to represent himself in court because lawyers are "enemies" of the people, arguing "for as it is clearly seen that if we [common people] be suffered to speak we shall batter to pieces all the old laws . . . and then the attorneys' and lawyers' trade goes down, and lords of manors must be reckoned equal to other men").

[10] Eighty-two percent of criminal cases in the nation's one hundred largest counties are handled by appointed counsel. BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE STATISTICS (2004), http://www.ojp.usdoj.gov/bjs/id.htm [hereinafter INDIGENT DEFENSE STATISTICS]; *see also* AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 7 (2004) [hereinafter ABA REPORT] (describing "glaring deficiencies" in provision of indigent defense nationally); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1735, 1762–65 (1993) (describing inadequacy of public defender resources and time spent on cases in number of minutes); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. &

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More generally, speech is the constitutionally celebrated vehicle by which defendants have their "day in court," enforce or waive their constitutional rights, tell their stories to the jury, persuade the judge of proper punishment, and communicate with their constitutionally guaranteed counsel. The fact that defendants speak rarely or not at all means that these democratic speech functions often go unfulfilled.

Silenced defendants are also excluded from the larger institutional and social discourses that control their fates within the justice system.[11] Since defendants speak for themselves so infrequently, judges, prosecutors, and lawmakers almost never hear from them, and the democratic processes that generate our justice system proceed without those voices. This process failure reinforces the social and psychological gaps between defendants and those who adjudicate them. Above and beyond the discourses that take place within legal institutions, defendants are excluded from broader social narratives that give meaning to systemic precepts such as fairness, deterrence, and punishment. Because they do not speak for themselves in court, and, as "criminals," are disfavored speakers outside the legal process, defendant voices are by and large missing from the criminal justice discourse.

Defendant silence thus extends beyond the courtroom. It is part of a larger phenomenon of expressive disempowerment of those disadvantaged groups who tend to become defendants: racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems.[12] A now-familiar literature explicates the legal silencing of subordinated groups: poor people, women, people of color, non-English-speakers, juveniles, and others.[13] At the center of this litera-

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SOC. CHANGE 153, 165 & n.50 (2004) (documenting overworked and "overloaded" nature of public defense work).

[11] *See* Robert M. Cover, *The Supreme Court 1982 Term Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4, 10 (1983) (describing narrative, communal, and participatory nature of law); James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985) ("[R]hetoric is continuous with law, and like it, has justice as its ultimate subject.").

[12] *See* Mauer & Chesney-Lind, *supra* note 4, at 2 (observing that two-thirds of prisoners are racial minorities, three-quarters have history of substance abuse, one-sixth have history of mental illness, more than half of women prisoners have history of physical or sexual abuse, and majority are from poor or working class families); *see also* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 4 (1999) (noting that forty percent of state prisoners are illiterate); SOURCEBOOK, *supra* note 2, tbl.4.10 (breaking down arrests by age and race); SENTENCING PROJECT, FACTS ABOUT PRISON AND PRISONERS (2004), http://www.sentencingproject.org/pdfs/1035.pdf (discussing demographics of inmate population).

[13] *E.g.*, Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (women); Barbara Bezdek, *Silence in the*

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ture lies the recognition that legal structures and norms contribute to such groups being silenced, and that being heard within the legal process can be an important part of a larger power struggle over social meaning.[14] Criminal defendants belong in this silencing literature. Not only are they silenced by their typical status as impoverished, young, undereducated people of color,[15] but they are additionally silenced by constitutional doctrines, criminal rules, and their attorneys. Although the plight of criminal defendants as legal speakers has generally evaded this type of analysis[16]—and the adversarial system creates unique demands discussed below—defendant silencing should nevertheless be understood as part of a larger, well-documented struggle over narrative social power.

This Article focuses primarily on the plight of this most disadvantaged class of defendants. In addition to their socioeconomic and edu-

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Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 HOFSTRA L. REV. 533 (1992) (poor people); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 154 (black women); Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278 (1992) (African Americans); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (accent, national origin, and race); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990) (poor people).

[14] Part of this literature identifies a similar silencing phenomenon that takes place within the civil rights attorney-client relationship. *See* White, *supra* note 13, at 28–31, 39, 45–47; *see also* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2146 (1991) (criticizing lawyers' tendencies not to listen to their clients and describing "primary task" of poverty lawyers as "restor[ing] integrity to the voices and stories [of clients] which may inspire change"); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2465 (1989) (describing how lawyering often silences clients); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HAST. L.J. 861, 873 (1992) (describing how "universalized legal narratives" deployed by lawyers create "legal blindness" to poor clients' perspectives).

[15] Poor people of color are also more likely to be linguistically unsure of themselves and thus more likely to permit themselves to be silenced. *See* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 63–66 (2d ed. 2005) (describing disempowered speech patterns of some women and minorities as "powerless language"); Ainsworth, *supra* note 13, at 261 (noting that women and ethnic minorities tend to adopt "indirect speech patterns").

[16] There is of course a vast literature on the "plight" of criminal defendants as a class, just not as speakers. *See generally* COLE, *supra* note 12 (documenting unequal treatment of poor people of color in criminal justice system); INVISIBLE PUNISHMENT, *supra* note 4 (collecting articles surveying impact of criminal justice policies on underprivileged communities); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (tracing history of race as criminal justice issue); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995) (documenting disparate impact of criminal system on poor individuals and communities of color).

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cational disadvantages, these defendants suffer an additional silencing set back: They are represented by public defenders or low-paid attorneys who lack resources to investigate and litigate each case to its fullest, or sometimes at all.[17] Some of this Article's conclusions therefore may not apply with equal force to those represented by well-resourced private or other counsel who have the time to develop a robust communicative relationship with defendants. Wealthy defendants also have greater speech opportunities outside the courtroom and therefore their silence within the legal system may not resonate with other silencing experiences in the same ways.[18] I thus focus on disadvantaged defendants both because they constitute approximately eighty percent of the defendant population,[19] and because they are most likely to suffer the sorts of socioeconomic and personal handicaps that make expression and representation difficult. Accordingly, their expressive experiences are both typical and tell us the most about the flaws in the system.

Not only does defendant silence raise troubling issues of social exclusion and dignitary harm, but the phenomenon itself largely escapes notice. Defendant self-expression receives practically no legal attention: The most highly developed area of law and scholarship in this regard takes the negative form of a jurisprudence of silence which

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[17] Recent studies of indigent defense indicate that poor defendants often receive little or no meaningful representation. *See* ABA REPORT, *supra* note 10, at 16–19 (documenting lack of representation, investigation, and advocacy provided to indigent defendants). As a former assistant federal public defender, I recognize the inaccuracy of the implicit assertion that all public defenders provide a lower quality defense than do highly-paid private counsel. Defendants represented by federal public defenders often get better representation than they would from private counsel because the federal public defenders are more experienced, know the bench well, and have time, investigative, and other resources at their disposal that do not flow from the client's ability to pay. Moreover, federal public defenders lack the financial incentives to pressure clients to plead guilty rather than go to trial. The quality of representation is thus in part contingent on the particular office. *See* Taylor-Thompson, *supra* note 10, at 165 & n.51 (noting that despite "considerable challenges, some defender offices have gained stellar reputations for the quality of service that they deliver to the indigent accused" and highlighting four offices in District of Columbia, Seattle, Harlem, and Bronx). That said, the overwhelming evidence indicates that state public defender offices and appointed counsel are overburdened and underresourced. *See* ABA REPORT, *supra* note 10, at 7 (describing "ongoing crisis in indigent defense funding" and concluding that "current indigent defense systems often operate at substandard levels and provide woefully inadequate representation"). This evidence supports generalizations about the inadequate level of attention paid to the average indigent client, even though such generalizations are demonstrably imperfect.

[18] *See* Luban, *supra* note 10, at 1762–63 (arguing that criminal defendants can be divided into two classes: relatively wealthy defendants who can afford most vigorous private defense, and everyone else).

[19] INDIGENT DEFENSE STATISTICS, *supra* note 10 (concluding that eighty-two percent of criminal cases in nation's one hundred largest counties are handled by appointed counsel).

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asks only when defendants may *not* be forced to speak.[20] But the right to remain silent implicates at best a small subset of expressive issues. It cannot fully account for the expressive experiences and needs of society's most disadvantaged speakers as they are investigated, prosecuted, and brought before our nation's official tribunals.

This Article is first and foremost a diagnostic project. It describes the phenomenon of defendant silence, identifies its sources in practice and doctrine, and explores its symptoms, including its negative impact on principles of expressive dignity, democratic responsiveness, and social empowerment. This Article is also prescriptive in that it argues that we should attribute more positive value to defendant speech, even as it acknowledges the tension between the normative assertion that defendant speech is valuable, and the reality that criminal defendants can be significantly harmed by their own words. The "cure" for defendant silencing therefore cannot lie simply in more speech, or giving defendants further opportunities to incriminate themselves. Because defendant silence is integral to the criminal justice system, any attempt to "turn up the volume" must contend with the system's larger commitment to an adversarial, representative process in which defendants who speak are severely punished and have their stories demeaned.

In effect, the phenomenon of defendant silence represents the clash of two sets of values. The first set is instrumental: those values that protect defendants against incriminating evidence in litigation. The second set of values is both personal and social, centering on defendants' expressive, dignitary, and participatory needs. The argument here is not that the latter trumps the former. Rather, it is two-

[20] A few scholars have addressed some of the expressive problems raised by criminal defendants in limited contexts. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004) (arguing that defendants and victims would both benefit if defendants had more opportunities to express their remorse); *see also* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1304 (1995) (arguing that defense counsel who deploy racialized defense narratives illegitimately reconstruct their black clients as pathological, thereby silencing their true voices); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. REV. 325, 329 (1996) (arguing that death penalty abolitionist advocates "silence the moral voice and community of the capital client"); Cunningham, *supra* note 14, at 2470–73 (exploring linguistic gaps between lawyer and client understanding); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85 (1999) (exploring narrative barriers to putting criminal defendants on stand); Christopher Slobogin, *Race-Based Defenses: The Insights of Traditional Analysis*, 54 ARK. L. REV. 739 (2002) (same); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999) (challenging Alfieri's model and arguing that defendants and their lawyers should deploy whatever narratives serve defendants' best legal interests).

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fold. First, this Article argues that notwithstanding the obvious instrumental value of silence, the criminal justice discourse has ignored the latter set of dignitary values, an omission this Article tries to remedy. Second, it argues that any balancing decisions between the two sets of values must take place within the larger conversation about the criminal justice system in which traditional models and assumptions are being challenged and rethought. With the demise of the adversarial model,[21] the dominance of plea bargaining,[22] the explosion in the criminal justice population[23] and its prevalence in poor communities of color, and greater attention being paid to the role of the criminal industrial complex within the body politic and the economy,[24] our understanding of our justice system is changing. This Article thus offers a richer description of defendant silence in order to situate it within these broader debates over the true nature of the criminal system. Ultimately, evaluating defendant silence—and making decisions about which procedural protections are appropriate—must take place within this larger effort to discern the extent to which our massive modern criminal justice system is fair and democratic.

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21 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (arguing that with expansion of criminal codes "both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long").

22 SOURCEBOOK, *supra* note 2, tbl.5.46 (finding that 95% of state court felony convictions are result of guilty plea); U.S. SENTENCING COMM'N, GUILTY PLEAS AND TRIALS IN EACH CIRCUIT AND DISTRICT, tbl.10 (95.7% of cases are resolved by guilty plea), *available at* http://www.ussc.gov/ANNRPT/2003/table10.pdf (last visited June 14, 2005); *see also* Bibas, *supra* note 6, at 2466 & n.9 (documenting dominance of plea bargaining).

23 Fox Butterfield, *U.S. 'Correctional Population' Hits New High*, N.Y. TIMES, July 26, 2004, at A10 (noting that 6.9 million Americans are under control of criminal justice system, up 130,700 since previous year, to comprise approximately 3.2% of adult population).

24 *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY xi (2001) (describing "how a new crime control culture has emerged [in the U.S.] that embodies a reworked conception of penal-welfarism, a new criminology of control, and an economic style of decision-making . . . . [and also indicating] how this new culture of control meshes with social and economic policies"); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. (forthcoming 2005) (manuscript at 51–53, 56, 62, on file with author) (documenting growing role of private prisons as political lobby as well as source of employment and revenue in local economies and analyzing potential threat to integrity of punishment system); Tracy Huling, *Building a Prison Economy in Rural America*, *in* INVISIBLE PUNISHMENT, *supra* note 4, at 197 (noting that prisons have become a "growth industry" in rural America); Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 173 (Lawrence M. Friedman & George Fisher eds., 1997) (arguing that "advanced industrial societies . . . are experiencing . . . a crisis of governance that has led them to prioritize crime and punishment as the preferred contexts for governance").

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Part I describes the twin engines of defendant silence: the practical mechanics of criminal cases, and the rules governing speech and silence. First, this Part describes the pervasive fact of silence in the criminal justice system and how the everyday procedures and practices of litigation consistently ensure that defendants say little or nothing. The Part then discusses at some length the silencing role of counsel and the constraints on the attorney-client conversation. I argue that counsel is best understood as a functionary of the adversarial system and its institutional predilection for silence. This system thus limits the ability of individual attorneys to overcome the silencing pressures stemming from their own roles.

Part II constructs a jurisprudence of defendant speech as a way of understanding how existing constitutional rights and criminal rules, taken together, define, restrain, and undervalue criminal defendant speech. This jurisprudence is conflicted: It contains robust theoretical commitments to defendant expressive freedom that are constantly subsumed by instrumental demands for defendant silence. Notwithstanding the fact that First Amendment doctrines rarely apply to criminal adjudication, this Part also explores the relevance of free speech values and principles to the criminal process. With its attentiveness to the role of speech in democratic governance and institutional integrity, free speech scholarship offers new ways to appreciate the value of defendant speech.

Part III hypothesizes some of the non-jurisprudential effects and costs of the silencing phenomenon. These include cognitive costs to defendants who do not participate expressively in their own cases, the institutional loss of information about defendant perceptions and experiences that might enable the judicial and political spheres to respond better to those who populate the criminal justice system, the erosion of normative principles of human dignity and participation, and, finally, the near total exclusion of defendants from the national dialogue on criminal justice.

The criminal system is undergoing reevaluation on several fronts: the erosion of adversarial ideals, the dominance of plea bargaining, the unprecedented level of incarceration and harshness of punishment, and the recognition that crime control is becoming a dominant governance mechanism. The Article concludes that, for this reevaluation to be complete, it needs to engage the phenomenon of defendant silence.

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I

THE PERVASIVENESS OF DEFENDANT SILENCE

Defendant silencing is built into the routine application and enforcement of the criminal law. While the rules of the criminal justice system technically contemplate both defendant speech and silence, the mechanics of the legal process formally and informally silence defendants far more often than they encourage or permit them to talk.

Once legal proceedings have begun and counsel is appointed or retained, defendants are not supposed to talk about their cases to anyone but their lawyers.[25] While a bail hearing may take place without counsel, thereby requiring the defendant to speak,[26] at all subsequent formal proceedings—arraignment, motion hearings, trial or plea colloquy, and sentencing—counsel will do most of the talking and defendants will speak only in the most limited, scripted way, if at all. In general, once defendants are represented, they are discouraged from talking to anyone: No government actor is permitted to obtain information from them,[27] and they are largely expected to remain silent in court as well.

These rules leave only four genuine opportunities for defendant speech during the legal process: trial, guilty pleas, sentencing, and, behind them all, conversations with counsel.[28] The first three are public, on-the-record events at which the defendant's liability and punishment are determined. Even here, defendants rarely speak.

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[25] While defendants clearly do discuss their cases with family, friends, and cellmates, they are deemed to have waived confidentiality by doing so and are strongly cautioned not to do so.

[26] *See* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 7–8 (1998) (noting that right to counsel at bail hearing has not been established); *see also* ABA REPORT, *supra* note 10, at 23 (documenting widespread instances of defendants languishing in jail for months without counsel).

[27] *See* Massiah v. United States, 377 U.S. 201, 206 (1964) (holding inadmissible defendant's statements made to government informant while on release).

[28] This description assumes representation by counsel. According to one report, less than one percent of state and federal felony defendants proceed pro se. CAROLINE W. HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (Nov. 2000, NCJ 179023), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf. While the report indicates that as many as one-third of federal misdemeanor defendants proceed pro se, *id.*, it should be noted that federal misdemeanor dockets typically include minor traffic offenses such as speeding. *See, e.g.*, 36 C.F.R. § 4.22(b)(1) (2004) (prohibiting operation of vehicles at speed greater than reasonable within national parks). This is not to minimize the problem of defendants entitled to counsel who nevertheless proceed pro se. *See* ABA REPORT, *supra* note 10, at 24–25 (documenting widespread pressure on misdemeanor as well as felony defendants to waive counsel and accept plea offers).

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Conversations with counsel are constrained in different ways but nevertheless represent a significant expressive loss to the defendant.

It should be noted that defendant silence is not a unitary phenomenon. The simplest form of defendant silence occurs when he is literally deprived of the opportunity to speak. A more complex form of silencing takes place when the defendant speaks but is not heard: when his speech is devalued or misunderstood.[29] This can take place before a judge, a jury, or during the attorney-client conversation. When the defendant's speech is devalued or misunderstood, this too constitutes silencing, in part because it creates an incentive for the defendant to forego speaking at all, but also because his speech is so reduced in value and efficacy that the speaker is silenced even as he talks.

A. Trial

Testifying at trial is the quintessential embodiment of the defendant's right to speak for himself. And defendants almost never do it. Fewer than five percent of defendants go to trial at all. When they do, according to Stephen Schulhofer's study, just over half of those charged with felonies testify.[30] The U.S. Sentencing Guidelines and their state counterparts contain additional sentencing penalties for trial and testimony that presumably reduce that percentage even further.[31]

Defendants do not testify largely because it is so dangerous. It exposes the defendant to potential perjury charges. It also permits the government to elicit the defendant's criminal history and prior bad

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[29] For linguistic convenience, the remainder of this Article refers to defendants by the male pronoun in light of the fact that nearly eighty percent of defendants are male. *See* SOURCEBOOK, *supra* note 2, tbl.4.8. This is not intended to marginalize female defendants or to suggest that the same arguments do not apply to their speech.

[30] Schulhofer, *supra* note 3, at 329–30; *see also* Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 951 (2002) (reaching similar empirical conclusion). The inability of defendants to testify is itself a factor in reducing trials and producing pleas. Where, for example, the defendant is the only witness with knowledge that could undermine the government's case, but his testimony might expose him to further or different liability, he will be unable to go to trial even though the government's case is contestable.

[31] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2004) (providing sentencing enhancement for obstruction of justice when defendant testifies falsely at trial); *id.* § 3E.1 (providing three-level reduction for acceptance of responsibility which is awarded when defendant pleads guilty rather than making government go to trial); *see also* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 69–70 (1999) (noting that seventeen states have guidelines similar to federal system). However, the constitutionality of all enhancements is now uncertain after *United States v. Booker*, 125 S. Ct. 738, 756 (2005) (holding that any fact necessary to increase sentence must be found by jury).

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acts, which may dissuade the jury from hearing the substance of the defendant's story, from having sympathy with the defendant, or from disbelieving the government. As described below, these dynamics arise whether or not the defendant is guilty. Indeed, it is precisely this phenomenon that makes the right to remain silent so central to the criminal justice system and that demonstrates why the privilege is universally considered protective: It embodies the recognition that the system is hostile to many facets of defendant speech, above and beyond its evidentiary content.

A defendant wishing to testify, and the lawyer giving him advice about it, must consider whether the government might prosecute him for perjury if his testimony contradicts the government's evidence. This is a nearly omnipresent concern: The only reason for a defendant to testify is to offer exculpatory testimony, which will almost always contradict the government's evidence, thereby inviting a perjury prosecution or a sentencing enhancement.[32] The U.S. Sentencing Guidelines provide a sentencing penalty against testifying defendants who are convicted in the form of obstruction of justice enhancements.[33] Such enhancements are even more effective silencers than perjury charges since they need be proven only by a preponderance of the evidence and require no separate prosecution. The point is not that defendants should be permitted to perjure themselves: Even truthful defendants risk perjury charges and sentencing enhancements by contradicting the government's evidence. Rather, the ease with which their testimony can be turned against them makes speaking all the more dangerous.[34]

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[32] For example, in 2003, 2993 federal defendants went to trial, and 2055 defendants received obstruction of justice enhancements under U.S. Sentencing Guidelines § 3C1.1, out of a total of 66,591 federal prosecutions. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbls.11 & 18 (2003). The Sentencing Commission statistics do not reveal the correlation between trial and the enhancement: Not all defendants who go to trial receive obstruction enhancements, and not all defendants who plead guilty avoid them. On the other hand, defense attorneys often believe that defendants who go to trial risk such enhancements. *See* Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 427, 480 (2004) (quoting defense attorney stating that putting client on the stand could lead to obstruction of justice enhancements).

[33] *But see Booker*, 125 S. Ct. at 756 (calling all fact-based sentencing enhancements into question). The enhancement had been previously upheld against the contention that it impermissibly burdens the defendant's right to testify. *See* United States v. Dunnigan, 507 U.S. 87, 96 (1993).

[34] By contrast, some inquisitorial systems in other countries do not require or even permit defendants to testify under oath. In such schemes, defendants do not risk additional legal sanctions for their testimony. *See* CRIMINAL PROCEDURE: A WORLDWIDE

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Under Rule 609 of the Federal Rules of Evidence, a defendant who takes the stand may have his criminal history presented to the jury to impeach his credibility, subject to a balancing test.[35] Over seventy percent of defendants who testify are impeached in this way.[36] Similarly, under Rule 404(b), the government can present evidence of the defendant's prior bad acts if they are relevant to intent, motive, knowledge, or nearly anything other than his character.[37] These two evidentiary rules are silencing in two ways. First, they threaten the defendant's ability to be heard by the jury. Past crimes and bad acts impair credibility, and make the defendant a less believable storyteller.[38]

Second, these evidentiary rules influence the attorney-client relationship, creating strategic reasons for the lawyer to silence her client. From the lawyer's perspective, criminal history and prior bad-acts evidence make her client a worse "witness" and impel her to recommend against testifying. Because they make defendant testimony more dangerous, the rules necessarily make counsel's speech more valuable. This creates a usurpation dynamic—"You can't tell your story, but I can"—in the attorney-client relationship. This dynamic itself may erode a defendant's trust in his lawyer and make it more difficult for him to communicate with her.

Finally, even a defendant who might want to testify is easily thwarted. First, he may not know about his right to do so. The Court is not obligated to inform him,[39] and while counsel is, there is no guarantee that the right will be conveyed in a meaningful or understandable way. The "silent record rule" applied by most jurisdictions holds that a defendant's failure to testify or to object to the lack of opportu-

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STUDY 43, 88, 176, 208–09, 277–78 (Craig M. Bradley ed., 1999) (describing inquisitorial systems for defendant testimony in Argentina, China, France, Germany, and Italy).

35 Federal Rule of Evidence 609 provides:

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

36 Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 45 n.230 (1988) (referring to 1966 study that found that seventy-two percent of criminal defendants are impeached under rule).

37 FED. R. EVID. 404(b).

38 *Cf.* Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 688 (1991) (arguing that Rule 609 should be abrogated).

39 At least not until he has already decided to plead guilty. *See* FED. R. CRIM. P. 11.

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nity will be deemed a waiver of the right.[40] Because the silent record rule assumes waiver unless the defendant objects, a defendant ignorant of his rights or pressured by counsel will find it very difficult to effectively exercise or preserve this right to testify.

In sum, between the threat of perjury charges, the prejudice associated with criminal history, strategic counsel, and strong sentencing disincentives, even defendants who might wish to speak at trial will often keep quiet.

B. Guilty Pleas

Approximately ninety-five percent of defendants plead guilty.[41] By definition, they give up their rights to go to trial and to testify. In exchange, they enter into a negotiation process with the government in which their attorneys do all the talking and in which the defendants will often lack the relevant bargaining information.[42] With the notable exception of those who cooperate,[43] represented defendants do not talk to prosecutors, and they must rely upon their attorneys to get good deals, to evaluate the legal merits of the case, and to convey the negotiations with the government accurately. In the end, the defendant has only veto power: the ability to accept or reject the outcome of, but not to participate directly in, the bargaining discussion.[44] The defendant's expressive participation is thus limited to how he communicates with his attorney and his satisfaction with the process hinges on how well he feels his attorney speaks on his behalf.

For indigent defendants the development of robust communicative relationships with counsel is difficult if not impossible. In overburdened state courts, it is not uncommon for a defendant to meet his public defender, hear about the deal, and decide what to do—all in the span of less than an hour and within the confines of a court lock-up or hallway while waiting to go into court.[45] This "meet

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[40] *See, e.g.*, Commonwealth v. Hennessey, 502 N.E.2d 943, 946 (Mass. App. Ct. 1987) (holding that defendant was not entitled to have judge inform him of right to testify and citing other jurisdictions following same rule); *see also* Leslie V. Dery, *Hear My Voice: Reconfiguring the Right to Testify to Encompass the Defendant's Choice of Language*, 16 GEO. IMMIGR. L.J. 545, 554–55 (2002) ("In a majority of jurisdictions, a trial judge is not required to inquire into the defendant's decision not to testify . . . .").

[41] SOURCEBOOK, *supra* note 2, tbls.5.17 & 5.46.

[42] *Cf.* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 89–94 (1995) (noting defendants' need for experienced counsel in order to get good deal).

[43] *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 654–57 (2004) (describing widespread cooperation practices).

[44] *See id.* at 665–67 (describing plea negotiating process); Richman, *supra* note 42, at 89–94 (same).

[45] *See* ABA REPORT, *supra* note 10, at 16 (describing testimony of one representative witness: "What happens [in Calcasieu Parish, Louisiana] is that on the morning of the trial,

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'em and plead 'em" scenario is exacerbated by mistrust and defendants' pervasive sense that they are not getting high quality representation.[46]

Once in court, the plea colloquy itself offers little or no expressive opportunity: It consists of highly scripted questions and the defendant's monosyllabic "yes" or "no" answers.[47] Rule 11 of the Federal Rules of Criminal Procedure and comparable state rules require courts to "determine that the defendant understands" the rights he is giving up and that the plea is voluntary.[48] This requirement typically translates into a series of general questions asked by courts, such as "Do you understand the rights you are giving up?" and "Has anyone made any threats or promises to induce you to take this plea?"[49] The Supreme Court has held that a defendant's correct

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the public defender will introduce himself to his client, tell him the 'deal' that has been negotiated, and ask him to 'sign here.'"); *see also* Taylor-Thompson, *supra* note 10, at 165 & n.50 (documenting public defender caseloads); Laura Midwood & Amy Vitacco, Note, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations*, 18 HOFSTRA LAB. & EMP. L.J. 299, 313 (2000) (arguing that caseloads numbering in hundreds prevent public defenders from spending adequate time on each one).

[46] *See* Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83, 119 (2003) (chronicling mistrust of public defenders, legal unsophistication, and other barriers to attorney-client communication).

[47] Robert F. Cochran, Jr., How Do You Plead? Guilty or Not Guilty?: Does the Plea Inquiry Violate the Defendant's Right to Silence? 2 (June 6, 2004) (unpublished manuscript, on file with the *New York University Law Review*) (describing plea colloquy). While a judge may, and occasionally will, inquire more deeply into a defendant's understanding during the plea colloquy, such departures from the rules are rare. *See* ABA REPORT, *supra* note 10, at 24–25 (describing mass plea procedures).

[48] FED. R. CRIM. P. 11(b)(1); *see also* MASS. R. CRIM. P. 12(c)(5) (mandating that court must "determine the voluntariness" of plea); N.C. GEN. STAT. ANN. § 15A-1022 (West 2000) (during guilty plea court must determine that defendant knows nature of charge).

[49] FED. R. CRIM. P. 11 provides in part:

> During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
> (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
> (C) the right to a jury trial;
> (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
> (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
> (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
> (G) the nature of each charge to which the defendant is pleading;
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

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answers to this limited set of questions will generally be deemed a sufficient showing that his decision to plead guilty is "knowing and voluntary."[50] The limited nature of the colloquy is strict and purposeful: If the defendant strays from the script—answering, "I don't know," or, "maybe"—the entire proceeding must halt until the "correct" yes or no answer is given.[51] Indeed, defendants often are told to say things they clearly do not mean or believe. For example, when asked if they have been threatened by anyone in order to induce their guilty plea, most defendants probably find it odd that they are expected to say "no," notwithstanding prosecutorial threats of additional charges and longer sentences. Similarly, at pre-plea arraignments, defendants are routinely instructed to say that they are "not guilty," even when they intend to plead guilty, sometimes later that same day.[52] In these ways, the formalistic, counterintuitive speech rituals of plea colloquies tell defendants that they do not control what they say, that what they say legally is unconnected to what they think, and that the justice system grants their speech little or no value. As a result of these dynamics, the first and only time a pleading defendant has an opportunity to speak for himself in public is at sentencing.

C. Sentencing

Defendants are entitled to address the court at sentencing.[53] However, as with most legal proceedings, the lawyers do most of the

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(I) any mandatory minimum penalty;
(J) any applicable forfeiture;
(K) the court's authority to order restitution;
(L) the court's obligation to impose a special assessment;
(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

[50] United States v. Vonn, 535 U.S. 55, 58 (2002) (noting that Rule 11 is meant "to ensure that a guilty plea is knowing and voluntary"); *see also* Iowa v. Tovar, 541 U.S. 77, 81 (2004) (noting that court need not elaborate on consequences of waiving right to counsel).

[51] *But cf.* Miles v. Stainer, 108 F.3d 1109, 1112–13 (9th Cir. 1997) (describing typical plea colloquies requiring "yes" or "no" answers, noting that such colloquies may be insufficient where court is on notice of defendant's potential mental incompetence).

[52] *See* Cochran, *supra* note 47, at 6–7 (arguing that initial plea colloquy in which guilty defendants say "not guilty" in order to preserve their right to trial is coerced speech); *see also* Cunningham, *supra* note 20, at 2465 (describing author's dilemma when his client wanted to say he was guilty at arraignment).

[53] *See* FED. R. CRIM. P. 32(i)(4)(A) ("Before imposing sentence, the court must . . . address the defendant personally in order to permit the defendant to speak or present any

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talking.[54] There will often be legal issues to debate and procedural tasks to accomplish. Most importantly, defense counsel must present an overall picture of the defendant: his personal background, family, and psychological history. The picture must highlight the good and explain the bad, and presenting it can take hours or, in death penalty cases, weeks.[55] If counsel has done a good job communicating with her client, the defendant will recognize himself in her description. But the description is necessarily a skewed one. It is an official excuse-making session, often painting the defendant in a victimized rather than empowered light. It is also a time to publicly air the defendant's personal, painful burdens: parental and/or substance abuse, diseases, and disabilities. Accordingly, for defendants, sentencing can be a time of discomfort, humiliation, or dissonance.

Sentencing, however, is also the hearing at which the court is most likely to hear the defendant speak. The traditional function of the defendant's speech is to convince the judge to render a lower sentence.[56] But the personal aims of the defendant may diverge from this goal. Recall that it will often be the first time he has ever had an opportunity to address the court and the public. This is his true "day in court," and he may have something to say beyond begging for mercy. He might happen to feel the way judges expect him to feel: remorseful, ashamed, apologetic, or reformed. But he is likely to feel other things as well: He may be dissatisfied with the process or his attorney, or feel pressured, wronged, angry, depressed, trapped, sullen, or confused. His expressive opportunities are so infrequent that it may be unrealistic to expect him to slip into traditional sentencing mode when this is his first opportunity to be heard by anyone other than his lawyer.

Many socially disadvantaged defendants, moreover, are ill-suited to address the bench in a way that judges are likely to embrace. The linguistic and experiential gap between the average defendant and judge is hard to overestimate. As Anthony Amsterdam put it years ago, "[t]o a mind-staggering extent . . . the entire system of justice

information to mitigate the sentence . . . ."); *see also*, *infra* text accompanying notes 109–111 (describing rule-based and constitutional entitlement to allocute).

[54] In the example below, Butch's own words take up less than a full page of the forty-four page sentencing transcript. *See infra* text accompaying note 61.

[55] *See* Austin Sarat, *Narrative Strategy Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 367–69 (1996) (noting comments of one death penalty lawyer: "We are like our clients' biographers.").

[56] *See* United States v. Li, 115 F.3d 125, 133 (2d Cir. 1997) ("The right of allocution allows a defendant to personally address the court before sentencing in an attempt to mitigate punishment. . . . [This is an] opportunity to plead for mercy . . . .") (quoting United States v. Barnes, 948 F.2d 325, 328 (7th Cir. 1991)).

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below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate [or trial] judges can throw off the fetters of their middle-class backgrounds . . . and identify with the criminal suspect . . . ."[57] Speech patterns that defendants use to express remorse might not sound remorseful to a judge. Particularly for defendants with prior criminal convictions, there is likely to be significant mutual distrust on both sides of the bench so that defendants may hedge their speech even as judges are predisposed to discount whatever the defendant says on his own behalf.[58] The stakes are as high as they can be: A defendant who gets it "wrong" gets a longer sentence. For some defendants, this threat is enough to dissuade them from speaking at all.

In addition, lawyers who anticipate that their clients will not sway the judge favorably, or worse, might offend the judge, are likely to pressure their clients not to speak. The professional incentives are strong; after all, the lawyer presumably has worked hard to create her "version" of the client that she believes will move the judge. If the client seems like he might diverge from this "best" version, this will appear risky to the lawyer. Accordingly, counsel is likely to promote either complete silence or a truncated, inauthentic version of the defendant's feelings about the case.[59] While such silencing by counsel is permissible, even zealous, legal advocacy in pursuit of a lower sentence,[60] it further erodes the defendant's ability to express himself. The following story describes this erosion, and the ways in which I, as defense counsel, was complicit in it.

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[57] Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970); *see also* Bezdek, *supra* note 13, at 568–70 (describing institutional and social barriers that make it nearly impossible for poor people either to speak for themselves effectively to judges or for judges to hear them); Andrew Taslitz, *Wrongful Rights*, 18 CRIM. JUST. 4, 8 (2003) (noting that "judges invariably believe the police" rather than defendants, "even though empirical data offer strong evidence that these credibility determinations are often wrong").

[58] *Cf.* Kimberly Holt Barrett & William H. George, *Psychology, Justice, and Diversity: Five Challenges for Culturally Competent Professionals*, *in* RACE, CULTURE, PSYCHOLOGY, & LAW 3, 13 (Kimberly Holt Barrett & William H. George eds., 2005) ("[P]rofessionals, especially white, majority-culture professionals, should not be taken aback if they encounter guardedness, mistrust, suspicion, and defensiveness on the part of the minority client. . . . These situational stylistic habits are survival skills, not pathology."). While Barrett and George are specifically describing the client relationship, these mistrusting "survival skills" are likely to play out in court as well.

[59] *See* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1713–14 (1993) (complaining that defense lawyers present inauthentic pictures of their clients).

[60] *See* Smith, *supra* note 20, at 1600–01 (lauding passionate storytelling by defense counsel as central to counsel's role); *see also* Sarat, *supra* note 55, at 364–65 (describing death penalty lawyers' narratives about their clients as ways of preserving their clients' stories).

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Butch always looked furious, even when he wasn't.[61] Weighing in at a good 260 pounds with an elaborately carved goatee snaking its way up his broad jaw, he scowled and glowered throughout our discussions of his case. He was charged with assaulting, resisting or impeding a military police officer stationed at the entrance to a military base.[62] The officer claimed that Butch cursed and spat at him, started towards him with clenched fists, and, ignoring orders to stay where he was, swung at him. Butch claimed that he always spat and cursed as a routine matter, and that he didn't try to hit the officer until after the officer pepper-sprayed him.

On the positive side, Butch had spent the past five years working hard to improve his life: He had a steady job and a fiancée with whom he was trying to buy a house, he hadn't been arrested in four years, and he devoted much of his time to caring for his ailing mother. Nevertheless, because of his long criminal record, he faced the possibility of a year of incarceration. Although we were headed for trial, as his public defender I viewed the chances of acquittal as slim given Butch's own description of events, his aggressive demeanor, and the unfortunate fact that the altercation had taken place a scant month after September 11, 2001.

Under severe pressure from his mother, the morning of trial Butch took a plea to disorderly conduct, the pettiest of misdemeanors, carrying a maximum sentence of sixty days. It was an excellent deal by usual standards. But not by Butch's. He felt that the military police officer had insulted and attacked him, and that his own conduct was unexceptional. By the standards of Butch's previous, rather dangerous existence, it certainly was. Butch also knew, however, that he had something of a hair-trigger temper and that he should have been more circumspect toward the police officer guarding the entrance of a closed military base during a Code Red alert. He was feeling very angry at himself for being in this situation and even though he felt the officer had been wrong, he also wished desperately that he had acted differently.

Having appeared numerous times before this judge, I was worried about sentencing. Based on Butch's previous criminal record I knew he was likely to get the maximum sentence. But Butch had made so many changes in his life that I still hoped for a sentence of

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[61] Butch's name has been changed to protect the attorney-client privilege. The transcript quoted below is on file with the author.

[62] *See* 18 U.S.C. § 111 (2000).

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probation without prison time so that Butch could keep working and buy his home.

The sentencing hearing was long and involved. His father and fiancée testified that Butch had worked hard to turn his life around. I produced testimonials from employers, friends, and others who described Butch as a committed worker and a devoted friend and family member. I showed photographs of his graduation and citations for community service. The judge was impressed. This disorderly conduct charge, I argued, was an aberration in an otherwise admirable reformation. The judge was softening. I put Butch's mother on the stand, who wept as she described how her son cared for her day after day. The judge's eyes were moist. I smelled victory, particularly since Butch had previously told me that he did not want to allocute.

But Butch changed his mind.

"I just want to say that I apologize for everything that happened . . . . I've been trying to straighten my life out and that incident happened. I mean, it wasn't partially all my fault." The judge's brow furrowed. "I mean, I know we can't get into it because I pled guilty." Butch then got into it, giving his understanding of the facts which differed significantly from that of the officer's. He concluded by saying, "It's just that incident occurred and I wish it never would have occurred. I apologize to the court. That's all I have to say."

I knew how hard it was for Butch to admit he was sorry. After all, he had been insulted, pepper-sprayed, and, in his view, he had acted in a restrained way. But he also regretted his actions and wanted to move on. Thunderclouds, however, were rolling over the judge's face.

"I just don't hear a lot of remorse," he scowled across the bench. "I don't hear a lot of remorse from [Butch] and I don't hear in any expression he has made . . . any acceptance of responsibility for the incident . . . . I don't hear that."

I stood up again and told the judge that for Butch this was a sincere apology and that this was how Butch talked, that this was how he said sorry. I asked the judge not to penalize Butch because he did not speak in the smooth, tutored jargon of professional remorse that is so often heard from better-educated or more savvy defendants. Instead, I implored the court to make an effort to hear what Butch meant, rather than to demand that he speak in a different voice altogether.

The judge glowered, said that Butch needed to "grow up," and gave him a month in prison. It was not the maximum sentence, but it was enough to ensure that Butch would lose his job and his house.

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Sentencing is the last stage of silencing: Between hostile judges, instrumentalist lawyers, and the threat of heightened punishment, the defendant's final day in court is one in which he will be told in numerous ways to be quiet. If he does speak outside the expected script of acquiescence and remorse, he will be punished more severely. Since this day will also often be his last day of freedom, for millions of defendants the silencing of the courtroom is the dress rehearsal for the silencing of incarceration.[63]

D. Defense Counsel: Handmaidens of Silence

1. Understanding Counsel Silencing

The most immediate engine of a defendant's silence is his lawyer. In his history of the common law privilege against self-incrimination, John Langbein attributes the creation of the right to remain silent directly and exclusively to defense counsel.[64] Prior to the advent of defense counsel, "the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent, but rather the opportunity to speak."[65] The injection of counsel, however, changed the entire purpose of the criminal trial. "Under the influence of defense counsel, the criminal trial came to be seen as an opportunity for the defendant's lawyer to test the prosecution's case."[66] Under this new scenario, defendants could defend by proxy, obtaining the ability to remain silent themselves. As a result of defense counsel's rise to prominence during the second half of the eighteenth century, "[w]ithin the space of a few decades, the expectation that the accused would defend himself disappeared. Defense counsel made possible that remarkable silencing of the accused that has ever since astonished European commentators."[67]

Under the adversarial, representative model, defendant silence as a legal strategy is prescribed by three facts: The burden of proof lies with the government, the jury hears only admissible evidence, and guilt is defined as the commission of discrete acts.[68] Conversely, defendant motive, jury sympathy, and mitigating circumstances that

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[63] *See* Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 252–57 (2004) (describing many ways that incarceration silences inmates).

[64] *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994).

[65] *Id.* at 1047.

[66] *Id.* at 1048.

[67] *Id.* at 1069.

[68] *See* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–96 (1981) (describing how choice of time frame defines nature of criminal act).

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do not rise to the level of technical defenses are irrelevant.[69] In this arrangement, the best defense tends to be decimation of the evidentiary record—eliminating facts from which guilt could be inferred—rather than the construction of an alternative, richer factual story line that might elevate the defendant's individuated voice.

Defense counsel thus effectuate the system's silencing mandate by speaking for their clients and persuading—or telling, cajoling, and pressuring—their clients not to speak. This silencing is both legally protective and personally undermining for clients, sometimes inseparably so. On the one hand, counsel make it possible for defendants to withhold incriminating evidence, to challenge the government's case without subjecting themselves to perjury charges, and to take advantage of all the technical defenses and procedures that the law has to offer. In order to do all this, defense counsel must be professional silencers. They must edit their clients' stories, impose the law's frameworks and narratives on their clients, and often actively exclude their clients' authentic voices. In this sense, silencing is the best of criminal defense. The lawyer places her skilled, trained voice between the state and her client, protects him from further revelations, reframes his case in the most legally advantageous terms, wields the law on his behalf, and generally makes the system work for him as far as the system permits.[70]

On the other hand, this silencing clearly subsumes certain aspects of the defendant's voice and identity. As one defense attorney put it:

> By casting my clients as powerless and dependent, with my legal story as the only one that counted, I set myself above them, enjoyed my superiority, and stole their voice—or at least made them self-

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[69] Lawrence notes:

> Where our tradition values rich contextual detail, the law excludes large parts of the story as irrelevant. Where we seek to convey the full range and depth of feeling, the law asks us to disregard emotions. Where we celebrate the specific and the personal, the law tells stories about disembodied 'reasonable men.'

Lawrence, *supra* note 13, at 2278; *see also* Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 443–44 (1994) (noting that many judges disfavor stories about defendants as human actors and admit only evidence about acts). *But see* Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1827–28 (1987) (bemoaning tendency of defendants to speak, noting that "[w]hen a suspect is confronted by the police . . . there appears to be an almost irresistible impulse to respond to the accusations, notwithstanding the *Miranda* warnings").

[70] *See* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 176 (1983) (discussing morality of representing criminal defendants); Smith, *supra* note 20, at 1600–01 (arguing for defense counsel's "fierce devotion" to individual clients, even at expense of community or other values); Taylor-Thompson, *supra* note 10, at 166–68 (discussing strengths and weaknesses of traditional individual representation model).

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> edit that voice to give me what they knew I was seeking—and in the process, to an extent I hurt them. I took their dignity, if only for the brief term of our interaction.[71]

At the extreme, it will be counsel's job to strive to ensure that their clients' voices are never heard, even if their clients want to speak. This is because a defendant's desire to share his reasoning or to explain himself can trigger liability or undermine defenses. Mitchell dubs this phenomenon "troublesome client stories."[72] In these cases, it is the lawyer's job to try to dissuade her client from sharing such information, in part by giving the client a safe, private haven in which to express himself, and in part by educating the client about the potential consequences of public disclosure. But such education will not necessarily persuade a client, nor is an explanation of the rules of liability and evidence always satisfying to defendants who may feel that their lawyers are not listening or that the rules are unfair. A client who is convinced that his illegal actions were nevertheless justified, that the police lied,[73] or that he was treated unfairly, may not be satisfied with silence even when his lawyer explains that his beliefs do not give rise to cognizable legal defenses.

What legal response should this client-expressive dissatisfaction trigger, if any? The traditional legal answer is "none." As long as the client's rights are not violated, this dissatisfaction merely represents the client's failure to understand his own "best" legal strategy, and the attorney has an independent legal duty to pursue that best legal strategy regardless of her client's misunderstandings about it.[74]

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[71] *See* Mitchell, *supra* note 20, at 100. Or, as William Simon put it more dryly:

> [L]awyers typically dominate their clients' cases and orchestrate their clients' behavior in court not to express their own sense of themselves, but to conform to the judge's and jury's stereotypes about how a respectable, law abiding citizen looks and behaves. Of course, if this is the best way to get an acquittal, most defendants would prefer such a defense; but few experience it as an affirmation of their individuality.

Simon, *supra* note 59, at 1713–14. What Simon refers to as client behavior is primarily speech.

[72] Mitchell, *supra* note 20, at 103.

[73] A common dynamic occurs when defendants know that a police officer has lied about something, but in order to expose that lie the defendant will incriminate himself. Many defendants find it hard to remain silent while a false police story stands, relying on counsel's cross-examination rather than presenting their own counter-story. *See id.* at 103–04 (describing dissonance between client's and lawyer's version of story).

[74] *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 753 n.6 (1983) (noting that under ABA Model Rules of Professional Conduct, clients control decisions over pleading guilty, waiving jury trial and testifying, and that "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client"); *see also* Kimberly Helene Zelnick, *In* Gideon's *Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*,

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Behind this legal answer lies an assumption about the normative status of the defendant's own perception of his representation and the legal process. Under this traditional model, a defendant's subjective satisfaction with his lawyer or the process has limited significance since it cannot fully substitute for the legal question of whether he was treated fairly by the system. A defendant may have gotten a fair trial but not realized it. Conversely, a defendant may feel well-represented even where his lawyer did not do a good job or, more fundamentally, where the system offered few meaningful opportunities for the defendant at all, regardless of his lawyer's skill and devotion.[75]

This approach, of course, dissociates the defendant's perception of fairness and legitimacy from the "objective" question of the fairness and legitimacy of the process. This dissociation has been challenged by a strain within poverty law literature, which argues that civil rights attorneys should adopt their subordinated clients' narratives, even those that conflict with traditional legal narratives, as a way of respecting and empowering their clients and improving the legal system.[76] But for criminal attorneys, subjective client expressive satisfaction cannot be the only touchstone of vigorous, respectful representation. Knowing the devastating legal consequences of their clients' speech, counsel are not simply free to sit back, disregard traditional legal narratives that define guilt, and let their clients hang themselves with their own words.[77] Indeed, insofar as clients internalize subordinated or limited understandings of their own entitlements, their narratives will reflect their own disenfranchisement.[78] Accepting such a point of view is not empowering or respectful of clients' expres-

30 AM. J. CRIM. L. 363, 380–81, 388–89 (2003) (describing increased attorney authority to waive fundamental client rights over client objection).

75 *See* Etienne, *supra* note 32, 478–82 (documenting decreased role for defense lawyers under sentencing guidelines in which advocacy makes little difference and can even disadvantage defendants).

76 *See* Alfieri, *supra* note 14, at 2146 (arguing that "[t]he repair of poverty law traditions . . . must be grounded in the lawyer's commitment to client narratives"); *cf.* White, *supra* note 13, at 46–48 (describing conflict between traditional legal narratives and client narratives). Mitchell points out that in criminal practice, this admirable desire to validate client narratives usually just "all falls apart" when you get to court. Mitchell, *supra* note 20, at 103; *see also id.* (noting that in some "run of the mill" criminal cases client's authentic story will be "automatically discount[ed]" by jury).

77 This was Cunningham's dilemma when his client wanted to plead guilty. *See* Cunningham, *supra* note 14, at 2465. As counsel, Cunningham was not at liberty to jettison the possibility of a defense, even though his client "insisted that he was 'guilty'" and wanted to say so in court. *Id.*

78 I once had a client who insisted vigorously that he wanted to plead guilty and that he did not want a trial. He had a long record that gave him a certain aura of expertise. Only after pressing him long and hard to reconsider did I figure out that he did not know what a trial was.

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sive needs but a capitulation to their limitations. Attorney-client silencing in the criminal context is thus a double-edged sword. It is both required by the adversarial framework and inherently at odds with the client's individual expression.

2. *Limits to the Attorney-Client Conversation*

The criminal system also imposes numerous requirements on attorney-client conversations. Attorney-client dialogue is the sine qua non of knowing and voluntary waiver, and courts require and assume that key constitutional duties have been performed by defense counsel during privileged conversations. During the plea colloquy, for example, a represented defendant's statement that he understands the rights he is waiving is presumed true, on the assumption that his counsel has in fact explained the rights to a jury trial, to testify, and to appeal that a defendant gives up by pleading guilty. Likewise, when counsel files a pre-trial motion to suppress evidence, the assumption is that she has discussed the issues with her client and the client is thereby waiving other constitutional issues that might have been raised at this time. Attorney-client communications are thus tools in pursuit of the public goals of defense and are constrained by the same end-goals of courtroom strategy.[79]

But attorney-client communications are also conversations between people, and as such can be shaped by the individual lawyer: She may listen well or badly, translate her client's wishes into legal action accurately or inaccurately, educate her client effectively or inef-

[79] These demands on attorney-client communication translate into constitutional requirements: An attorney who fails to explain vital rights or the meaning of certain decisions may be found ineffective. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (lawyer's basic duties include duty "to consult with the defendant on important decisions"). There is thus a floor beneath which attorney-client communications may not fall. This communicative floor, however, is quite low. Generally speaking, a defendant need not know the "specific detailed consequences" of his plea as long as he understands the constitutional basics, Iowa v. Tovar, 541 U.S. 77, 92 (2004), and the defendant has no right to a "meaningful relationship" with counsel, Morris v. Slappy, 461 U.S. 1, 14 (1983). Failing to discover the circumstances of a potentially illegal search could constitute ineffectiveness, Kimmelman v. Morrison, 477 U.S. 365, 385 (1986), whereas failure to consult with a client regarding the vast array of trial decisions that do not give rise to traditional constitutional claims or defenses would not be, even if those decisions might be of personal significance to the client. *See* Wainwright v. Sykes, 433 U.S. 72, 91 n.14 (1977) (noting that counsel's decisions about what issues to raise at trial, "even when made without the consultation of the defendant" will not be reviewed except under "exceptional" circumstances and "reiterate[ing] the burden on a defendant to be bound by the trial judgments of his lawyer"); *see also* Jones v. Barnes, 463 U.S. 745, 754 (1983) (appellate counsel need not raise non-frivolous issues requested by client). Finally, even complete misinformation given by an attorney will not upset a guilty plea as long as the defendant would still have pleaded guilty. *See* Hill v. Lockhart, 474 U.S. 52, 58–60 (1985).

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fectively. Attorneys thus can be an additional source of client expressive empowerment or silencing. It is here that poverty law's preoccupations with the role of counsel are most pertinent: Insofar as counsel is able to establish a functional communicative relationship with her client, she can make meaningful choices about its contours.[80] Good communication between client and counsel may enable a defendant to express himself more fully, better understand the legal implications of his lay intuitions, and feel comfortable with the legal strategies employed in his case. Without good communication, the defendant is deprived of even this limited opportunity to engage expressively with his own case.

The realities of the criminal system, however, make it likely that silence will predominate even between counsel and client. The typical public defender is severely pressed for time and resources, with a yearly caseload of hundreds of cases.[81] If she is lucky, she will spend a few hours with her client, but it may be as little as ten minutes in the courthouse hallway. She will look at the file, tell him what he is charged with, the deal the government is offering, and recommend a course of action. She will be both the educator, informing her client of his rights and options, and the bearer of bad news, gauging his likelihood of conviction. Worse, she will be the prosecutor's mouthpiece, explaining the deal offered by the government. Finally, the average criminal client has numerous personal attributes that make the attorney-client conversation challenging, including substance abuse, mental health problems, and functional illiteracy.[82] Even "great communicators" understandably have trouble communicating effectively with their clients under these circumstances.

With all these barriers, much of what the defendant wants, feels, or thinks will not get through to his lawyer, and vice-versa. Nor does the law require it: The right to counsel guarantees only that the defendant and attorney have enough of a conversation to convey the bare minimum of information, and not even necessarily accurate

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[80] *See* Alfieri, *supra* note 14, at 2140 (arguing that lawyers should strive to "collaborate" with their clients and that "[b]y way of collaboration, the lawyer may realize that the banishment of client speech from the public discourse of legal advocacy is due to interpretive practices, not the client's incompetence"); Cunningham, *supra* note 14, at 2482–84 (arguing that lawyers should strive first to understand their clients and then translate for them).

[81] *See* sources cited *supra* note 10; *see also* Bibas, *supra* note 6, at 2476–82 (describing incentive structures and failings that impede defense counsel ability to litigate and bargain effectively on behalf of clients).

[82] *See* COLE, *supra* note 12, at 4 (finding that forty percent of state prisoners cannot read); Mauer & Chesney-Lind, *supra* note 4, at 2 (noting that seventy-five percent of prisoners have history of substance abuse).

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information at that.[83] The state-sponsored attorney-client conversation is thus something of a missed opportunity.

II
SILENCE IS GOLDEN: THE JURISPRUDENCE OF DEFENDANT SPEECH

Analyzing legal practices and participation as forms of speech has become a fertile scholarly field.[84] The legal system is a creature of language, and participation in that system necessarily takes place through verbal and written speech, rendering all litigants in some essential sense "speakers." Conceptualizing legal actors as speakers highlights the idea that speaking can have value in and of itself—in terms of self-expression, recognition, and participation—above and beyond the content or instrumental effect of the words themselves. This framework also reveals the ways in which "speakerhood" plays an important role in the law.

For criminal defendants, this speakerhood framework is especially fertile. Defendants' speech has unique constitutional significance: They have the right to remain silent, to testify at trial, and to represent themselves. As part of their right to counsel, they also have the right actually to communicate with that lawyer.[85] Defendant speech also has democratic significance: It is the weapon with which defendants protect themselves against the executive branch and supplicate the judiciary. Defendant speech thus plays a central role in many foundational aspects of the criminal justice system itself.

Although neither criminal procedure nor First Amendment doctrine expressly conceptualizes criminal defendants as speakers, taken together these doctrines constitute a de facto jurisprudence that cele-

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[83] *See, e.g.*, *Hill*, 474 U.S. at 60 (holding that attorney who gave misinformation to client about potential sentence was not constitutionally ineffective).

[84] *See* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 10, 138 (1998) (describing framework of sociolinguistics and its application to law); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 40–71 (1989) (defending exclusion of certain language crimes—threats, solicitation, and conspiracy—from First Amendment protection); Ainsworth, *supra* note 13, at 262 (analyzing right to remain silent in light of distinctive female speech patterns); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 707–14 (2004) (evaluating courtroom procedures, such as evidentiary rules, in terms of First Amendment).

[85] *See* U.S. v. Rohan *ex rel.* Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003) (noting that competency requirement presumes client's capacity to communicate with his lawyer). *But see* Morris v. Slappy, 461 U.S. 1, 13–14 (1983) (noting that right to counsel does not include right to "meaningful attorney-client relationship") (citations omitted); Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601, 611 (1999) (arguing that defendant's ability to communicate with counsel effectively is part of right to counsel).

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brates defendant speech and personal expression in theory, but serves in practice as a powerful engine of silence. Fifth and Sixth Amendment doctrines contain significant theoretical commitments to defendant expressive choice and dignity, but in operation they inevitably succumb to the instrumental pressure in favor of silence. While First Amendment jurisprudence and scholarship offer little direct protection to defendants, free speech discourse concerns itself with many values and questions centrally implicated by defendant speech, the main one being the question of whether a criminal justice system that never hears from its subjects is democratically legitimate.[86]

Reconceptualizing defendants as speakers is not just a way of reorganizing existing doctrine; it offers an alternative to the dominant instrumental model that treats defendant speech, indeed all defendant rights, as valuable primarily insofar as it reduces the likelihood of punishment.[87] The speakerhood model recognizes additional values such as the defendant's personal dignity and choice, democratic participation, expressive freedom, and the ability to be heard—values that are sacrificed when defendants remain silent. The speakerhood model thus permits a more accurate evaluation of the true costs of silence, an evaluation of particular importance in a system in which ninety-five percent of defendants will never go to trial or actually exercise many of their constitutional rights.

The speakerhood model also brackets questions of individual guilt or innocence.[88] The question of whether defendants' speech is exculpatory or factually true does not answer the broader question of whether they are worth hearing from.[89] The speakerhood framework thus gives weight to all defendant speech, perhaps especially that of those who plead guilty since they constitute the bulk of the criminal defendant population[90] and also represent that class of defendants least likely to be listened to.

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[86] Several scholars have pointed out the confluence of First and Fifth Amendment values. *See e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 925 (1994) (discussing relationship between dignitary and expressive values protected by Fifth Amendment doctrine and First Amendment jurisprudence); Langbein, *supra* note 64, at 1074 (noting that if First Amendment values had been more developed, seventeenth century heresy defendants would not have had to press for protections against self-incrimination which evolved into modern Fifth Amendment doctrine).

[87] I am indebted to Stephanos Bibas and Rick Hasen for pressing me on this point.

[88] *But see, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 154 (1997) (arguing that criminal procedure should primarily protect those who are innocent and, only incidentally, those who are guilty).

[89] *See infra* Part II.C (describing free speech values that attach to defendant speech).

[90] That a defendant pleads or is found guilty does not necessarily mean he is guilty. *See* ABA REPORT, *supra* note 10, at 23–25 (describing how innocent defendants nationwide

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A. *Defendant Expressive Rights*

The Fifth Amendment privilege against self-incrimination, often referred to as "the right to remain silent," is a vast doctrinal creature generating volumes of analysis and dispute. It is not my purpose to try to reduce it to a unitary theory. Rather, the contention here is that we can fairly read the privilege as conferring value on defendant expressive freedom. It gives independent, dignitary value both to speech and to the very act of choosing whether or not to speak at all. In particular, it recognizes the central role of speech within the criminal case and the defendant's right to shape his legal destiny with his own words. This recognition is reflected in those doctrinal areas protecting a defendant's right to testify at trial, and to proceed without counsel, in which the Fifth and Sixth Amendments together directly protect the defendant's right to speak. In these senses, the "right to remain silent" is a misnomer: The privilege protects, not the right to remain silent, but rather the right to make autonomous expressive decisions about whether or not to speak.[91]

1. Miranda*: The Suspect as Subjugated Storyteller*

In establishing the classic contours of the right to remain silent, the *Miranda* Court was centrally concerned with defendant expressive liberty. The protections of counsel and warnings, explained the Court, "enable the defendant under otherwise compelling circumstances *to tell his story* without fear . . . ."[92] The evil of interrogation is that it "subjugate[s] the individual to the will of his examiner,"[93] "is . . . destructive of human dignity,"[94] and prevents defendant speech

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are routinely pressured to plead guilty either with or without counsel even being appointed); SAMUEL R. GROSS, EXONERATIONS IN THE UNITED STATES: 1989 THROUGH 2003 3, 27 (2004), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/exonerations_20040419/exon_report.pdf (estimating numbers of wrongfully convicted inmates at a minimum in hundreds and more likely in thousands).

[91] This expressive description is not, of course, the only possible interpretation of the privilege, nor is defendant expression the only value it protects. To the contrary, much Fifth Amendment jurisprudence and scholarship devalues the expressive aspects of the privilege, focusing instead on its other functions: procedural regularity, evidentiary reliability, or the control of police conduct. *See, e.g.*, Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625–27 (1996) (describing two traditional Supreme Court approaches to function of privilege as protecting defendant's right to withhold evidence and forbidding improper police interrogation methods); Amar & Lettow, *supra* note 86, at 859, 922 (arguing that privilege should be read primarily as safeguarding evidentiary reliability). In this sense, the expressive aspects of the privilege remain underappreciated.

[92] Miranda v. Arizona, 384 U.S. 436, 466 (1966) (emphasis added).

[93] *Id.* at 457.

[94] *Id.*

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that is "truly . . . the product of his free choice."[95] The privilege also reflects the proper relationship between the state and individual expression: "[T]he privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens."[96] At bottom the privilege is not about silence but expressive choice: "[T]he privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'"[97] "Our aim," concluded the Court, "is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."[98]

Some scholars have also placed expressive choice at the heart of the privilege. In his historical analysis, William Stuntz described the definitional Fifth Amendment cases of *Miranda* and *Massiah* as protecting defendant choice: The privilege protected the defendant's private information "unless the defendant chose—really chose—to give it up."[99] Christopher Slobogin has likewise described the array of due process, Fifth and Sixth Amendment privileges as reflecting a "deep and universal commitment to voice,"[100] focusing on the notion that the privileges value speech and expression and not merely silence.[101]

The testimonial component of the privilege reflects even more specific expressive concerns. It protects a suspect's "communications," even where the information contained in those communications is not itself protected and may be obtained by other means.[102] "It is the extortion of information from the accused, . . . the attempt to

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95 *Id.* at 458.

96 *Id.* at 460 (citations omitted).

97 *Id.* at 460 (1966).

98 *Id.* at 469.

99 William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 441 (1995) (emphasis omitted); *see also* George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 246 (1991) ("'[C]hoice' seems a particularly good metaphor for the protection of the self-incrimination clause.").

100 Slobogin, *supra* note 20, at 758.

101 In a related vein, Kent Greenawalt argues for "the kind of right to silence that comports with respect for individuals," and that is in "accord with respect for autonomy and dignity." R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 19, 41 (1982). By contrast, Akhil Amar and Renée Lettow argue that the admittedly expressive and dignitary components of Fifth Amendment doctrine belong more properly in First Amendment jurisprudence, and that the right to remain silent should be interpreted more narrowly as protecting the reliability of evidence and innocent defendants. *See* Amar & Lettow, *supra* note 86, at 859, 891, 925.

102 Schmerber v. California, 384 U.S. 757, 763–74 (1966).

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force him 'to disclose the contents of his own mind,' . . . involving [the accused's] consciousness . . . and the operations of his mind" that trigger the privilege.[103] It is precisely its ability to reveal thought-processes that makes testimonial speech expressive and makes its protection integral to defendants' dignity and autonomy as free, willing speakers.

2. *The Defendant's Right to Speak*

The Constitution also confers upon defendants affirmative rights to speak: the right to testify, to allocute at sentencing, and the right to represent oneself. These expressive privileges flow from a combination of principles: the Fifth Amendment right to remain silent and various aspects of the Sixth Amendment including the right to put on witnesses in defense.

The right to testify is perhaps the defendant's most obviously expressive entitlement. The Court has repeatedly affirmed that every defendant has the right to tell his story in his own way.[104] The right flows from three constitutional provisions: due process, the Sixth Amendment's Compulsory Process Clause, and the Fifth Amendment right to remain silent. Each of these constitutional components contains an expressive element. "[D]ue process of law include[s] a right to be heard" and the defendant's right to "choose between silence and testifying in his own behalf."[105] The Sixth Amendment's right to call witnesses includes "an accused's right to present his own version of events in his own words."[106] Finally, the right to remain silent implies a correlative right to speak.[107]

Defendants also have the right to speak at sentencing, although this expressive entitlement appears to rest more on the rules of criminal procedure than the Constitution. Rule 32 of the Federal Rules of Criminal Procedure provides that the defendant has the right to allocute,[108] and numerous courts have remanded for resentencing when it appears that defendants were not given the opportunity to speak.[109] As a constitutional matter, the Supreme Court has held that the Fifth Amendment applies at sentencing and that therefore a

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103 Pennsylvania v. Muniz, 496 U.S. 582, 594 (1990) (citations omitted).

104 *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 52 (1987).

105 *Id.* at 51 (citations omitted).

106 *Id.* at 52.

107 *See id.* at 52–53.

108 *See* FED. R. CRIM. P. 32(i)(4) ("Before imposing sentence, the court must: . . . address the defendant personally" in order to permit the defendant to speak or present any information to mitigate the sentence).

109 *See Thirty-Second Annual Review of Criminal Procedure: Sentencing*, 91 GEO. L.J. 629, 676 & n.2070 (2003) (collecting cases).

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defendant's silence at sentencing cannot be held against him.[110] Likewise, the Court has implied that, under the Fifth Amendment, a defendant cannot be precluded from allocuting.[111]

Finally, the Court has held that the Sixth Amendment right to assistance of counsel includes the correlative right to self-representation, which the Court has specifically recognized as an expressive entitlement to individual voice: "A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard."[112] It is a right to a strong, individuated voice: "[T]he right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others . . . a defendant may legitimately be concerned that multiple voices for the defense will confuse the message the defendant wishes to convey . . . ."[113] This right to voice, moreover, has an illustrious pedigree. In tracing the history of self-representation, the Court noted the longstanding common law presumption that a fair trial included the defendant's right to "conduct his own cause in his own words."[114] Even after the emergence of the right to counsel, "the accused retained his established right 'to make what statements he liked.'"[115] In these senses, the right to self-representation is the quintessential, non-instrumental expressive right. The defendant has the right to control both the speech that constitutes his own case and the voice in which it takes place, even to the detriment of his legal success.

In sum, the right to remain silent, the right to testify, the right to self-representation, and their rationales add up to a broad expressive commitment. Defendants have the constitutional right to choose whether to speak or to remain silent, and ultimately to control the messages sent by their own criminal defenses. This expressive privilege recognizes the inherent value in speakerhood and its intimate connection to personal autonomy, dignity, and democratic participatory values.

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110 Mitchell v. United States, 526 U.S. 314, 328–29 (1999).

111 *See* Hill v. United States, 368 U.S. 424, 428–29 (1962) (holding that defendant's missed opportunity to allocute did not rise to level of constitutional violation); Green v. United States, 365 U.S. 301, 304–05 (1961) (noting that Rule 32 establishes defendant's right to speak at sentencing).

112 McKaskle v. Wiggins, 465 U.S. 168, 175 (1984); 28 U.S.C. § 1654 (2000) (codifying defendant's right to proceed pro se); *see also id.* at 177 ("The specific rights to make [one's] voice heard . . . form the core of a defendant's right of self-representation.").

113 *McKaskle*, 465 U.S. at 177 (internal quotation marks omitted).

114 Faretta v. California, 422 U.S. 806, 823 (1975) (internal quotation marks omitted).

115 *Id.* at 825.

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B. Doctrinal Silencing

Despite their strong roots, the expressive rights of defendants are rarely honored in practice. The privilege against self-incrimination operates most often not as a basis for defendant expression, but to ensure that defendants say nothing or that their words are excluded from evidence.[116] The right to counsel tends to guarantee not that defendants will feel safe to tell their own stories, but rather that lawyers will do all the talking, while the appointment of counsel is treated as a proxy for nearly all the defendant's expressive needs.

As an historical matter, Stuntz describes the shift away from expressive empowerment as a development of post-1960s jurisprudence. "Police interrogation law was reshaped," he explains. "[T]he privacy-autonomy value that lay at the core of *Miranda* was abandoned."[117] Through a series of cases, the Court shrank the definition of interrogation and sanctioned police trickery, allowing defendant mistakes and misunderstandings to stand as long as the defendant was technically aware of his rights. What initially looked like a broad doctrine protective of defendant dignity and expression narrowed into a set of instrumental "tools for regulating the level of pressure the police may use."[118]

The historical shift away from expressive concerns also manifests itself in the operation of the privileges themselves. The pivotal point at which the right to remain silent transitions into a silencing mechanism is when the right to counsel attaches, after a defendant is formally charged.[119] At that point, the privilege against self-incrimination shifts from the protection of the defendant's autonomy against government coercion (a scenario in which a defendant might choose to speak) to a strong bias against uncounseled speech. A defendant's invocation of his right to counsel receives more solicitous treatment than his invocation of his right to remain silent.[120] After the right to counsel has attached, even voluntary speech by defendants made without counsel's sanction is inadmissible, if "deliberately elic-

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116 *See* Schmerber v. California, 384 U.S. 757, 762 (1966) ("[T]he privilege has never been given the full scope which the values it helps to protect suggest.").

117 Stuntz, *supra* note 99, at 442.

118 *Id.*

119 *See supra* text accompanying notes 64–67 (discussing Langbein's historical assertion that right to remain silent was invented by defense counsel in late eighteenth century).

120 *Compare* Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that police can reinitiate questioning after suspect invokes right to remain silent as long as initial invocation of "right to cut off questioning [is] scrupulously honored"), *with* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that police cannot reinitiate questioning after suspect invokes right to counsel unless suspect voluntarily reinitiates communication).

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ited" by the government.[121] A charged defendant's waiver of the right to remain silent is presumed invalid absent strong evidence that the defendant does not wish counsel to be present.[122] In this scheme, it is counsel, not the defendant's personal right to remain silent, which is treated as protecting defendants most vigorously.

Plea doctrine likewise reflects the devaluation of defendant expression by tolerating coerced speech as long as it is counseled. Threats of death, prison, prosecution of family members, promises of leniency, and even cash[123] are all permissible bargaining tools for the prosecution in its effort to induce the defendant to say what the state wishes him to say and to waive his constitutional rights, including the right to speak at trial. In its leading case on the topic, the Court rejected the notion that such inducements are coercive, relying on the presence and advice of counsel to ensure that a defendant's decision to plead guilty is rational and voluntary.[124] In other words, a defendant can agree to plead guilty out of fear for his life or his family as long as he has a lawyer, and his decision to do so will be deemed voluntary even if the defendant's subjective feeling is that he has no choice at all. This impoverished notion of voluntariness contrasts with the more robust and nuanced expressive concerns of *Miranda* and *Faretta* discussed above.[125] Or, as Albert Alschuler put it over twenty years ago, "[t]he practice of plea bargaining is inconsistent with the principle that a decent society should want to hear what an accused person might say in his defense."[126]

This jurisprudential shift is part of a larger analytic transition in the criminal process in which representation by counsel becomes a proxy for defendant autonomy. After counsel is appointed, the avail-

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121 Massiah v. United States, 377 U.S. 201, 206 (1964).

122 *See* Brewer v. Williams, 430 U.S. 387, 401–06 (1977) (holding that defendant who confessed to location of victim's body had not waived right to counsel).

123 In the form of reduced fines or restitution.

124 *See* Brady v. United States, 397 U.S. 742, 749, 754 (1970) (reasoning that plea was voluntary because defendant had consulted with competent counsel).

125 *See supra* Part II.A. Jason Mazzone argues more generally that the Court devalues criminal constitutional rights in plea bargaining in ways that would violate the unconstitutional conditions doctrine in the civil context. *See* Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801, 802–03 (2003). As he puts it:

> Oblivious to what qualifies as coercion in the First Amendment context, courts and commentators have insisted that plea bargains are freely entered. As a result, society is left with the exceedingly strange result that in the First Amendment context, unemployment benefits, jobs, and tax breaks are all unduly coercive, but in the criminal context, only the threat of death constitutes duress.

Id. at 849.

126 Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 933–34 (1983).

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ability of the privilege no longer turns on *Miranda*-type concerns: whether the defendant actually feels coerced or free. Instead, the assumption is that as a represented litigant, a defendant's expressive and autonomy needs are fulfilled by having a lawyer present and it is counseled speech, not voluntary speech, which the constitutional rules aim to produce. Counseled speech is actually *presumed* to be voluntary and informed, even absent evidence that the defendant in fact understood or was specifically told of all his rights by counsel.[127] The role of defendant speech in the law shifts accordingly: Instead of speech being the vehicle by which a defendant expresses himself, it becomes the thing that the lawyer does for him. The onset of representation is actually a moment of silencing, all the more so because, as described above, the attorney-client conversation often cannot do the expressive, communicative work assigned it by the Court.[128]

1. Erosions of Specific Speech Rights

As noted above, the Supreme Court has held that the necessary corollary of the right to remain silent is the right to speak. But the Court's protection of the defendant's right to speak is markedly weaker than its protection of the right to remain silent. A defendant may never even be informed by the court of his right to testify at his own trial: The "silent record rule" holds that a defendant's failure to testify or object to the lack of opportunity will be deemed a waiver of the right.[129] By contrast, *Miranda* requires that defendants be warned even before they are charged with a crime of their right to remain silent, and the court will inform them on the record of this right.[130] Similarly, the failure to allow a defendant to allocute at his own sentencing is not per se constitutional error,[131] while his right to remain silent at sentencing is constitutionally protected.

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[127] As the Supreme Court noted in *Henderson v. Morgan*:

> Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense, in sufficient detail to give the accused notice of what he is being asked to admit.

426 U.S. 637, 647 (1976).

[128] *See supra* Part I.D.

[129] *See* Commonwealth v. Hennessey, 502 N.E.2d 943, 945–46 (Mass. App. Ct. 1987) (holding that record silent as to waiver supported conclusion that defendant waived right to testify); Dery, *supra* note 40, at 553 ("In a majority of jurisdictions, a trial judge is not required to inquire into the defendant's decision not to testify . . . .").

[130] *See* FED. R. CRIM. P. 5(d)(1)(E) (court must inform defendant of right to remain silent at initial appearance).

[131] Green v. United States, 365 U.S. 301, 304–05 (1961).

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The Court's treatment of the right to self-representation reflects a similarly weakened commitment to defendant's expressive rights, flowing again from the Court's heavy reliance on defense counsel. Soon after *Faretta*[132] declared the defendant's right to proceed pro se in order to tell his own story, the Court modified its approach to the right to self-representation in *McKaskle*,[133] affirming the court's authority to appoint stand-by counsel and stand-by counsel's authority to speak for the defendant to the court and the jury, notwithstanding the defendant's opposition to counsel's participation.[134] The *McKaskle* Court held that as long as the defendant retained "actual control over the case,"[135] presenting the essence of the case to the jury the way he wanted, stand-by counsel's speech did not infringe the defendant's right to control his own case. In particular, the Court was concerned about the lower court's ability to use stand-by counsel for its own convenience, to create a mouthpiece for the defendant, against his wishes, who could better address the rules and procedures to ease the process of trial.[136] In that sense, the defendant's expressive rights were trumped by the court's desire to hear the case in a convenient and familiar manner, and stand-by counsel's need to usurp the defendant's speech when necessary to do her job.

In sum, despite significant expressive underpinnings, defendant's speech rights do not function in practice as expressive entitlements but primarily as silencing ones, limitations on the speech that the government can extract rather than an affirmation of the dignitary rights of defendants. The Court has given shorter shrift to the right to speak—making it easy to waive and hard to enforce—than its rhetoric about the importance of speech would seem to predict. This de-emphasis of defendant speech flows from the Court's reliance on counsel: Once represented, the defendant's personal expressive needs disappear, jurisprudentially speaking. The Court's jurisprudence thus contributes to a criminal justice process that devalues defendant speech rights and is in tension with the Court's broader commitments to expressive autonomy and dignity.

C. First Amendment Values in the Criminal Context

Nearly all the ways that defendants speak in court are heavily regulated and potentially punishable without raising First Amendment claims. The rules of evidence and procedure strictly limit court-

132 Faretta v. California, 422 U.S. 806 (1975).
133 McKaskle v. Wiggins, 465 U.S. 168 (1984).
134 *Id.* at 184.
135 *Id.* at 178.
136 *Id.* at 183–84.

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room speech.[137] Defendants who speak disrespectfully to the court or address the jury directly may be held in contempt.[138] The government can burden the defendant's right to go to trial and testify by threatening him with additional counts and longer sentences.[139] A defendant who speaks angrily or without remorse at a sentencing hearing may be put in prison for additional years. Even the rare defendant who openly criticizes the nature of the proceeding—thus engaging in classic political speech—has limited protection.[140] In any event, political protest-type "high speech" is not directly implicated by the vast majority of routine expressive activity that occurs in court during testimony, plea colloquies, and sentencing.[141] The bulk of criminal defendant speech thus takes place in ways that do not trigger First Amendment protections at all.

Likewise, courts and scholars do not assess defendant speech through the broader political or expressive prism of First Amendment values.[142] This inattention can be seen as a species of what Frederick Schauer calls the "invisible," "camouflaged" boundaries of First Amendment doctrine—the fact that during the criminal process "the First Amendment just does not show up."[143] More concretely, there is

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137 *See* Peters, *supra* note 84, at 709 ("[T]he Court has never even entertained, much less upheld, a challenge to *[Federal Rules of Evidence] 401* or *402,* or indeed to any evidentiary rule, on the ground that such rules impermissibly restrict speech in violation of the First Amendment.").

138 *See, e.g.*, Codispoti v. Pennsylvania, 418 U.S. 506 (1974) (reviewing judgment of contempt against defendants who accused court of "railroading" them and favoring government).

139 Brady v. United States, 397 U.S. 742, 749 (1970) (upholding sentence where defendant pleaded guilty in order to avoid death penalty).

140 *Codispoti*, 418 U.S. at 509 nn.2–3 (reviewing case of pro se defendant held in contempt for accusing court, inter alia, of protecting prison authorities, railroading him, and calling judge "Caesar," "tyrannical," and "corrupt"). *But see* Huminski v. Corsones, 396 F.3d 53, 58 (2d Cir. 2005) (holding that former defendant who sought access to court in order to protest treatment had First Amendment access rights).

141 *But see* Alfieri, *supra* note 14, at 2146 (arguing that poverty law cases are potential vehicles for broad political and socioeconomic progress and that therefore client speech has political quality).

142 Under Greenawalt's analysis of punishable speech, for example, defendant courtroom speech might not even be "speech" in the First Amendment sense at all because the defendant's words "do things" rather than express something. *See* GREENAWALT, *supra* note 84, at 58–59. The two scholars who have come closest to evaluating defendant speech this way are Peters and Mazzone. Peters defends the practice of rule-bound, systemic control of courtroom speech against First Amendment complaints. Notably he addresses only civil litigation and never mentions criminal defendants. *See* Peters, *supra* note 84, at 722 n.66. Mazzone, by contrast, attacks the seeming inconsistency in the way waivers are treated in civil and criminal contexts, arguing that criminal plea bargaining is inconsistent with the unconstitutional conditions doctrine. Mazzone, *supra* note 125, at 848–49.

143 Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69, 1787, 1801 (2004).

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heavy pressure to treat defendant speech instrumentally as part of the criminal process, relevant only to its impact on defendant liability and punishment, and not to external non-adjudicative values. The fact that his "free speech" can cost a defendant years in prison tends to push non-instrumental dignitary concerns about speakerhood into obscurity.[144]

This section maintains that defendant speech has non-instrumental, democratic, expressive value of the sort commonly associated with the First Amendment. This is not a positive law claim about the contours of actual First Amendment doctrine, but rather a more general exploration of how we value speech and expression in other governmental and social arenas, and how those values and concerns are triggered when defendants are silenced. Free speech concerns are triggered in the courtroom because that is where defendants directly address the government and the public, where the public and media have the right to hear them,[145] and where the official process of adjudication takes place. Free speech concerns are also implicated more broadly by defendant silence because the criminal justice system—its value judgments and its place within the political economy—is deprived of the challenges that defendant voices might pose. This latter concern is of particular significance because defendants' silence is exacerbated by their social status: Defendants constitute a significant segment of poor communities of color[146] for whom the criminal justice system is a dominant governmental presence and for whom the lack of speech opportunities represents an additional democratic and dignitary loss.

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144 By contrast, scholarly attention has been comparatively lavished on criminal speech that gives rise to potential liability such as conspiracy agreements, solicitation, and threats. *See* GREENAWALT, *supra* note 84, at 79–158 (discussing, inter alia, solicitation, threats, pornography, and hate speech); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1106, 1217–18 (2005) (proposing framework for extending First Amendment protection to some speech that facilitates crime); *see also* Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1272–74 (1987) (exploring exclusion of substantive defense arguments through use of motions in limine).

145 *See infra* note 172.

146 In low-income urban communities in cities such as Baltimore and Washington D.C., fifty percent or more of the African American male population between the ages of 18 and 35 is under criminal justice supervision at any given time. *See* ERIC LOTKE, NAT'L CTR. ON INSTS. & ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MEN IN D.C.'S CRIMINAL JUSTICE SYSTEM FIVE YEARS LATER (1997), http://66.165.94.98/stories/hobblgen0897.html; *see also* SENTENCING PROJECT, *supra* note 12 (noting that black males have thirty-two percent chance of serving time in prison); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT, *supra* note 4, at 51 (noting that thirteen percent of African American males and two percent of entire adult population are disenfranchised by felon disenfranchisment laws).

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1. *First Amendment Values*

The First Amendment triggers deep inquiries about the value of speech in our constitutional democracy. It has become an umbrella for wide-ranging debates over the meaning of truth and democracy, equality and tolerance, as well as the proper relationship between government and individual. The two classic themes discussed below—the marketplace of ideas and the role of free speech in self-governance—illustrate how criminal defendants' speech implicates some of the values typically associated with free speech ideals.[147]

a. The Marketplace of Ideas

Justice Holmes famously wrote of the First Amendment that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[148] These words have generally been interpreted to mean that free speech plays an important role in permitting social truths to emerge, and that silencing voices within that "marketplace" impedes rigorous inquiry into truth.[149] By extension, when viewpoints are excluded from the public debate, it undermines confidence in the conclusions.

Criminal defendants are excluded from the "marketplace of ideas" that shapes the criminal justice system. Spoken for and about by lawyers, criminologists, legislators, and law enforcement, defendants rarely share their own views on the criminal process: Is it fair? Does it deter? Does it seem cruel or lenient? Legitimate or overbearing? Rational or random? At no point during the criminal process itself can defendants safely share their thoughts on these matters, and afterwards, in prison or on release, the opportunities to speak are even more scarce.[150]

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[147] The first two themes, the marketplace of ideas and self-governance, have long been cited as organizing principles of free speech scholarship. *See* Lee C. Bollinger & Geoffrey R. Stone, *Introduction* to ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 23–24 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (arguing that the First Amendment ensures equal liberty); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591–92 (1982) (discussing various rationales for First Amendment).

[148] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[149] *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, *supra* note 147, 157–58 (describing *Abrams* and marketplace ideology).

[150] *See* Feierman, *supra* note 63, at 252–57 (describing how prison rules, correctional officers, prison conditions, and restricted access to media and communication media work to silence prisoners).

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From a market viewpoint, this loss of voice is significant. There is increasing evidence that innocent defendants are not heard in their own cases, resulting in wrongful convictions.[151] From a more systemic perspective, defendants are experts in the system, with unique experiences that could cast light on the central efficiencies and inefficiencies of the criminal process, as well as its various claims to fairness. Indeed, defendants are the subjects of the system itself: Laws and punishments are aimed centrally at *their* minds and behaviors. If defendants are ignorant of the law and their obligations, it may mean that the system does not convey its message well.[152] If defendants experience the legal process as unfair, overbearing, and unresponsive, it suggests that some of the promises of due process and the Bill of Rights have gone unfulfilled.[153] If defendants feel guilty and remorseful about their criminal behavior, perhaps the criminal law reflects generally shared norms and values.[154] Without hearing from defendants in their own voices, however, it's hard to say whether any of these things are true. For these reasons, a marketplace of ideas that does not include defendant voices is an impoverished one whose outcomes and conclusions are suspect.

b. Democratic Self-Governance

Another classic theme paints free speech as a prerequisite for participatory democracy and self-governance, necessary to any system that rests on the "consent of the governed."[155] The Court has held variously that democratic self-governance requires "free political discussion to the end that government may be responsive to the will of

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151 *See* ABA REPORT, *supra* note 10, at 3–4 (estimating that as many as ten thousand innocent defendants are convicted annually at trial and noting that this figure does not include innocent defendants who plead guilty); *see also supra* note 90 (citing reports of innocent defendants presumed to plead guilty and estimates of number of wrongfully convicted inmates).

152 *See* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J.L. STUD. 173, 174–77 (2004) (arguing that legal rules do not deter in part because people do not know about them).

153 *See, e.g.*, Faretta v. California, 422 U.S. 806, 834 (1975) (expressing concern that forcing defendant to accept counsel against his will "can only lead him to believe that the law contrives against him").

154 *Cf.* Bibas & Bierschbach, *supra* note 20, at 109 (describing crime and punishment as embodying "social norms" and "relations between persons").

155 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these [unalienable] rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); *see also* David B. Sentelle, *The Courts and the Media*, 48 FED. LAW. 24, 26 (2001) (reviewing Owen Fiss, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)) (rationalizing Supreme Court protection of media access to courts in part because "openness is an essential element of public trust in a system that depends at root on the consent of the governed").

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the people,"[156] that free speech is the "guardian of our democracy,"[157] and that the First Amendment was designed to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."[158] Scholars have likewise described the First Amendment as intended "to make the public debate sufficiently rich to permit true collective self-determination,"[159] to preserve responsible and regulated discussion,[160] and as necessary to "best promote democratic deliberation."[161] Others adopt a more individualistic and participatory focus, treating free speech as a way of preserving the individual right to participate in and shape the public debate.[162] In each version, free speech's crucial function is to legitimate the political process and thereby its outcomes.

Defendant silence engages the question central to these approaches to free speech: whether the democratic debate over the state's power to punish can proceed without hearing from those who are punished. Or, put another way, is our criminal justice apparatus legitimate from a participatory, political responsiveness perspective? The democratic decisional process that creates criminal laws, mandatory minimum sentences, sentencing guidelines, felon disenfranchisement laws, and registration requirements—in other words, all the punishments and burdens imposed on criminal defendants—takes place without hearing from defendants who are in the process of being subjected to those very laws. Once convicted and incarcerated, defendants continue their exclusion from the public debate. Their silence begins in prison,[163] and continues upon release, not least because of felony disenfranchisement laws and defendants' inability to hold public office. Defendants do not even have good proxy speakers: Their actual representatives—their attorneys—are constrained by the exigencies of litigation and sworn to secrecy. Moreover, there are very few interest groups who speak for defendants within the political

156 Stromberg v. California, 283 U.S. 359, 369 (1931).

157 Brown v. Hartlage, 456 U.S. 45, 60 (1982).

158 Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

159 Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986).

160 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 24 (1960).

161 Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 28 (1991).

162 *See, e.g.*, Karst, *supra* note 147, at 21 (arguing that First Amendment contains "equality principle" integral to freedom of expression); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524–25 (1997) (arguing that the First Amendment protects individual autonomy and not merely collective decisonmaking processes).

163 *See* Feierman, *supra* note 63, at 252 (describing how silence is imposed on prisoners).

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process.[164] Since First Amendment self-governance theory holds that the political process derives its legitimacy from the opportunity for expressive participation, defendants' lack of parliamentary floor time[165] renders their treatment by the criminal system deeply suspect.

This problem becomes more poignant when defendants comprise a large percentage of poor communities of color. What Jonathan Simon refers to as "governing through crime"[166] and David Garland describes more generally as a "culture of control,"[167] points to the fact that the criminal system is a dominant form of governance in poor black neighborhoods. In communities where fifty percent or more of the men are under criminal justice supervision at any given time, where the odds that a black man will be arrested in his lifetime are one in three, and where thirteen percent of the men are disenfranchised, the criminal system *is* the government.[168] The central fact about this government, of course, is that it is coercive and punitive. However, its failings are exacerbated by the fact that it actively silences its constituents, cutting off traditional avenues for democratic change and practically ensuring official unresponsiveness.

c. Subordinated Speakers

The silencing of criminal defendants is an example of the phenomenon that seemingly neutral principles of free speech can actually silence disempowered speakers.[169] Discourse—the way things are

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[164] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 553 (2001) ("[O]rganized interest group pressure to *narrow* criminal liability is rare."). Attorney organizations may be exceptions to the general rule since they often oppose legislation that makes defense work more difficult. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, ACTION ALERT, http://www.nacdl.org/public.nsf/freeform/legislation?opendocument (opposing Congressional bill on gangs and Patriot Act); AM. BAR ASS'N, LEGISLATIVE AND GOVERNMENTAL ADVOCACY, http://www.abanet.org/poladv/priorities/home.html (advocating increased funding for indigent defense).

[165] *Cf.* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2100 (1991) ("The state must act as a high-minded parliamentarian, making certain that all viewpoints are fully and fairly heard.").

[166] Jonathan Simon, *Crime, Community and Criminal Justice*, 90 CAL. L. REV. 1415, 1416–17 (2002).

[167] *See* GARLAND, *supra* note 24, at 165 ("The open, porous, mobile society of strangers that is late modernity has given rise to crime control practices that seek to make society less open and less mobile: to fix identities, immobilize individuals, quarantine whole sections of the population, erect boundaries, close off access.").

[168] *See supra* note 146.

[169] *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS 9–10 (1993) (describing free speech principles that protect pornography as form of discrimination against women); Matsuda, *supra* note 13, at 1337–39, 1348, 1355 (describing how dominant views about accent and language discriminate against minorities). *See generally* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION (David S. Allen & Robert Jensen eds., 1995) (describing speech rights and disadvantaged speakers).

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talked about—is an exercise in power. In this case, criminal justice discourse shapes the identity and fate of defendants.[170] Defendants are thus silenced twice, first by the adversarial process, but also by their status as overwhelmingly low income, predominantly minority, undereducated "criminals." Defendants as a class are among those least likely to be heard by judges, legislators, and the public. In other words, they are the least likely to have authentic "free speech" opportunities. Moreover, the "speech" doctrines of criminal procedure are specifically designed to ensure their silence and to empower others to speak for them.

The fact that criminal procedure doctrine and scholarship ignore the harm of silencing—even treat it as a favor to defendants—only exacerbates the problem. Or, as Catharine MacKinnon put it elsewhere:

> Both [First Amendment and Equal Protection law] show virtually total insensitivity to the damage done to social equality by expressive means and a substantial lack of recognition that some people get a lot more speech than others. In the absence of these recognitions, the power of those who have speech has become more and more exclusive, coercive, and violent as it has become more and more legally protected. Understanding that there is a relationship between these two issues—the less speech you have, the more the speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from—is virtually nonexistent.[171]

Defendant silence thus skews the scholarly debate. First Amendment discourse does not grapple with the special problems posed by criminal defendant speech, and criminal procedure's jurisprudence of silence is barren of the sorts of concerns and pressures that First Amendment questions exert in other arenas. As a result, we lack even the vocabulary to describe the "free speech" concerns that arise when a defendant feels official pressure to keep silent about his own fate in the face of government prosecution.[172]

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[170] *See* MACKINNON, *supra* note 169, at 9 (describing how pornography shapes and harms women's identities); Lawrence, *supra* note 13, at 2251 (describing his scholarship as form of resistance to dominant paradigms of legal meaning).

[171] MACKINNON, *supra* note 169, at 72.

[172] In one rather ironic sense, First Amendment doctrine expressly values defendant speech: It provides strong entitlements to those who want to hear it. The media and the public have robust courtroom-access rights precisely because the Court has recognized how important it is to hear what goes on in a criminal case. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570, 573 (1980) (noting that "public trials ha[ve] significant community therapeutic value" and that media reportage on criminal proceedings "contribute[s] to public understanding of the rule of law and to comprehension of the func-

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2. *Reevaluating Defendant Speech*

Ultimately, the problem revealed here is that defendant speech is undervalued, treated narrowly as a Fifth Amendment problem instead of broadly as a First Amendment opportunity. The cure is not to extend First Amendment protection to everything a defendant says. Rather, it is to start valuing defendant speech.[173] This brief discussion suggests new ways to attribute familiar, positive values to defendant speech. Likewise, the previous discussion of the Fifth and Sixth Amendments reveals existing doctrinal foundations that place high importance on defendant expression and choice, the very same "premise of individual dignity and choice upon which our political system rests" and which the First Amendment also protects.[174] These existing tools offer ways both to appreciate defendant speech for its potential democratic and social contributions, and to identify the significant losses that accompany defendant silence.

III
FURTHER IMPLICATIONS OF DEFENDANT SILENCE

To this point, this Article has examined defendant silence primarily by reference to existing jurisprudential norms, as a way of highlighting the costs of defendant silence for which we already have legal labels and frameworks. Widespread defendant silence implicates core concerns of First, Fifth, and Sixth Amendment jurisprudence and scholarship, undermining personal expressive freedom within the legal

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tioning of the entire criminal justice system") (citation omitted). Similarly, lawyers have important First Amendment rights to speak about their cases in public to shape the public discourse about the criminal justice system and to serve their clients' interests in a fair trial. *See* Gentile v. Nevada, 501 U.S. 1030, 1036–37, 1048 (1991) (invalidating state court interpretation of state bar restriction on attorney out-of-court speech as void for vagueness). Those who want to receive letters from prisoners have stronger First Amendment protections in receiving the mail than prisoners have in sending or receiving mail themselves. *See* Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989) (upholding prison mail censorship regulations that limited incoming mail to prisons); Procunier v. Martinez, 416 U.S. 396, 409–10 (1974) (overturning prison mail censorship regulations insofar as they infringed non-prisoner recipients' rights to receive mail from prisoners). In other words, everyone except defendants appears to have strong expressive and democratic interests in participating in a free-wheeling, fully informed, uncensored discourse about the criminal process and its meaning.

173 Criminal defendants are not alone; there are many groups of speakers with important things to say who get reduced First Amendment protection. *See, e.g.*, Victoria Smith Holden, *Effective Voice Rights in the Workplace*, *in* FREEING THE FIRST AMENDMENT, *supra* note 169, at 114–15 (arguing for stronger conception of workplace expressive rights). *But see* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–25 (1948) (arguing that restricting speech may be necessary to permit meaningful speech).

174 Cohen v. California, 403 U.S. 15, 24 (1971).

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system, reducing democratic participation, and impeding responsive government.

But defendant silence involves additional costs beyond these jurisprudential harms. This Part inquires into these costs, which emerge from a richer inquiry into the role that speech plays in individual consciousness, legal practices and institutions, and, more broadly, in constituting the discourses that shape the legal system and our understanding of it.

A. Defendant Losses

1. Understanding

How much do defendants who do not speak for themselves understand the legal process?[175] The legal system has long grappled with the concern that defendants, particularly those with educational or cognitive deficits, may not understand what is happening to them.[176] As studies of medical consent demonstrate, even when technical concepts are explained to them, laypeople often do not understand the language being used or remember what they are told.[177] Silent defendants are even more prone to misunderstandings because their ignorance is rarely revealed, either to the court or often even to their own lawyer. For the under-educated, often functionally illiterate defendant population, silence may thus both mask and contribute to incomprehension.

Silence can also cause cognitive disengagement: Defendants who are not expected to speak or testify during motions, hearings, or trials may stop listening, especially when the language used is legalistic or technical.[178] Silent defendants are also less likely to grasp the concepts that govern their case because they never have to reproduce

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[175] The ability of defendants to comprehend legal proceedings is related to deeper questions about the role of language skills in social acculturation and success. *See* Eugènie Humber & Pamela C. Snow, *The Oral Language Skills of Young Offenders: A Pilot Investigation*, 8 PSYCHIATRY PSYCHOL. & L. 1, 2–3, 7 (2001) (discussing relationship between offenders' poor language skills and aggressive behavior, substance abuse, and failure of intervention programs).

[176] *See* Iowa v. Tovar, 541 U.S. 77, 88 (2004) (holding that "intelligen[ce]" of defendant's waiver will depend on "case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding").

[177] *See* Alan Meisel & Loren H. Roth, *Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies*, 25 ARIZ. L. REV. 265, 298–99 (1983) (identifying linguistic complexity, technical tone, and lack of time to read and assimilate information as reasons why patients do not understand consent forms).

[178] Counsel and jurors have even been known to sleep through trials. *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (holding that sleeping counsel constituted prejudice).

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them out loud.[179] Counsel likewise are under little pressure to ensure that their clients understand anything more than the basic precepts because defendants (and therefore counsel) are never tested. While defense counsel will usually ask questions to determine whether their clients understand key concepts, much of what goes on in a case or in court will never be explicitly discussed.[180]

Silence also reinforces defendants' psychological distance from court proceedings. Silence is a form of acquiescence to authority, a way of admitting incomprehension and the inability to contest what is being said. In her study of Baltimore rent court, Barbara Bezdek concluded that tenants' in-court silence both reflected and reinforced their perception that they were powerless and that their legal fate was predetermined.[181] Psychologists have noted that silent litigants who do not participate in their own cases "due to issues of acculturation, linguistic background, and/or mental health difficulties," are more likely to experience discrimination from judges and jurors, and that the inability to participate verbally in their own legal proceedings is itself a species of discrimination.[182] While the incomprehension that accompanies forced silence is a well-recognized phenomenon for non-English-speaking litigants,[183] it is a danger for all defendants in light of the system's bias against silence.

2. *Remorse and Rehabilitation*

Acceptance of responsibility and rehabilitation are intertwined, central goals of the criminal justice process.[184] A defendant's acceptance of responsibility or remorse for his crime is usually seen as a necessary precursor to rehabilitation because it reflects an internalization of the wrongfulness of his actions. According to the Supreme Court, "[a]cceptance of responsibility . . . demonstrates that an

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[179] The same is true of students. *See* Carole J. Buckner, *Realizing* Grutter v. Bollinger*'s "Compelling Educational Benefits of Diversity"—Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 877–78, 887–88 (2004) (arguing that minority students' silence in class and lack of class participation translate into reduced learning and success after law school); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141–46 (1988) (documenting lack of participation by women in law school classrooms and associated feelings of alienation).

[180] Nor is in-depth discussion constitutionally required. *See* United States v. Broce, 488 U.S. 563, 571–73 (1989) (holding that guilty plea remained valid even though counsel never discussed viable double jeopardy defense with defendant).

[181] *See* Bezdek, *supra* note 13, at 582, 585, 586.

[182] Barrett & George, *supra* note 58, at 9.

[183] *See* Dery, *supra* note 40, at 564–65 (discussing inability of non-English speaking defendants to participate fully in their cases even when using translator).

[184] *But see* GARLAND, *supra* note 24, at 8 (describing shift away from rehabilitation as goal of modern criminal systems).

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offender 'is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.' "[185]

While there is certainly such a thing as silent remorse, talking out loud about remorse is an important aspect of being remorseful. As Stephanos Bibas and Richard A. Bierschbach have noted: "Apology . . . is a powerful ritual for offenders, victims, and communities."[186] But as discussed above, it can be highly risky for a defendant to express remorse in his own voice, either because it can lead to additional liability, or because the ways in which defendants express remorse may be misinterpreted by their intended audience.[187] Accordingly, defense counsel will often curtail the free expression of their client's remorseful feelings, thereby teaching defendants that the system does not value and may even punish their remorse.

The Supreme Court has held that authentically remorseful defendant speech is so important for purposes of rehabilitation that under some circumstances the state can require it. In *McKune v. Lile*,[188] the Court upheld a Kansas prison program that threatened the defendant—a convicted sex offender—with the deprivation of various privileges that he had earned during his six years of incarceration because he refused to take part in a sex offender rehabilitation program. That program would have required him to accept responsibility for his offense and confess to all previously uncharged conduct, both verbally and in writing. The defendant argued that the rehabilitation program infringed his right to remain silent because its purpose and effect were to coerce him into incriminating himself.[189]

The Court rejected this argument in part by balancing the coercive effects of the program's penalties with Kansas's legitimate need to get sex offenders to express themselves.[190] The Court accepted Kansas's conclusion that, for authentic rehabilitation to occur, offenders need to verbally admit to and take responsibility for past conduct.

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[185] McKune v. Lile, 536 U.S. 24, 36–37 (2002) (quoting Brady v. United States, 397 U.S. 742, 753 (1970)).

[186] Bibas & Bierschbach, *supra* note 20, at 90; *see also id.* at 114 (arguing that verbal expressions of remorse heal defendants and benefit victims).

[187] *See supra* text accompanying notes 138–44.

[188] 536 U.S. 24 (2002).

[189] *Id.* at 31.

[190] *Id.* at 36. *But see* United States v. Antelope, 395 F.3d 1128, 1136–38 (9th Cir. 2005) (distinguishing *McKune* and holding that infliction of additional incarceration on sex offender who refused to participate in treatment *did* violate Fifth Amendment).

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> An important component of [these] rehabilitation programs requires participants to confront their past and accept responsibility for their misconduct. Denial is generally regarded as a main impediment to successful therapy, and [t]herapists depend on offenders' truthful descriptions of events leading to past offenses in order to determine which behaviours need to be targeted in therapy.[191]

Interestingly, Kansas's therapeutic requirement implicitly rejected the plea colloquy and sentencing as insufficient acknowledgements of responsibility for the purposes of rehabilitation.[192] Rather, defendants had to supplement their formal legal expressions of remorse by participating in group therapy in which they had to confess and discuss their crimes and past conduct in their own voices. In this scheme, defendant expressive speech was so valuable (and so lacking in court) that the Court found that Kansas could effectively force inmates to engage in it.

The restorative justice movement explicitly recognizes speech as a form of personal and social therapy, permitting healing for both offenders and victims and creating a community mechanism for rehabilitation and reintegration.[193] One version of restorative justice argues that "'reintegrative shaming'—bringing home the crime's wrongfulness to the offender and then reintegrating him into the law-abiding community—can reduce the likelihood of recidivism through the power of affective bonds and dialogic persuasion."[194] The traditional silence of defendants stands directly in the way of this "dialogic" healing.[195] The silencing demands of the adversarial process thus potentially deprive defendants and others of important rehabilitative and reintegrative opportunities.

3. *Perceptions of Legitimacy*

When the law does not hear or recognize individuals' speech, it undermines the legitimacy of the legal process for those silenced individuals. People who are not heard, who feel unrecognized and unacknowledged during the legal process, are less likely to accept its

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191 *McKune*, 536 U.S. at 33 (citations omitted).

192 *See supra* Part II.B (describing limited expressive opportunities in plea colloquy).

193 *See* Erik Luna, Introduction: *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3–4 (2003) (describing restorative justice movement).

194 *Id.* at 4 (citation omitted) (citing conference participant John Braithwaite as having coined term "reintegrative shaming").

195 The related phenomenon of criminal mediation likewise depends on defendant expressions to create opportunities for forgiveness and resolution. *See* Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 582 (2004) (describing predominance of victim-offender mediation model in which victims and offenders jointly negotiate resolution).

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outcomes or consider them to be fair. For example, as Bezdek described Baltimore's silent rent-court litigants, their decision not to speak in court reflected in part their belief "that the outcome was predetermined, i.e., that rent collection through rent court was another set of rules in which others have all the say-so."[196]

Similarly, William O'Barr and John Conley concluded that litigants who are silenced by formal legal procedures experience less personal satisfaction with the legal process than small-claims participants who are permitted to speak in their own voices.[197] Formal constraints led to "frustration and dissatisfaction," and some litigants reported that "they never would have taken their cases to court or agreed to testify if they had realized ahead of time how little opportunity they would have to tell their stories."[198] While criminal defendants are in a significantly different posture than civil litigants, presumably they experience similar distrust of a legal process that does not hear their voices.[199]

By contrast, studies of litigant satisfaction with restorative justice programs suggest higher offender satisfaction with the expressive opportunities in these programs than with those afforded by traditional adversarial court sentencing proceedings.[200] The example should not be strained. Restorative justice programs, such as victim-offender mediations in which victims and offenders negotiate a resolution through a mediation process, involve a great deal more than mere defendant/offender speech, and they typically address punishment alone: Liability is usually already determined.[201] Nevertheless, it is

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196 Bezdek, *supra* note 13, at 591.

197 William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court*, 19 LAW & SOC'Y REV. 661, 662 (1985).

198 *Id.* at 667; *see also* Jack B. Weinstein, *The Ohio and Federal Rules of Evidence*, 6 CAP. U. L. REV. 517, 521 (1977) ("[A]llowing litigants to introduce evidence relatively freely . . . tends to tranquilize them. This truism is demonstrated repeatedly in magistrates' courts where a complaining witness pours out his heart to an attentive judge and then, having had his day in court, withdraws his complaint.").

199 On the other hand, when small-claims litigants were able to express themselves in their own words, they often lost their cases or received less compensation than they might have had they used more traditional legal narratives. *See* O'Barr & Conley, *supra* note 197, at 685–90 (analyzing legal adequacy of lay narratives). The study thus reinforces the point made above that the adversarial system sometimes encourages silence as the optimal legal strategy.

200 *See* Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167–98. The restorative justice programs studied involved victim-offender mediation sessions, group conferencing, and mediated negotiations between victim and offender, each of which took place in lieu of traditional criminal sentencings. *Id.* at 167–76. In each of these alternative proceedings, defendant silence is not an option.

201 *But see* Laflin, *supra* note 195, at 572–74 (documenting increased instances of judges mediating serious felonies including murder and rape).

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worth noting that offenders who participated in the studies were explicitly asked whether they "had an opportunity to tell their story"[202] and whether "their opinion was adequately considered."[203] For both questions, the restorative justice programs scored significantly better than the court proceedings.[204]

None of these examples contradicts the bedrock importance of the right to remain silent in protecting the typical defendant from self-incrimination. In the United States, restorative justice programs are still "embryonic"[205] and complementary to the adversarial process: They typically do not adjudicate contested issues of liability, and are often limited to juvenile offenders.[206] The open nature of restorative proceedings, moreover, permits different sorts of inquiries: For obvious reasons we lack data on defendant satisfaction with the ability to withhold inculpatory evidence from the police and the court. But these examples nevertheless indicate that, at the very least, in our system where the vast majority of defendants admit guilt, more attention needs to be paid to defendant perceptions of the legitimacy of the process by which their stories are heard and their punishments determined.

B. Systemic Harms

1. Institutional Ignorance

If defendants could speak more freely, what might we learn? First, we might learn what defendants know about their obligations under the law and potential punishments. While ignorance is no excuse under the law, we could better determine what deters and what does not, and under what circumstances legal rules function well.

Judges and prosecutors would learn about the social circumstances that breed crime and violence from the perspectives of those who must survive under them. They might also learn some of the reasons why people commit crimes in high-crime neighborhoods, why

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202 Poulson, *supra* note 200, at 184.

203 *Id.* at 185.

204 When asked if they believed they had an opportunity to tell their story, eighty-eight percent of offenders answered "yes" with respect to restorative justice programs in contrast to sixty-four percent of court participants. For the question of whether their opinion was adequately considered, the respective percentages were seventy-two percent and fifty-five percent. *Id.* at 183–85. While one study also asked whether offenders considered the various types of proceedings to be fair—and the restorative justice programs scored higher in this regard as well—these results were not statistically significant. *Id.* at 191–92.

205 Luna, *supra* note 193, at 3.

206 *See* Kathy Elton & Michelle M. Roybal, *Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 46–55 (evaluating restorative justice primarily by reference to its use in juvenile adjudication).

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heroin addicts rob banks, or why juveniles steal cars.[207] Legislators could better probe the elusive relationships between poverty, dignity, and criminality. The system would also obtain more information about law enforcement and how police behave, in ways that suppression hearings rarely permit because defendants face incrimination if they take the stand.[208] Every aspect of criminal justice, in other words, could be evaluated in light of its actual effects on its intended targets.

Instead, the adversarial system makes silence the safest, most protective option for a defendant. As a result, the criminal system never gets to know defendants—their voices, identities, motivations, or experiences. The only institutional actors who do—defense counsel—are overworked and sworn to secrecy. If the system was intended to keep society substantially clueless about the people it incarcerates, it could not have been better designed.

Defendant silence thus maintains the ignorance of institutional players such as judges and prosecutors who never hear the full story about the individuals before them, or indeed about the functioning of the justice system itself.[209] There are remarkably few alternative sources of information. For judges, defense counsel are expected to fill in the narrative gaps about their clients, although, as described above, this is a highly artificial, constrained account. Judges are also expected to have some institutional memory about the conditions that affect defendants, but since they rarely hear from a defendant in his own voice, their worldview is necessarily limited.

This information deficit often occurs, moreover, in the context of existing judicial bias and hostility. Recent studies indicate pervasive racial and economic discrimination in sentencing, particularly at the federal level, in which unemployed black and Hispanic youth receive heavier sentences than other defendants with similar criminal histories.[210] The ABA Report on indigent counsel similarly documents

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[207] *See generally* ABOUT CRIMINALS: A VIEW OF THE OFFENDER'S WORLD 61, 71, 191 (Mark R. Pogrebin ed., 2004) (collecting sociological studies discussing offenders and their motivations).

[208] *See* Amsterdam, *supra* note 57, at 790 ("[T]he Supreme Court simply never gets to see many of the police practices that raise the most pervasive and significant issues of suspects' rights.").

[209] I argue elsewhere that the extent of police use of informants is hidden from courts and from the public under layers of law enforcement discretion, thus obscuring from public view the way the system really works. *See* Natapoff, *supra* note 43, at 677–80. Hearing from more defendants would provide new sources of information on this and other secretive topics.

[210] *See* TUSHAR KANSAL, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 4–7 (Marc Mauer ed., 2005), *available at* http://www.sentencingproject.org/pdfs/disparity.pdf (examining racially discriminatory sentencing outcomes in criminal jus-

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judicial collusion with prosecutors in which some judges help to ensure that defendants plead guilty, sometimes without appointing counsel at all.[211]

For prosecutors, the problem of defendant silence likewise ensures institutional ignorance. Prosecutors are charged with ensuring fairness and balance,[212] even though they will never obtain full or balanced information about the circumstances that generate the cases they prosecute.[213] Prosecutors are thus deprived of the worldview that might inform their charging decisions and sentencing recommendations, even as those decisions strongly predetermine the ability of the court to make judgments about lenience.[214]

Whether defendant silence leads to harsher charging and sentencing decisions is admittedly speculative. After all, the presumption behind the privilege is precisely that defendants will harm themselves by talking freely to prosecutors and judges. On the other hand, the system is already remarkably harsh,[215] and widespread defendant silence means that there is little empathetic or educational impetus for change in the perceptions and predispositions of these institutional decisionmakers. Prosecutors and judges rarely contend with the human voice of the person they punish, learn his story, or hear his perspective. What is true of psychologists and defense counsel is equally true for prosecutors and judges: Learning to hear defendants despite their differences takes education and dialogue.[216] While there

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tice system); *see also* Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1488–94 (2004) (describing pervasive judicial hostility to defense counsel and defendants).

211 *See* ABA REPORT, *supra* note 10, at 23–26.

212 *See* Berger v. United States, 295 U.S. 78, 88 (1935) (noting prosecutor's interest not merely in winning cases but in seeing that "justice shall be done").

213 There is an informal negotiating dialogue between defense counsel and prosecutors in which a fuller story can potentially be offered. This process is limited by the need to preserve options later if negotiations fail.

214 *See* Stuntz, *supra* note 21, at 519–21 (describing shift in adjudicative authority to prosecutors).

215 Whitman notes:

> As a result of the last quarter century of deepening harshness, we [the United States] are no longer clearly classified in the same categories as the other countries of the liberal West. Instead, by the measure of our punishment practices, we have edged into the company of troubled and violent places like Yemen and Nigeria, China and Russia, pre-2001 Afghanistan and even Nazi Germany . . . .

See WHITMAN, *supra* note 4, at 4 (citations omitted).

216 Kimberly Holt & William H. George, *Judicial Colorblindness, Race Neutrality, and Modern Racism*, *in* RACE, CULTURE, PSYCHOLOGY & LAW, *supra* note 58, at 32 (noting that, in order to be effective, "psychologists and attorneys who work with racial, cultural, and ethnic minorities very likely will need to discuss racial/ethnic/cultural issues in presenting the dynamics and contexts of their clients' case as well as the client's identity, personality, and character").

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may be good legal reasons for individual defendants to remain silent, in the long run, silence is a recipe for continued institutional hostility.

2. *Social and Discursive Exclusion*

The institutional silencing of defendants ensures that courts, legislatures, and the public rarely hear the viewpoints, experiences, and stories of the people at the center of the criminal justice system. Insofar as we understand criminal law as narrative or rhetoric—even as "the central art by which community and culture are established, maintained, and transformed"[217]—defendants do not directly participate in it, at least not while they are defendants. Defendant silence is thus a species of the more general phenomenon that the law silences the disadvantaged.

Not only does silence render defendants invisible, it affirmatively shapes the law in ways that further disadvantage them. As Charles Lawrence put it with respect to African Americans generally,

> [o]ur stories have, for the most part, not been told or recorded in the literature that is the law . . . . We remain invisible and unheard in the literature that is the evidentiary database for legal discourse, and when we are seen, in stories told by others, our images are severely distorted by the lenses of fear, bias, and misunderstanding.[218]

Feminist scholars have shown the symbiotic relationship between women's silence under the law and the dominance of male-centric legal norms such as the "reasonable man," the devaluation of domestic violence, and the acceptance of pornography.[219] Defendant silence likewise reinforces legal norms of punitiveness, hostility, and incomprehension.

Beyond the legal arena, the media and political spheres are saturated with overblown, racially charged images of criminals and criminality, images which in turn stir up fear and are used to support harsher punitive measures.[220] Silent defendants cannot compete with

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[217] White, *supra* note 11, at 684.

[218] Lawrence, *supra* note 13, at 2278–79.

[219] *See, e.g.*, MACKINNON, *supra* note 169, at 20 ("[A]ll pornography is made under conditions of inequality."); Ainsworth, *supra* note 13, at 261–62 (exposing bias toward male norms in criminal procedure doctrines of speech); Martha Minow, *Foreword, Justice Engendered*, 101 HARV. L. REV. 10, 13 & n.15 (1987) ("Legal treatment of difference tends to take for granted an assumed point of comparison: Women are compared to the unstated norm of men.").

[220] *See* Mikal Muharrar, *Media Blackface: "Racial Profiling" in News Reporting*, EXTRA!, Sept.–Oct. 1998, http://www.fair.org/omdex.php?page=1431 (describing media bias toward portraying crime as black phenomenon); Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 PRESS/POLITICS 6, 6–15

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these voices. Because it eliminates the primary voices that might be raised against harsh practices including long sentences, inhumane prison conditions, and deprivations of rights upon conviction, defendant silence helps to validate such practices.

The criminal system is not, of course, the only place where defendants can speak or be spoken for. Politics, literature, music, and other parts of the public discourse remain.[221] For example, Paul Butler argues that more attention should be paid to hip-hop because it has become a vehicle for the voices of men of color who are familiar with the criminal justice system. Says Butler:

> At the same time that an art form created by African American and Latino men dominates popular culture, African American and Latino men dominate American prisons. Unsurprisingly then, justice—especially criminal justice—has been a preoccupation of the hip-hop nation. The culture contains a strong descriptive and normative analysis of punishment by the people who know it best.[222]

At the same time, hip-hop may be the exception that proves the rule: Originally shunned by record labels, mainstream media, political discourse, and other conventional speech arenas, the creative denizens of the world dominated by the criminal justice system managed to create a new cultural speech medium in which they could authentically speak and be heard. As Butler recognizes, hip-hop's political power remains weak and should not be treated as a substitute for discourse in other social arenas.[223] In other words, the existence of the multi-million dollar hip-hop industry, or other limited public outlets for defendant voice, does not excuse or cure the deafening silence that characterizes the justice system and public discourse more generally.

The silence of criminal defendants thus demands recognition as a socio-political phenomenon that harms individuals within the criminal justice system and skews public perceptions of criminal justice. The fact that silence is good litigation strategy, and that it has constitutional support, does not alter the fact that it is yet another disability

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(1996) (documenting local news' tendency to overstate crime phenomenon and to portray it as black problem).

221 *See* Taylor-Thompson, *supra* note 10, at 154–55 (chronicling community-based efforts to influence criminal justice system).

222 Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 986 (2004). Paul Butler highlights the lyrics of one rap song as an example of a hip-hop analysis of criminality:

> [A] nigga wit' nothin' to lose
> One of the few who's been accused and abused
> Of the crime of poisonin' young minds
> But you don't know shit 'til you've been in my shoes

Id. at 1005.

223 *See id.* at 995.

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imposed on the already overpunished defendant population, as well as a systemic dysfunction that impedes progress within the criminal system.

CONCLUSION

The picture offered above is one of a fundamentally flawed system. On the one hand, defendant silence is an inevitable by-product of the adversarial system necessary to protect defendants. At the same time, widespread silencing devalues defendant dignity, contradicts the expressive impulses within the law, and systemically excludes disadvantaged groups from the criminal justice discourse. As a result, in a democracy that prides itself on its devotion to expressive rights and individual voice, millions of disadvantaged citizens are thrust into the court system, found guilty, and sent off to prison, while uttering nary a word in public. This bodes ill for individual defendants as well as for the democratic vitality of the system. It is also a most suspect species of public policy, for it ensures that the very individuals who have fallen through society's cracks will never be heard.

Defendant silencing thus poses a fundamental challenge to the criminal justice system. That challenge is to reconceptualize defendants as speakers rather than objects of litigation, to turn them from abstract "juridical subject[s]"[224] into thinking, feeling human beings from whom, as a society, we need to hear. Recognizing defendants as speakers and valuing their speech is a form of empathy, inclusion, and empowerment.[225] It also resonates with fundamental values of our legal system such as the importance of individual speech, personal autonomy, and democratic participation.

Reconceptualizing defendant speech in these ways dovetails with the ongoing scholarly debate over the nature and role of the adversarial criminal process. Despite its illustrious pedigree, there is an increasing consensus that we have an adversarial system in name only. In reality, the majority of criminal cases are handled administratively, their outcomes are determined by police and prosecutorial discretionary decisions, and only a few cases at the margins are actually litigated and shaped meaningfully by defense counsel and judges.[226] There is also growing recognition that the few cases that make it to

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[224] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 13 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

[225] *Cf.* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099, 2110 (1989) (arguing that newer calls for judges to "empathize" are in fact reiterations of old arguments about who should be listened to).

[226] *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124–25 (1998) (admitting that administrative process of

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trial, thus implicating the full panoply of defendant constitutional rights, play a reduced role in shaping criminal justice norms and practices. Plea bargaining takes place not merely in the "shadow" of trial but subject to its own internal pressures and dynamics that have little to do with constitutional criminal procedure but turn rather on institutional pressures on prosecutors and defense counsel.[227]

More globally, increasing attention is being paid to the ways that the criminal system functions as a form of government: criminalizing a wide range of behavior in disadvantaged communities, and representing a model of punitive social control rather than a more cooperative form of consensual governance.[228] In this vein, Jonathan Simon argues that "advanced industrial societies (particularly the United States) are experiencing not a crisis of crime and punishment but a crisis of governance that has led them to prioritize crime and punishment as the preferred contexts for governance."[229] This general description resonates with the contention above—that defendant silence is an anti-democratic phenomenon that reflects a public policy choice to limit the socio-political voices of defendants in exchange for instrumental litigation advantages.

By challenging the purely instrumental, case-oriented approach to the "right to remain silent," this Article implicitly questions whether the privilege is justifiable from a personal, dignitary, and democratic perspective. This question cannot be answered without reference to larger unsettled concerns about the demise of the adversarial model and the extent to which the criminal system is part of a larger governance crisis. On the other hand, I submit that these larger questions cannot be answered in full without reference to the deafening silence of defendants themselves. Acknowledging the losses experienced by silent defendants, and the social deformations silence creates, is thus a first step toward breaking the silencing itself.

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prosecutorial decisionmaking may violate adversarial ideals, but arguing that it functions fairly in practice).

[227] *See* Bibas, *supra* note 6, at 2470–86 (describing personal and institutional pressures on prosecutors and defense lawyers that shape plea process); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (arguing that plea bargaining outcomes are more heavily determined by prosecutorial choices than by substantive criminal law).

[228] *See* GARLAND, *supra* note 24, at 7–20 (listing twelve indices of change in criminal justice system that make it more intolerant and coercive).

[229] Simon, *supra* note 24, at 173.

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