Silencing as Blackening

Bennett Capers*

We are so accustomed to seeing defendants sit silently at criminal trials while their lawyers speak that we hardly question it. Or we tell ourselves this silence is for their own protection, part of their privilege against self-incrimination and the rules we have created for their own benefit. But what if we've gotten everything wrong? What if encouraging defendants to remain silent does not inure to their benefit at all, but to the State's? And what if this silencing is tied to race?

"Silencing as Blackening" tells a fuller story about silent defendants. One, that this silence is rarely voluntary, but instead the result of a host of rules and decisions that encourage, coerce, and even compel silence. Two, although we have come to take defendants sitting silently as normal, in fact this silence is of recent origin. Three, although we claim this silence benefits defendants, the real beneficiary seems to be the State. Four, this silencing of defendants has a racial history, and today has race effects, such that we should recognize that silencing functions as a type of blackening.

Rather than silencing defendants, and in effect blackening them, "Silencing as Blackening" argues we should carve out space for defendants to speak freely. And carve out space for us to listen. It argues that listening to defendants can help us rethink our entire criminal system. More ambitiously still, it argues that, just maybe, listening to defendants can help reduce racial and other biases. Can help undo race. And can help us let race go.

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INTRODUCTION

Most jurors probably take for granted that, in real life at least,[1] a defendant sits silently while their attorney speaks. During the trial, the prosecutor, the defense lawyer, the judge, and witness after witness will speak. But probably not the defendant.[2] Most defendants, either at the urging of their defense attorneys or on advice from other defendants, keep quiet at the defense table. True, some jurors might wonder why the defendant sits passively rather than at least taking the stand and giving his side. The purported reason for the silence might seem clearer when the trial judge, as required, instructs the jury about the defendant's right to remain silent, that his silence should not be used against him,[3] and that the burden of proof is solely on the government to prove beyond a reasonable doubt "every fact necessary to constitute the crime charged."[4] The defendant need not prove anything. With these explanations, the defendant's silence might again seem normal. His choice.

But what if we've gotten everything wrong? What if the defendant's "choice" to remain silent is hardly a choice at all, but instead actively encouraged by a host of decisions and rules we've erected? What if encouraging defendants to remain silent does not inure to their benefit at all, but to the State's? And what if this silencing is tied to race?

The ambition of this Article is to tell a fuller story and challenge our norm of defendants sitting silently. This fuller story suggests this silence is rarely voluntary but instead the result of a host of rules and decisions that encourage, coerce, and even compel silence. But that is only the start. The Article explores how we went from criminal trials where most defendants spoke, to trials where most defendants sit silent. It examines silencing's racial history and current race effects. And it argues that reversing course and encouraging defendants to speak can benefit us all.

The fuller story this Article tells begins, in Part I, by calling attention to the many rules and decisions that have the collective effect of prodding, encouraging,

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1. To be sure, fictional depictions of trials are often different. There, it is not uncommon for defendants to testify, often for dramatic effect. But of course, "real law is not television." Kimberlianne Podlas, *Guilty on All Counts:* Law and Order*'s Impact on Public Perception of Law and Order*, 18 SETON HALL J. SPORTS & ENT. L. 1, 48 (2008).

2. A study from 2009 found that only about half of criminal defendants who go to trial testify. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORN. L. REV. 1353, 1373 tbl. 2 (2009) (summarizing findings from a study of felony trials). It seems likely the number is far smaller today. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449 (2005) ("Criminal defendants rarely speak."). Natapoff adds: "[I]n 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." *Id.* at 1450. This accords with my own experience as a federal prosecutor. Defendants rarely testify.

3. *See* Carter v. Kentucky, 450 U.S. 288, 305 (1981) (holding that judges must, upon request, instruct jurors of a criminal defendant's right to remain silent).

4. In re Winship, 397 U.S. 358, 363 (1970) (quoting Davis v. United States, 160 U.S. 469, 493 (1895)).

and even coercing defendants into being silent, into reducing themselves to just bodies,[5] into subalterns.[6] Think, for example, of *Miranda* "rights."[7] *You have the right to remain silent. Anything you say can and will be used against you in a court of law*.[8] And it is not just *Miranda* "rights." As Part I shows, there is a panoply of rules—from the rules governing a defendant's first appearance in court, to the appointment of counsel, to evidentiary rules at trial, to even the threat of harsher punishments at sentencing—that encourage silence.

We did not always encourage silence. Part II shows that the practice we now take for granted—that an attorney does all the talking while the defendant sits silently—is a fairly recent development in the grand scheme of things. During the colonial period, criminal defendants spoke all the time. Even at the time the Sixth Amendment was ratified in 1791, and the right to counsel was enshrined, criminal defendants speaking at trial was very much the norm. Indeed, this speaking remained the norm until shortly after the Civil War. Part II also considers the racial history of defense counsel speaking for defendants. After all, the change from defendants speaking to defendants being encouraged to remain silent coincided with Emancipation and the Reconstruction Amendments. In short, it coincided with the very real possibility, suddenly, of Black defendants speaking in court.

Having limned out some of this history, Part III turns to a broader question: What happens when we silence defendants? Part III shows that silencing harms both victims and defendants. It deprives victims who want closure of the opportunity to speak to those who have harmed them and have them speak back. It casts defendants in a shadow and strips them of individuality, of dignity, and of the ability to explain, often a necessary precursor to rehabilitation. And silencing harms the rest of us too. When the defendant is reduced to a shadowy, mute

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5. There is a reason I titled an earlier piece on this subject "Bringing Up the Bodies," a play on the translation of "habeas corpus" and a reference to Hilary Mantel's *Bring Up the Bodies*, the second in her award-winning trilogy of historical novels about Thomas Cromwell and King Henry VIII. *See generally* Bennett Capers, *Bringing Up the Bodies*, 2022 U. CHI. LEGAL F. 83 (2022); HILARY MANTEL, BRING UP THE BODIES (2012). As I wrote then:

> We are used to thinking of convicted men (and women) as merely bodies, known by their inmate numbers, dressed in identical prison garb to strip them of individuality. But what interests me, and what I hope to explore, is how we reduce defendants to bodies long before a verdict is announced. Or, since we have become a system of pleas, well before a plea of guilty is entered.

Capers, *supra* note 5, at 84.

6. To be sure, other scholars have noted some of the ways the criminal process encourages silence. *See generally, e.g.*, Natapoff, *supra* note 2; Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851 (2008); Erin Sheley, *Substantive and Procedural Silence*, 84 TENN. L. REV. 447 (2017); Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309 (2020). I have written about this as well. *See* Capers, *supra* note 5; Bennett Capers, *Free-ing Criminal Justice*, 120 MICH. L. REV. 999 (2022) (book review). Part I joins this scholarship, but with a difference. For starters, it shows how pervasive, systematic, and *totalizing* this silencing is. Equally important, it shows the role race plays in silencing.

7. *See* Miranda v. Arizona, 384 U.S. 436, 468 (1966).

8. *See id.* at 469.

figure, it leaves us not knowing why defendants offended or what steps we can take to prevent crimes from happening again.

Part IV returns to silencing's racial history and the fact that silent defendants became a norm shortly after the Civil War. Turning to silencing's current racial effects, Part IV argues that we should recognize silencing as a type of blackening. For starters, it is a way to portray the defendant—regardless of their race—as having a black heart, as being the black sheep, and as deserving of punishment. But the term blackening is apt here for another reason. To blacken also means to darken. Part IV argues that silencing defendants has the effect of leaving us in the dark as to why defendants offend in the first place. For the defendant accused of stealing diapers or selling drugs or engaging in domestic violence, our norm of silencing means we never actually learn why. Were they poor? Were they unable to find a job? Did they have addiction issues? When we silence defendants, it does not just deprive us of our ability to hear them. It also deprives us of our ability to see them. To see them as fully human, as having a story of their own, and as being one of us.

Having made the argument that silencing functions as a type of blackening, the Article turns prescriptive. Part V argues that now—this liminal moment when momentum is building to question mass incarceration and racial disparities, when people increasingly recognize the importance of letting everyone have a voice—is the time to do something different. It shows why and how we can carve out space for defendants to speak and for us to listen.

In a conventional law review article, the normative part—here, Part V—would be followed by a conclusion. But this Article is far from conventional and not only because it taps into areas as disparate as legal history and literary theory, critical race theory, and psychology. As Sabeel Rahman and Jocelyn Simonson have recently written, "Liberating ourselves from the straight jacket of the Part IV [or Part V] requirement means expanding the possible species of our interventions."[9] With that in mind, Part V makes two final arguments. The first is that listening to defendants can quite possibly get us closer to a world without prisons, or at least far fewer prisons. Indeed, building on an argument I made about crime victims,[10] I argue that listening to defendants has the potential to help us rethink our entire criminal system.

This leads to my second and final argument, the one that motivates this project and motivates me not only as a criminal justice and evidence scholar but as a Black criminal justice and evidence scholar[11] who knows that our criminal

9. Sabeel Rahman & Jocelyn Simonson, The Part IV Problem in Legal Scholarship 4 (Aug. 2024) (unpublished manuscript) (on file with author).

10. *See* I. Bennett Capers, *Against Prosecutors*, 105 CORN. L. REV. 1561, 1586–1605 (2020) (questioning the state's monopoly on criminal prosecutions and arguing that we should empower victims to speak and have more say in how they can be made whole).

11. Like the Critical Race Theory scholar Patricia Williams, I am a firm believer that my identity matters when it comes to thinking about the law. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3 (1991) ("Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning.").

system and our racial system are joined at the hip.[12] My argument is that, just maybe, listening to defendants can help "make America what America must become"[13]—"fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects."[14] That, just maybe, listening to defendants can help reduce racial and other biases. Can help undo race. And can help us let race go.

I. THE SILENCED DEFENDANT

By the end of most criminal trials, jurors will have heard from a lot of people. Prosecutors. Defense Lawyers. Judges. Witnesses. Even the bailiff and the clerk of court. But the one person they are unlikely to hear speak is the defendant himself. Chances are he will sit silent at trial. Indeed, this silencing is so pervasive that a trial observer from another planet—or for that matter a visitor from a civil law country—might be tempted to channel the literary theorist Gayatri Spivak and ask, "Can the [s]ubaltern [s]peak?"[15] But to someone from this country or versed in our common law tradition, it will all seem completely normal. It may even seem right. Certainly this is the view many lawyers are taught.[16] That lawyers talk and defendants sit silent. That when it comes to defendants speaking, "silence is golden."[17]

Before I became a law professor, in the days when I was a federal prosecutor, I too took defendants' silence for granted, though I knew it mostly worked to my advantage in terms of securing a conviction.[18] A voiceless defendant is like a cipher, after all—easy to demonize. All the more so if the defendant is Black or Brown since race itself often functions as evidence,[19] triggering assumed cultural

12. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the criminal justice system functions as a modern racial caste system, disproportionately targeting and disenfranchising Black Americans through mass incarceration); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (discussing how Blackness and criminality became linked in the American psyche); Marcus Bell, *Criminalization of Blackness: Systemic Racism and the Reproduction of Racial Inequality in the US Criminal Justice System*, *in* SYSTEMIC RACISM: MAKING LIBERTY, JUSTICE, AND DEMOCRACY REAL 163 (Ruth Thompson-Miller & Kimberley Ducey eds., 2017) (discussing how the criminalization of Blackness has appeared throughout U.S. history).

13. JAMES BALDWIN, THE FIRE NEXT TIME 10 (1963) ("[G]reat men have done great things here, and will again, and we can make America what America must become.").

14. I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 880 (2008).

15. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

16. *See, e.g.*, DAVID SCOTT GOULD & ALISON GARFIELD, 1A CRIMINAL DEFENSE TECHNIQUES § 24.03 (2025); F. LEE BAILEY & KENNETH J. FISHMAN, 2 CRIMINAL TRIAL TECHNIQUES § 44:1 (2025) (noting that "classically it was thought that a defendant should avoid testifying unless absolutely necessary").

17. GOULD & GARFIELD, *supra* note 16.

18. Indeed, according to at least one empirical study conducted, defendants without prior convictions who testify are nearly twice as likely to be acquitted as similarly situated non-testifying defendants. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 421 (2018).

19. *See* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 885–93 (2018); Montré D. Carodine, *Race Is Evidence: (Mis)Characterizing Blackness in the American Civil Rights Story*, *in* CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 64, 64–67 (Austin Sarat ed., 2014).

scripts that "can 'hijack the mind' to foster a sense of 'obviousness.'"[20] But it was only recently, when I really began to think about silence, that I saw how *much* silence there is when it comes to defendants—from the moment of arrest when they are advised of the *Miranda* right to silence, through pretrial and trial, and even sentencing—and how a host of rules and decisions not only constrain the defendant's choice but practically compel the choice of silence. And it was only recently that I began to see the deeper connection between silencing and race.

Later, in Part II, I will show that things weren't always this way. Defendants used to speak all the time. I will argue that silencing—purportedly to protect defendants—in fact harms them. And harms us as well. I will argue that silencing has a racial history, and has race effects, such that we should think of silencing as blackening. But it makes sense to begin with silencing as, well, silencing. This first Part, therefore, is about this silence. It shows how this silencing permeates every aspect of a criminal defendant's case, beginning with his arrest and continuing through sentencing and even post-sentencing.

A. PRETRIAL SILENCING

You have the right to remain silent. Anything you say can and will be used against you in a court of law.[21] So begins the warning made famous by *Miranda v. Arizona*.[22] Hoping to provide some protection to suspects vis-à-vis police officers *trained* to elicit incriminating statements, often through psychological tactics,[23] the Court in 1966 insisted on a prophylactic: "concrete constitutional guidelines for law enforcement agencies and courts to follow."[24] Prior to commencement of any custodial interrogation, a suspect must be advised of his rights as a precondition to the admissibility of his statements.[25]

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20. NOÉMIE NDIAYE, SCRIPTS OF BLACKNESS: EARLY MODERN PERFORMANCE CULTURE AND THE MAKING OF RACE 17 (2022) (quoting KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 6, 198 (2012)).

21. Miranda v. Arizona, 384 U.S. 436, 469 (1966) ("The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.").

22. *Id.*

23. *See id.* at 448–50. Citing the advice contained in several police training manuals, the Court made clear its concern about the misuse of tactics:

> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

Id. at 450 (footnotes omitted).

24. *Id.* at 442.

25. *See id.* at 444.

Miranda is often thought of as rights enhancing.[26] As a federal prosecutor, I thought of it this way. But then I began to consider *Miranda* from the point of view of the suspect. Its message is that the suspect *should* remain mute, say nothing. That *anything* he says *will* be used against him. To be sure, not all suspects heed this warning, especially since the deliverer of the warning, the law enforcement officer, is likely trained to lull the suspect into doing the opposite: speaking. For those suspects who waive their right to silence, their attorneys will likely chastise them later for being foolish. For those suspects who keep silent, their lawyers will likely commend them for doing the right thing. Either way, the defendant will learn that silence is the recommended option and may even assume silence is in their best interest. And *Miranda* alone might be. But many defendants will soon realize *Miranda* is just one of several decisions and rules and norms that collectively have the effect of silencing them. Of inducing a type of silence that is totalizing, oppressive, and often not in defendants' interest at all.

Again, consider things from the suspect's point of view. If arrested, the defendant will be taken "without unnecessary delay before a magistrate judge."[27] In addition to appointing counsel and determining whether the defendant will be released and on what terms,[28] this judge will *again* advise the defendant of his "right not to make a statement" and repeat the warning "that any statement made may be used against the defendant."[29]

The defendant may assume, perhaps optimistically, that the judge is looking after his best interest. After all, the defendant will be able to talk freely when he meets with counsel. But even upon meeting with counsel he will find himself silenced. One of the first things counsel is likely to do—after either chastising him for speaking earlier or commending him for remaining silent so far—is warn him not speak to anyone about the case except her going forward. *Shut it and keep it shut*. The attorney may even add that the defendant should "shut it" in general since, under the party-opponent evidentiary rule, the prosecution will be able to use any of his statements against him, whether they are made to law enforcement or not, whether such statements are inculpatory or not.[30] She might warn

26. *See, e.g.*, Roscoe C. Howard, Jr. & Lisa A. Rich, *A History of* Miranda *and Why It Remains Vital Today*, 40 VALPARAISO U. L. REV. 685, 685 (2006) ("Custodial interrogations and how they are conducted in light of *Miranda* and its progeny are an integral part of the American criminal justice process and a necessary tool for criminal law enforcement . . . ."). This is not to say *Miranda* is without criticism. *See, e.g.*, Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 719 (1992) (arguing *Miranda* presents only the illusion of enhancing rights, when in fact it legitimates the status quo); Albert W. Alschuler, Miranda'*s Fourfold Failure*, 97 B.U. L. REV. 849, 850 (2017) (arguing that the decision misconstrued the privilege against self-incrimination, departed from the role of courts, and did nothing to protect suspects).

27. FED. R. CRIM. P. 5(a)(1)(A). Though I focus on the federal system, cognate rules exist in most state rules.

28. 18 U.S.C. §§ 3006A(b), 3142.

29. FED. R. CRIM. P. 5(d)(1)(E).

30. FED. R. EVID. 801(d)(2).

that his calls from jails will be recorded,[31] that his cellmate might be a jailhouse snitch,[32] and that even his "trusted friends" or family members might be required to testify and repeat anything he's said,[33] another reason why he should shut it and keep it shut. And while she will explain the attorney–client privilege means he can speak freely to her,[34] she is likely to clarify that even this "privilege" has some limitations. There's a crime–fraud exception, for one,[35] and then there's her ethical obligation to the court, for two.[36] She may even *encourage* a type of attorney–client silence regarding whether he's factually guilty, since knowing too much might ethically tie her hands.[37] The defendant might pick up on things she doesn't say. It may be clear that she only has time for him to talk about what is

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31. Relying on implied consent, courts have long held that monitoring inmates' telephone communications does not violate the Fourth Amendment, so long as the inmate is made aware of the monitoring program. *See, e.g.*, United States. v. Balon, 384 F.3d 38, 44 (2d Cir. 2004) (citing United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002)); United States v. Workman, 80 F.3d 688, 693 (2d Cir. 1996). Consent will be inferred where automated warnings inform the inmate of the recording policy, posted signs are available to alert the inmate, or a handbook informs inmates that calls are recorded. *See, e.g.*, United States v. Hodge, 85 F. App'x 278, 281 (3d Cir. 2003); United States v. Morin, 437 F.3d 777, 780 (8th Cir. 2006).

32. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 439, 459 (1986) (finding no violation of the right to counsel where jailhouse informant, instructed to "keep his ears open," later testified as to incriminating remarks an inmate made to him); *see also* Bey v. Morton, 124 F.3d 524, 526, 532 (3d Cir. 1997) (reaching similar conclusion with respect to incriminating statements made to a corrections officer).

33. Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 690 (1991); *see also* Hoffa v. United States, 385 U.S. 293, 303 (1966) (finding no Fourth Amendment violation where, without a warrant, law enforcement worked with an informant who pretended to be defendant's friend to elicit incriminating information). To be sure, marital communications may be privileged if made in private. *See* United States v. Rakes, 136 F.3d 1, 3 (1st Cir. 1998) ("[The marital communications privilege] permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage."). But as courts have made clear, no such privilege attaches to communications between other family relations, such as a parent and child. *See, e.g.*, In re Grand Jury, 103 F.3d 1140, 1142–43 (3d Cir. 1997) (holding that a father could be compelled to testify to statements his son made to him and that a sixteen-year minor daughter could be compelled to testify about statements her father made to her).

34. United States v. Zolin, 491 U.S. 554, 562 (1989) (describing the purpose of the attorney–client privilege as ensuring clients are free to "'make full disclosure to their attorneys' of past wrongdoings" (quoting Fisher v. United States, 525 U.S. 391, 403 (1976)).

35. The attorney–client privilege does not protect all confidences. If communications are "'made for the purpose of getting advice for the commission of a fraud' or crime," the communication will "'cease to operate.'" *Zolin*, 491 at 563 (first quoting O'Rourke v. Darbishire [1920] AC 581(PC) 601; then quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 573 (John T. McNaughton ed., 1961)).

36. For example, lawyers have a duty of candor to the court that can override their duty of loyalty to the client. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2020); *see also* L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1724–26 (2007).

37. Although an attorney is charged with zealously representing her client, that zealous representation may conflict with the attorney's ethical obligations, including obligation to the court. For example, Rule 3.3 of the Model Rules of Professional Conduct prohibits a lawyer from *knowingly* permitting a client to testify falsely or to "offer evidence that the lawyer *knows* to be false." *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2020) (emphasis added). From the point of view of the defense lawyer, the less she knows, the less her hands are tied, and the better she may be able to secure a better outcome for her client.

"legally" relevant—a point I return to in Section C below—and redirects the conversation any time he mentions something that, to her mind, will not matter to legal innocence.[38]

Moreover, the defendant will soon learn that, going forward, he is not expected to speak in court at all. The defendant will be permitted to answer "not guilty" at arraignment on the indictment or information,[39] but otherwise his attorney will speak for him. The detained defendant will be shuffled into each pretrial conference by the marshals, but it will be the defense lawyer who will say "present" so the record reflects the defendant was in fact in court.[40] It will be the lawyer who addresses the court in nearly all circumstances.[41] For the defendant released on his own recognizance or on bail, things will not be much better. He might arrive to court on his own, but still, it will be his lawyer who does the talking.[42]

B. PLEA SILENCING

Very few criminal cases go to trial these days.[43] One reason for this is the Court has given prosecutors virtually unlimited bargaining power when it comes to negotiating pleas;[44] prosecutors can almost always threaten a hefty trial penalty, e.g., additional charges or a much higher sentence if the defendant refuses to play ball and take a plea.[45] As such, it makes sense to turn next to pleas since, in theory at least, it is at the plea allocution that most defendants will have their first opportunity to speak. And yet from the point of view of most defendants, this

38. "Defense counsel focus on what is useful to the conduct of their representation that relates to innocence—its proof." Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 3 (2010).

39. In fact, even these words are rote, scripted, a pro forma requirement, though to the outsider it might appear as if the words were a protestation of innocence. They are simply a requirement of the arraignment process. *See* FED. R. CRIM. P. 10(a)(3).

40. *See* FED. R. CRIM. P. 43(a) (requiring defendant's appearance at "the initial appearance, the initial arraignment, and the plea," at "every trial stage," and at "sentencing"). Of course, at least in the federal system, if the released defendant does not appear at the pretrial conference, the court may issue a bench warrant for his arrest. *See, e.g.*, 18 U.S.C. § 3148(b) ("A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release . . . .").

41. *See* Natapoff, *supra* note 2, at 1458.

42. Indeed, from the point of view of the defendant, he might wonder why his presence is even necessary, since he is just expected to be a silent body during each pretrial conference.

43. *See* Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html.

44. *See* Brady v. United States, 397 U.S. 742, 748–50 (1970) (holding that trial penalties do not violate due process, as long as any resulting plea is knowing, intelligent, and voluntary).

45. This puts it mildly. It would be more accurate to say, as Norman Reimer does, that the threat of additional punishment allows prosecutors "to bludgeon the accused into surrendering the right to a trial for fear of geometrically increased sentences if convicted after trial." Norman L. Reimer, *Overcriminalization and the Trial Penalty: Gaining Traction One Case—and One Justice—at a Time*, 39 CHAMPION 9, 9 (2015). Mary Price is equally blunt, calling the trial penalty "one of the most lethal tools in the prosecutor's kit. With it, the government coerces defendants to plead guilty and punishes those who don't. . . . It is the criminal justice equivalent of a shakedown . . . ." Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT'G REP. 309, 309 (2019). For more on the trial penalty, see generally John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

opportunity is likely to prove illusory. In reality, plea colloquies, as they are called, are hardly colloquies at all.[46] In fact, it is the judge who does almost all of the talking. The judge will advise the defendant of his right to plead not guilty, of his right to a jury trial, of his right to counsel, of his right to be protected from self-incrimination should he go to trial—silence, again—and a whole litany of other rights that the defendant will be waiving by entering a plea of guilty.[47] The judge will ask the defendant if he understands each right, and the defendant, if well-prepared by his lawyer, will answer with the obligatory "yes."[48] All of this will seem perfunctory, with everyone just going through the checklist to make sure all the rights are covered.[49] Or as Dan Richman has put it, "the churn of business in busy courtrooms" turns plea colloquies "into generic scripts."[50] Only near the end of the colloquy will the judge, to satisfy Rule 11's requirement that there be a factual basis for the plea,[51] finally say to the defendant something along the lines of, "Tell me, in your own words, what you did to make you guilty." But even here a type of silence reigns. The defendant, if well-prepared by his attorney, has likely been instructed to say something brief, a sentence or two, admitting what he did to make him guilty but not waste the judge's time with why.[52] Never mind that the defendant has things he'd like to get off his chest. To move things along, the defense lawyer might tell the defendant, "You can say the rest at sentencing." Except, as we'll see later on in Section D, even this is not really true.

Again, few criminal defendants go to trial. The prosecutor's ability to threaten a trial penalty—*five years if you plead, life if you go to trial*[53]—discourages them. There is a reason Albert Alschuler compares the threat of a trial penalty to having a gun to your head.[54] But a few defendants roll the dice and do go to trial. As such, before turning to sentencing, it makes sense to examine the silencing that

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46. Capers, *supra* note 5, at 94.

47. *See* FED. R. CRIM. P. 11(b).

48. Capers, *supra* note 5, at 94; *see also* Natapoff, *supra* note 2, at 1463 (observing that the plea colloquy "consists of highly scripted questions and the defendant's monosyllabic 'yes' or 'no' answers")

49. In fact, in my office we used a checklist to make sure the judge did not miss a right. Many defense lawyers did the same. An example of a checklist can be found here: FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 63–73 (6th ed. 2013).

50. Daniel C. Richman, Accounting for Prosecutors 9 (Oct. 7, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757811; *see* Kimberley Brownlee, *The Offender's Part in the Dialogue*, *in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 54, 55 (Rowan Cruft et al. eds., 2011).

51. FED. R. CRIM. P. 11(b)(3).

52. Russell Gold makes a similar observation. *See* Russell M. Gold, *Look What You Made Me Do*, 82 WASH. & LEE L. REV. 1377, 1386 (2025) (manuscript at 6) ("Plea colloquies construct a rote, simplified, theatrical version of the crime in which we hear about only the defendant's wrongdoing. . . . The script has a defendant affirming in open court that they are pleading guilty 'because [they] actually are guilty of the crime.'" (quoting *Questions for Taking Guilty Plea*, *in* BENCHBOOK, E.D. MICH. 1, 2, https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf)).

53. In fact, this was the offer and trial penalty the Court gave its blessing to in *Bordenkircher*. *See* Bordenkircher v. Hayes, 434 U.S. 357, 358–59, 365 (1978).

54. Albert W Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 55 (1975).

happens for the few defendants who choose the second option and elect to go to trial.

C. TRIAL SILENCING

For the small percentage of defendants who do take their cases to trial, they might initially think trial is where they will finally have their opportunity to speak. To testify in their own defense. But even at trial—especially at trial—a type of silence is expected.

For starters, unless the defendant has the wherewithal to represent himself,[55] it will again be the defense lawyer who speaks at trial, starting with jury selection. She might ask the defendant to stand so she can introduce him to the jury, but even here he will be discouraged from saying anything. From the get-go, to the jury, the defendant will simply be a body. And even as a body, the defendant will likely feel silenced, since the lawyer is almost certain to advise the client not only to keep quiet but to remain expressionless as well.[56] Otherwise, the jury might misinterpret his body movement or even facial expression as signs of guilt.[57] So she will be the one who speaks during jury selection. She will be the one who will speak during opening statements. She will be the one who will cross-examine witnesses. She will be the one who makes closing arguments. And assuming the

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55. For the defendant who wants to represent himself—who wants to speak for himself—the Court's decision in *Faretta v. California,* 422 U.S. 806 (1975), functions as another pressure to remain silent. While the defendant in theory has "the right to self-representation—to make one's own defense personally," *id.* at 819, the Court has erected several hurdles. First, the Court requires the defendant to waive his right to have counsel speak for him. The defendant thus must actively opt out of representation. *Id.* at 835. Second, the defendant must answer a litany of questions before his waiver will be accepted as knowingly and intelligently made. *Id.* ("Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942))). Here are some typical questions taken from the *Faretta* inquiry used by Florida courts.

1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Are you familiar with the exact legal elements of each charge?
4. Do you realize that if you represent yourself, you are on your own?
5. Are you familiar with the Rules of Evidence?
6. Do you know the definition of hearsay?
7. Do you know the exceptions to the hearsay rule?
8. Do you know the best evidence rule?

FLORIDA'S 10TH JUDICIAL CIRCUIT, FARETTA INQUIRY, https://www.jud10.flcourts.org/sites/default/files/docs/FarettaInquiry.pdf. Again, the message is clear. Learned counsel represent defendants. Learned counsel speak in court. Defendants do not.

56. *See* Steve Pokin, *Pokin Around: Defense Lawyers Say It's OK for Clients to Look at Jurors—Just Don't Stare*, SPRINGFIELD NEWS-LEADER (Mar. 3, 2018, at 21:54 CT), https://www.news-leader.com/story/news/local/ozarks/2018/03/04/defense-lawyers-criminal-trials-jurors/388276002 [https://perma.cc/U34P-SXU6].

57. *See* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 582–83 (2008); *see also* Capers, *supra* note 19, at 882–85; *see also* Kiel Brennan-Marquez & Julia Simon-Kerr, *Judging Demeanor*, 109 MINN. L. REV. 1503, 1505–08 (2025) (critiquing the practice of permitting jurors to consider a non-testifying defendant's demeanor).

defendant heeds the advice from his lawyer to remain silent—the lawyer is the supposed expert, after all—the defendant will sit silent, and the jury will never once hear the defendant's voice. In fact, the defendant who assumed the trial would be about him, that the spotlight would be on him, might even sense that he's not in the spotlight at all. It is as if the light has a dimmer, and the light the defendant thought would be on him is fading to nothing, leaving him in the shadow.

The defendant who, over his lawyer's advice, tries to persist in telling his side of the story will likely soon realize there are a host of reasons for his lawyer's advice. She will likely tell him there are evidentiary rules that make his testifying costly. For starters, there is Evidence Rule 609. The rule explicitly permits a testifying defendant to be impeached with evidence that would otherwise be inadmissible,[58] namely evidence of any prior felony convictions the defendant may have, and potentially misdemeanor convictions as well.[59] This is no small matter given that about 60% of felony defendants today have a criminal record.[60] Anna Roberts puts it this way:

> Like Odysseus, defendants must attempt to sail between Scylla and Charybdis, choosing whether to waive their right to testify, and thus either plead guilty or remain mute at trial, or to take the witness stand and risk the demolition of their testimony through the use of their criminal records. Odysseus made it to his destination: it just took a while. But for many defendants the result is disastrous: all too often, the result of impeachment—actual or threatened—is virtually automatic conviction.[61]

And it is not just Rule 609 that functions this way. Even if the defendant does not have a criminal record, Rule 608(b) will permit the prosecutor to impeach the testifying defendant with anything in his past that suggests untruthfulness, no matter how unrelated to the case at hand.[62] For example, in a trial against a Tyco executive for financial improprieties, the prosecutor was allowed, under Rule 608(b), to cross-examine the defendant with evidence that he once lied about where he lived.[63] Similarly, if the defendant attempts to testify about his good character, Rules 404[64] and 405[65] and the Court's decision in *Michelson v. United States*[66] will suddenly permit the prosecution to not just introduce rebuttal evidence,

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58. *See* FED. R. EVID. 404(a)(3).

59. FED. R. EVID. 609. Some version of this rule appears in nearly every state. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1987 (2016).

60. Bellin, *supra* note 18, at 398 n.11 (citing BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DOJ, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 8 (2013)).

61. Roberts, *supra* note 59, at 1978–79 (footnotes omitted).

62. FED. R. EVID. 608(b).

63. Jonathan D. Glater, *Character to Be Major Issue in Tyco Trial*, N.Y. TIMES (May 6, 2004), https://www.nytimes.com/2004/05/06/business/character-to-be-major-issue-in-tyco-trial.html.

64. *See* FED. R. EVID. 404(a)(2)(A).

65. *See* FED. R. EVID. 405.

66. 335 U.S. 469, 485 (1948).

but also to cross-examine the defendant about any instances in the defendant's past to undermine his character, again including conduct that otherwise would be inadmissible.[67]

From the point of view of the defendant, the purpose of these evidentiary rules will likely seem clear: to discourage him from testifying. But for the defendant who still wants to explain, or who has no impeachment baggage, there is a triad of rules that is likely to present a bigger hurdle. Rules 401, 402, and 403 essentially provide that only relevant evidence is admissible[68] and that even relevant evidence can be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury."[69] What this triad of rules does in practice is permit judges to forbid any defendant's testimony that does not directly go to guilt or innocence. In other words, a defendant who wants to explain *why* he committed the crime,[70] or offer a defense other than a recognized affirmative defense,[71] will likely find himself stymied and silenced.[72] Imagine a defendant who stole baby formula because he was poor, his newborn was hungry, and there were no jobs available. Should he try to testify, his admission that he stole baby formula would be admissible because it "is of consequence in determining" guilt or innocence.[73] But if he wanted to explain why and testify about the paucity of jobs or how his newborn was hungry? The judge would likely preclude this testimony under Rules 401, 402, and 403.[74] The

67. *See* FED. R. EVID. 405(a).

68. *See* FED. R. EVID. 401–03.

69. FED. R. EVID. 403.

70. *See* Gold, *supra* note 52, at 7.

71. There are a limited number of recognized affirmative defenses in criminal law, and if a defendant fails to meet his burden of production regarding a recognized affirmative defense—say, because a defendant acted out of financial hardship and not a physical threat required in most jurisdictions to claim duress—the judge can bar all evidence of that defense. For more on the interplay between the burden of production, affirmative defenses, and relevance, see Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 329 (1980).

72. *See* GLANVILLE L. WILLIAMS, THE MENTAL ELEMENT IN CRIME 14 (1965) (noting that a defendant's motive for committing a crime "is legally irrelevant, except perhaps in relation to sentence."); *see also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 153 (1947) ("[H]ardly any rule of penal law is more definitely settled than that motive is irrelevant.").

73. FED. R. EVID. 401.

74. *See* Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 495 (2013) ("It is widely assumed and accepted in our American criminal justice system that poverty is not a defense to crime."); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 9 (1985) ("No jurisdiction in the United States or elsewhere recognizes a criminal defense based on socioeconomic deprivation *simpliciter*."); Andrew E. Taslitz, *The Rule of Criminal Law: Why Courts and Legislatures Ignore Richard Delgado's Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 79, 80 (2011) (stating that discussions of a "rotten social background" defense have not impacted statutory or case law). In a well-known dissent, Judge Bazelon famously pushed back against the common understanding that a defendant's social background should always be irrelevant. Indeed, he suggested that permitting defendants to introduce evidence of what drove them to commit a crime could be "indispensable first steps toward solving the problem of violent crime." United States v. Alexander, 471 F.2d 923, 926, 965 (D.C. Cir. 1977) (Bazelon, C.J., dissenting).

defendant's explanation may be relevant to sentencing,[75] but it is not relevant to a trial about guilt. By way of illustration, consider a case likely familiar to most law students, *State v. Norman*.[76] There was evidence from multiple witnesses that Judy Norman, charged with shooting her husband while he was sleeping, had been abused by him for years.[77] "His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her."[78] He forced her into sex work and repeatedly threatened to maim her and kill her.[79] But the North Carolina Supreme Court ruled that, because she was not facing the imminent use of deadly force when she shot him, she was not entitled to a self-defense instruction.[80] What this also meant was that her evidence of years of abuse—initially offered to show why she honestly and reasonably feared for her life and believed she needed to use defensive force—was no longer relevant.[81] It might be relevant at sentencing but not at trial. She could not testify to it. And the jury would never learn about it. Earlier, I suggested that when we silence defendants, it does not just deprive us of our ability to hear them. It also deprives us of our ability to see them. To see them as having a story of their own, something that provides context and explains why and how come. The Judy Norman case illustrates this.

Finally, if these evidentiary rules have not discouraged the defendant enough, the testifying defendant will likely find himself "silenced by instruction," to borrow a term from Vida Johnson.[82] Put simply, since the Court's decision in *Reagan v. United States*,[83] it has become routine for many jurisdictions to warn the jury that, in evaluating the defendant's testimony, they should give his testimony *special* scrutiny *because* he has an interest in the outcome of the case.[84] In other words, simply to speak—regardless of what he says—invites a strike against him.

So most defendants will remain silent. And jurors, not knowing any better, will assume it was his choice.

D. SENTENCING AND SILENCING

Jeff Bellin has observed that the "modern American criminal justice system . . . unabashedly encourages defendants to . . . remain silent."[85] He is right. And it continues through to sentencing.

75. *See* 18 U.S.C. § 3553(a) (requiring courts consider "the nature and circumstances of the offense" in imposing sentence).

76. 378 S.E.2d 8 (N.C. 1989).

77. *Id.* at 11.

78. *Id.* at 10.

79. *Id.*

80. *Id.* at 12.

81. *See* Julia Simon-Kerr, *Relevance Through a Feminist Lens*, *in* PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 364, 367 (Christian Dahlman et al. eds., 2021) (emphasizing that relevance is not inherent and depends on what the substantive law deems material: "In other words, evidence may be 'irrelevant'. . . 'because that proposition is not provable in the case'" (quoting George F. James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941)).

82. Johnson, *supra* note 6, at 338.

83. 157 U.S. 301, 304 (1895).

84. Johnson, *supra* note 6, at 317 (citing *Reagan*, 157 U.S. at 304–05).

85. Bellin, *supra* note 6, at 851.

A defendant might think sentencing would provide him with an opportunity to have his say, that it would be his time to be in the spotlight instead of being left in the shadows. After all, in theory, sentencing is the "one place in the criminal process where every convicted defendant has the chance to speak."[86] But even here, the defendant is likely to find his opportunity to speak fictive.[87] The defendant will soon learn that the invitation to speak does not mean his "right to address the sentencing court is unlimited. The exercise of his right may be limited both as to duration and as to content. He need be given no more than a reasonable time; he need not be heard on irrelevancies or repetitions."[88] Beyond this, the defendant will soon realize that when the judge invites him to speak, the judge is essentially holding a stick in one hand and a carrot in the other. The stick is that *after* the defendant speaks, the judge will decide the sentence.[89] The carrot is that *after* the defendant speaks, the judge has the authority to impose a lesser sentence based upon whether the defendant has shown "acceptance of responsibility." In the federal system for example, the United States Sentencing Guidelines allow a judge to reduce a defendant's offense level, for sentencing purposes, by two points "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense."[90] Moreover, in determining whether to award a two-point reduction for acceptance of responsibility, the Guidelines provide that the district court may consider several benchmarks, including whether the defendant "truthfully admit[ed] the conduct comprising the offense(s) of conviction."[91] So the defendant has the right to speak, but if he hopes to receive a lower sentence, the system requires him to first "truthfully admit[]" and "not falsely deny[]" his relevant conduct.[92] He is certainly discouraged from offering an explanation, which might seem like making excuses.[93] A survey of federal judges confirms this. The survey makes clear that many judges *most* want to hear expressions of remorse and contrition.[94] Which

86. Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2643 (2007).

87. *See* Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who Is a Victim?*, 87 BROOK. L. REV. 1299, 1309 (2022) (observing that a defendant's right to speak at sentencing is essentially "a scripted routine with the institutional expectation that it will be limited to expressions of remorse and pleas for leniency").

88. Ashe v. North Carolina, 586 F.2d 334, 336–37 (4th Cir. 1978); *see also* United States v. Li, 115 F.3d 125, 133 (2d Cir. 1997) ("[A] defendant's right to allocution is not unlimited in terms of either time or content."); United States v. Muniz, 1 F.3d 1018, 1025 (10th Cir. 1993) ("[T]he judge does not have to let the defendant re-argue the case at sentencing."); United States v. Kellogg, 955 F.2d 1244, 1250 (9th Cir. 1992) ("Although the defendant has a right of allocution at sentencing, that right is not unlimited.").

89. FED. R. CRIM. P. 32(i)(4)(A) ("Before imposing sentence, the court must . . . permit the defendant to speak . . . .").

90. U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) (U.S. SENT'G COMM'N 2024).

91. *Id.* at § 3E1.1 cmt. 1(A).

92. *Id.* at § 3E1.1 cmt. 3.

93. *See* Zeidman, *supra* note 87, at 1310 (stating that "[g]oing beyond the confines of . . . contrition, remorse, accepting responsibility" is risky because "[j]udges do not want to hear anything that to them sounds like an excuse"); *see also* Gold, *supra* note 52, at 6; M. CATHERINE GRUBER, "I'M SORRY FOR WHAT I'VE DONE": THE LANGUAGE OF COURTROOM APOLOGIES 92 (2014).

94. Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 ALA. L. REV. 735, 752 (2014). Judge Frankel's observations about the

means even the defendant who wants to explain he stole baby formula to feed his newborn might again find himself silenced.

Lastly, for the defendant who resisted the pressure to remain silent at trial and instead testified in his own defense, he is likely to find that speaking now is useless. The mere fact that he testified at trial and was found guilty is enough reason for the judge to conclude the defendant lacks remorse and deserves a harsher sentence.[95] Any claim of acceptance of responsibility now, after the jury has found him guilty, would simply ring false. Again, rules, decisions, and norms contribute to silence.

E. MORE SILENCE

For the defendant who is convicted and appeals, holding out hope an appellate court will hear him, this defendant is again likely to find himself silenced. Whereas before, the defendant at least had a constitutional right to be physically present in the courtroom,[96] now the defendant's presence is no longer needed, or even an option, for any appeal. As the Supreme Court noted in *Price v. Johnston*, "a prisoner has no absolute right . . . even to be present at the proceedings in an appellate court."[97]

For the defendant who has exhausted his appeals, served his time, and is hoping to speak at his parole hearing, he will likely find his speech again silenced, limited to expressions of remorse and contrition. If he wants to be granted parole, he must accept responsibility.[98]

In the end, the defendant is likely to realize that, since the day he was told "anything you say can and will be used against you," he has been silenced again and again. He has not gotten a word in. He may have had his day in court, but he may as well have been a spectator. Even with an attorney representing him, purportedly speaking for him, something was lost.[99] His presence hardly mattered, other than to allow the prosecutor to project her image of the "other" onto him. Indeed, if his sentencing hearing included algorithmic risk assessment tools—increasingly likely as AI enters courtrooms to help judges determine recidivism

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sentencing habits of a fellow judge speak volumes. That judge, after listening to a defendant complain about the system, boasted about giving "the son of a bitch five years instead of the four." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 18 (1972).

95. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(a) cmt. 2 (U.S. SENT'G COMM'N 2024).

96. *See* Snyder v. Massachusetts, 291 U.S. 97, 105–06 (1934); *see also* FED. R. CRIM. P. 43(a).

97. 334 U.S. 266, 285 (1948). Although *Price v. Johnson* involved a prisoner, the Court later extended its holding to defendants in general, ruling that defendants do not have the right to represent themselves on appeal. *See* Martinez v. Court of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 163 (2000).

98. Zeidman, *supra* note 87, at 1313–14 (noting that "[i]t is generally understood that it is a grave error for a parole applicant to talk about regret and lost opportunities as opposed to the impact of the crime on the victim"); *see also* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

99. As the legal philosopher David Luban has put it, dignity requires recognizing that a person has their "own story to tell" and affording them the opportunity to tell it. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 837 (2005).

risks in imposing sentences[100]—his silencing was likely even more complete. One consequence of the use of algorithms is that justice itself becomes algorithmic and data-driven. Anything the defendant might say at sentencing or at the parole determination—already essentially scripted[101]—will now matter even less.[102] For the defendant, it is as if the whole time his presence hardly mattered, or mattered only so that he could be reduced to a shadowy figure, someone barely visible, just a body, a subaltern, someone the prosecutor could project criminality and "otherness" onto. And though the defendant might not have heard of Critical Legal Studies' critique of rights—the idea that securing "rights" and legal victories alone are unlikely to result in real change[103]—he might intuit from his own experience and expertise[104] the same thing: that so called rights that were supposed to benefit him or promote fairness—the *Miranda* right to silence, the privilege against self-incrimination, the right to assistance of counsel, the Rules of Evidence—hardly benefited him at all. They merely gave the veneer of fairness and justice.

F. AND SILENCING FROM THE BEGINNING

But this is the clincher. The defendant is also likely to sense that the silencing he's experienced since his arrest is, in many ways, an extension of the silencing he has experienced his whole life, especially if he is poor, especially if he is Black or Brown. It is not only the "Know Your Rights" warnings he's heard most of his life, or "the talk" he's heard from his parents—the same talk Justice Sotomayor mentions in *Utah v. Strieff*.[105] It's that if he's poor, and especially if he's Black or Brown, his public school education likely began and ended each

100. *See* Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1716 (2019) (book review); CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK vii (2021); *cf.* Martha Rayner, *Commentary: This Algorithm Is Used to Deny Inmates Parole. We're Not Allowed to Know Anything About It.*, TIMES UNION (May 5, 2023), https://www.timesunion.com/opinion/article/commentary-proprietary-algorithm-deny-inmate-18001304.php.

101. Zeidman, *supra* note 87, at 1313–15.

102. Indeed, as Professor Ngozi Okidegbe persuasively argues, these sentencing tools are also problematic for excluding the voices of the community. *See generally* Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688 (2023); Ngozi Okidegbe, *Discredited Data,* 107 CORN. L. REV. 2007 (2022).

103. *See generally* Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). For more on the critique of rights, including its history, see generally Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); Valeria M. Pelet del Toro, Note, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America's Colony*, 128 YALE L.J. 792 (2019).

104. For an argument about the neglected expertise of those most impacted by the criminal system, see Bennett Capers, *Race, Gatekeeping, Magical Words, and the Rules of Evidence*, 76 VAND. L. REV. 1855, 1869–72 (2023). *See also* Terrell Carter & Rachel López, *If Lived Experience Could Speak: A Method for Repairing Epistemic Violence in Law and the Legal Academy*, 109 MINN. L. REV. 1, 2 (2024) (arguing that those "marginalized by the law [are] uniquely position[ed] . . . to critique it").

105. 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting). She stated, "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *Id.*

day with students passing through metal detectors,[106] with the line between school resource officers and the police being a fine one,[107] with the school itself seeming to function as a pipeline to prison.[108] And a predominant lesson he likely learned in each class was to be silent.[109] *To shut it, and keep it shut*. Put differently, the schooling likely functioned as a place that primed him to be silent, to not assert himself. He may even look ahead and sense that even when he completes his sentence and re-enters society, there will just be more silencing, especially if he becomes one of the estimated 4.4 million Americans ineligible to vote because of a felony conviction.[110] After all, not being able to vote and have a say—on who sits on the school board, on who the mayor or president will be, on what kind of country we'll live in[111]—all of this is a type of silencing.[112]

In her recent *Harvard Law Review* Foreword, Karen Tani recalls the work of Robert Cover and reminds the reader that law is often about narrative.[113] "Legal decisions provide opportunities to tell particular stories—about what happened and why; about what is changeable and what is fixed; about who 'we' are as a people and who is not our concern."[114] She is talking about judicial opinions, but of course narratives and counter-narratives begin earlier and are a hallmark of complaints and indictments, of opening statements and closing arguments, of the witness testimony in between. How believable—beyond a reasonable doubt—is the prosecution's story? Even though the burden of proof never switches to the defense, does the defense's story raise doubt? We could even say the adversarial

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106. *See* Katayoon Majd, *Students of the Mass Incarceration Nation*, 54 HOW. L.J. 343, 368 (2011). *See generally* Jason P. Nance, *Schools, Security, and Race*, 63 EMORY L.J. 1 (2013) (describing the use of strict security measures in predominantly low-income and minority schools).

107. *See* Majd, *supra* note 106, at 366–67.

108. *See generally* CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010).

109. *See* Michelle Fine, *Silencing in Public Schools*, 64 LANGUAGE ARTS 157, 157 (1987) ("[T]he press for silencing pervades low-income urban schools.").

110. *See* CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ROBERT STEWART, THE SENT'G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2022).

111. As one author put it:

> The disenfranchisement of voters impacts the outcomes of elections and, in turn, impacts the policies that govern our lives. When large sects of the population are marginalized, can elected representatives justly reflect the will of the people? The implications of voter disenfranchisement reach far and wide, it creates a distrust of governmental institutions and denotes the theme of the United States standing as a symbol of democracy on the global stage.

Lundyn Huhn, *Voter Disenfranchisement: The Silent Blight*, COMMON CAUSE: ALL. FOR EMERGING POWER (July 18, 2024), https://www.commoncause.org/emerging-power/articles/voter-disenfranchisement-the-silent-blight [https://perma.cc/26N9-PGBB].

112. *Cf.* David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 411 (2006) (arguing that many states deprive felons of their voting rights, disproportionately affecting racial minorities).

113. *See* Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 44 (2024) (citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983)).

114. *Id.* at 8.

process is really a battle of stories.[115] And yet if we were being honest, we'd acknowledge that even when the defense attorney speaks for the defendant and offers the defendant's version of events, the battle hardly seems fair; it is as if the defense must fight with one hand tied behind her back. That even in the few cases where defendants speak, evidentiary rules block out too much, leaving not just a truncated narrative but a narrative that seems to have little to do with the truth of what happened. That the record seems incomplete. If we were being honest, this system in which defendants are lulled, coerced, and even compelled to remain silent—or to cabin their speech if they do speak—would seem flawed. Unless the flaw is a feature. A way of telling us who "we" are as a people and who is not our concern.

But things didn't used to be this way. Originally, defendants spoke all the time. Their own narratives mattered. The next Part explores this neglected history.

II. Looking Back

To some readers content with the status quo, the suggestion that we listen to defendants may seem absurd. These readers may think convicted felons have forfeited their right to say anything. Or that they can simply "speak" through their attorneys. Moreover, defendants sitting silently is what we are accustomed to. Defendants sit silent, their lawyers speak for them.

The first goal of this part is to show that things were not always this way. We are accustomed to defendants sitting silently because we *became* accustomed to it. Section A below thus traces this change from defendants speaking, to their attorneys speaking for them. It begins by limning out the history of defense counsel in England through the eighteenth century before turning to America and the rise of counsel here.

The second goal of this Part is to show that, as with almost everything in the law, race matters. In brief, the change from the norm of defendants speaking, to lawyers speaking for them, is only fully intelligible when one sees race. Accordingly, Section B below explores the racial history of defense counsel supplanting the voices of defendants.

A. LOOKING BACK

Today, public defenders and other defense counsel are "so ubiquitous in American courtrooms" that they "form part of the American way of life in the literal sense."[116] In a way, this is unsurprising. *Gideon v. Wainright*—in which the Supreme Court held that the Sixth Amendment's right to counsel obligates the government to provide an attorney to indigent felony defendants—was decided

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115. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 293 (2013); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 CARDOZO L. REV. 519, 520 (1991).

116. SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 2 (2020).

more than half a century ago,[117] long enough to become settled and so taken for granted that it seems part of our culture.

But from a different vantage point, it is *Gideon* that marks a radical departure. The Sixth Amendment was ratified in 1791.[118] Nearly two centuries passed before the Court read the Amendment as requiring states to provide counsel to defendants in criminal cases. Put differently, from the point of view of our forebears, that the state would appoint lawyers to represent defendants, and that those appointed lawyers would then speak in their stead, is what would seem strange. As explored below, it was certainly not part of the common law system we inherited from England.

1. In England

As the historian William Beaney makes clear in his book on the history of the right to counsel, defendants in felony cases in English courts "had no legal right to appear with counsel."[119] Indeed, until the eighteenth century, criminal defense in England was essentially a "do-it-yourself activity,"[120] where defendants made their own statements, cross-examined witnesses, and in effect defended themselves.[121] The 1603 trial of Sir Walter Raleigh—a staple of Evidence casebooks[122]—was typical in this regard. Recall that it is Sir Walter Raleigh himself who demands that his accuser "be sent for" so that he can "maintain his accusation to my face."[123] It is Sir Walter Raleigh himself who protests the prosecutor's use of hearsay to convict him.[124]

As a response to the rise of public prosecutors,[125] defense counsel *did* begin to appear in small numbers in England in the 1730s, but their role was limited. Defense counsel could speak when "some Point of Law [arose], proper to be debated,"[126] but they were barred "from making opening and closing statements, and thus from replying directly to the charges and the evidence against the

117. 372 U.S. 335, 335 (1963).

118. *The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript [https://perma.cc/8HVX-PSXE] (last visited Mar. 10, 2026).

119. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 9 (1955); MAYEUX, *supra* note 116, at 75 ("Traditionally, English courts forbade defense counsel from appearing in felony trials . . . .").

120. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11, 26 (2003); *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 124 (finding that in the 171 Old Bailey cases studied, lawyers appeared in only 12).

121. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 283 (1978).

122. *See, e.g.*, GEORGE FISHER, EVIDENCE 374–76 (3d ed. 2013).

123. Raleigh's Case, 2 How. St. Tr. 1, 15–16, 24 (1603).

124. *Id*. Interestingly, it was in response to the perception that innocent men were being convicted of treason that the British Parliament enacted the Treason Trials Act of 1696, permitting defendants accused of treason to have counsel. This rule did not extend to other felony cases, however. *See* LANGBEIN, *supra* note 120, at 39; Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 84 n.31 (1995); BEANEY, *supra* note 119, at 9.

125. For more on the history of public prosecutors, see Capers, *supra* note 10, at 1573–81.

126. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 345 (2d ed. 1872). Roger North made a similar observation: Criminal defendants "should not have any Assistance in Matters of Fact, but defend upon plain Truth, which they know best, without any Dilatories, Arts, or Evasions." ROGER NORTH, THE LIFE OF THE RIGHT HONOURABLE FRANCIS NORTH, BARON OF GUILFORD, LORD KEEPER OF THE GREAT SEAL, UNDER KING CHARLES II. AND KING JAMES II. 146 (1742).

accused."[127] It was still the defendant himself who contested facts, cross-examined witnesses, and told his version of events.[128] It was the defendant himself, legal historian John Langbein notes, who ran "bicker with the accusers."[129] In response to the victim's accusations ("thou robbest me in such a place, thou beatest me, thou tookest my horse from me, and my purse, thou hadst then such a coat and such a man in thy company") the defendant himself would respond, such that the victim-prosecutor and defendant "stand a while in altercation."[130] Defendants speaking was the norm.[131] In fact, the legal historian J.M. Beattie estimates that, until the mid-eighteenth century, no more than ten percent of criminal defendants had attorneys.[132]

This is not to suggest this was a perfect system or one we should seek to replicate now. But there were advantages. Defendants spoke. And not only to contest guilt. They also spoke to contextualize the alleged offense and seek leniency. In other words, one advantage of this "do-it-yourself"[133] system was that a defendant, to quote Langbein, could present "the circumstances of the crime that would encourage a verdict of mitigation."[134] More importantly, because this system predated the bifurcation of guilt from punishment—another thing we now take for granted—the jury was able to exercise "an important role in what was functionally the choice of sanction."[135] The jury, in other words, typically got to hear both sides. In a very real sense, this contributed to fairness.

2. In America

During the colonial period, most trials here were very much like trials in England: a "'lawyer-free' contest between citizen accusers and citizen accused."[136]

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127. LANGBEIN, *supra* note 120, at 5, 171.

128. Langbein, *supra* note 121, at 283 ("The accused spoke in his own defense. . . . [W]e see him cross-examining prosecution witnesses and producing and questioning witnesses of his own. He was, therefore, performing functions that would later be assumed by counsel.").

129. LANGBEIN, *supra* note 120, at 253; *see also* Levinson, *supra* note 57, at 589.

130. LANGBEIN, *supra* note 120, at 13 (quoting SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (L. Alston ed., Cambridge University Press 1906)).

131. As Langbein puts it:

> The accused's merged roles as defender and witness were inextricable. In order to resist or probe the evidence of the accusers, the accused found himself constantly speaking about his role in the events. Because the accused was forbidden to testify on oath (a disqualification that was not removed in England until 1898), he was not conceived to be a witness. Although he spoke unsworn, he performed what was in function a testimonial role, by speaking to his knowledge of events.

Id. at 13–14 (footnote omitted).

132. J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 227 (1991).

133. LANGBEIN, *supra* note 120, at 11.

134. *Id.* at 59. To be sure, the defendant was barred from actually testifying under oath. *See* Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L.Q. 454, 464 (1962). But in a way, this was a matter of little consequence, since this simply meant the defendant addressed the court and the jury without being sworn. *Id.*

135. LANGBEIN, *supra* note 120, at 57–58.

136. Levenson, *supra* note 57, at 589; *see also* BEANEY, *supra* note 119, at 15 (concluding, at least based on colonial court records from New York and Virginia, that "the right to counsel in those states was no greater in actual practice than in England").

As Lawrence Friedman puts it, the defendant was "a courtroom player at his own trial."[137] Stephanos Bibas, now a judge on the Third Circuit Court of Appeals, adds, "In colonial America, criminal justice was the business of laymen, not lawyers. Lay constables arrested suspects, victims prosecuted their own cases, *and defendants defended themselves pro se*."[138] Indeed, Laurent Sacharoff argues that our forebears understood this as a right: "the right to be heard."[139] As he documents, Benjamin Franklin even added the right to be heard "by himself and his council" into Pennsylvania's Declaration of Rights; other states followed by codifying a right to be heard in their constitutions.[140] Massachusetts's constitution, for example, provided that a criminal defendant has a right "to be fully heard in his defence by himself, or his counsel, at his election."[141]

Again, some defendants began to retain attorneys, especially as the legal profession grew.[142] And the Sixth Amendment ensured that criminal defendants who wanted to have assistance and had the means could retain counsel; in short, the Sixth Amendment rejected the English rule *prohibiting* legal assistance.[143] But what is too often glossed over or forgotten is that the shift from the right to counsel meaning the right to retain counsel if one had the wherewithal, to meaning the state was obligated to provide counsel so that everyone could be represented, was gradual, taking nearly two centuries.[144] The Court noted as much in *Portuondo*

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137. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 245 (1993).

138. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006) (emphasis added).

139. Laurent Sacharoff, *The Accused Speaks*, 94 U. CHI. L. REV. (forthcoming 2026) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6269898 (noting that at its apex, this right to be heard allowed defendants "to present facts, address prosecution facts, cross-examine witnesses, and make legal arguments").

140. *See id.* at 5–6.

141. *Id.* at 35.

142. *See* Carlton F.W. Larson, *The Origins of Adversary Criminal Trial in America*, 57 U.C. DAVIS L. REV. 1, 13 (2023). In addition, a handful of colonies—Pennsylvania, Delaware, and South Carolina—provided for the appointment of counsel in capital cases. *See* Shaun Ossei-Owusu, The Welfarist Right to Counsel 18–19 (Jan. 2022) (unpublished manuscript) (on file with author).

143. MAYEUX, *supra* note 116, at 75; Jonakait, *supra* note 124, at 109 ("The Sixth Amendment, in granting a full right to counsel in all cases, was not constitutionalizing English law. It was rejecting, or at least going beyond, the existing common law."); Powell v. Alabama, 287 U.S. 45, 61 (1932). England did not completely shift to permitting counsel in felony cases until 1836, when Parliament granted a right to retain counsel in all cases. BEANEY, *supra* note 119, at 11. This is not to suggest the history of the ratification of the Sixth Amendment is clear to begin with. The senator whose journal is the primary source of information about the Senate in the First Congress was "ill during the period the amendments were debated in the Senate," and there is a "complete lack of information on the proceedings in the Senate." FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 31, 33 (1951); *see also* BEANEY, *supra* note 119, at 23 ("The available debates on the various proposals throw no light on the significance or the interpretation which Congress attributed to the right to counsel.").

144. *United States v. Van Duzee* illustrates the Court's attitude in the late 1800s. 140 U.S. 169 (1891). There, the Court stated that there was "no general obligation on the part of the government . . . to . . . retain counsel for defendants or prisoners," and explained the purpose of the Sixth Amendment's right to counsel this way: "The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government." *Id.* at 173.

v. Agard: At the time the Bill of Rights was ratified, defendants still "typically spoke and conducted their defense personally, without counsel."[145] And for decades after, defendants representing themselves, and speaking themselves, "was the norm."[146] Moreover, when defendants did retain counsel, counsel tended to function as "an assistant rather than a master."[147] As recently as the start of the nineteenth century, it was still common for criminal trials to open with an unsworn statement by the defendant, who would then confront and question the witnesses against him.[148]

But as the Section below demonstrates, this norm of defendants speaking in court changed. And one of the things that seems to have ushered in, and accelerated, this change was race.

B. RACE-ING THE RIGHT TO BE HEARD

It seems reasonable to attribute the change to lawyers speaking for defendants to the growth of the legal profession—and indeed the growth of law schools—at the turn of the century.[149] As a result, "[L]awyers supplanted ordinary citizens in criminal justice. Public prosecutors displaced victims, and more defendants began hiring counsel."[150] Or at least this is how the standard story goes. Lawyers, adds Alexandra Natapoff, became "professional silencers."[151]

But what scholars have missed is the role race likely played. The history of defendants speaking in court, after all, was raced: Although originally defendants represented themselves and spoke for themselves in court, this was in all likelihood limited to white defendants.[152] Before the Civil War and the ratification of

145. 529 U.S. 61, 66 (2000) (citing JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776) 574 (1944); ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 79 (1930)).

146. McCoy v. Louisiana, 584 U.S. 414, 421 (2018) (citing Faretta v. California, 422 U.S. 806, 823 (1975)); *see* FRIEDMAN, *supra* note 137, at 245 ("Most defendants were arrested, tried, and sentenced (or acquitted) without a lawyer."); BEANEY, *supra* note 119, at 22 ("As late as 1800 it seems probable that only in New Jersey, by statute, and in Connecticut, by practice, did the accused enjoy a full right to retain counsel, and to have counsel appointed if he were unable to afford it himself."); James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681–1837*, 40 AM. J. LEGAL HIST. 455, 457 tbl.1 (1996) (noting that between 1766 and 1771, only 27.5% of felony defendants and 15.1% of misdemeanor defendants in Frederick County, Maryland had defense counsel).

147. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1168 (2010); *see also Faretta*, 422 U.S. at 832 (noting that the Framers "conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself."). It is also noteworthy that Virginia seems to have followed the English rule in limiting the role of counsel to legal arguments. *See* BEANEY, *supra* note 119, at 22.

148. *See* Langbein, *supra* note 121, at 283.

149. Larson also attributes it to the change from private prosecutions to public prosecutors. *See* Larson, *supra* note 142, at 33–35. But even the growth of public prosecutors seems reasonably attributable to the growing number of lawyers.

150. Bibas, *supra* note 138, at 920.

151. Natapoff, *supra* note 2, at 1470.

152. Of course, ascertaining with exactness what processes were followed during the trials of Black defendants in the 18th and early 19th centuries before the Civil War and the passage of the Reconstruction Amendments is notoriously difficult. To borrow from the legal historian Lawrence

the Reconstruction Amendments, enslaved people—indeed, all people of color[153]—were essentially barred from speaking in any meaningful way at trial, since they were generally barred from testifying.[154] However, several facts are worth noting. Most importantly, since enslaved people were generally barred from speaking at trial, states generally *mandated* that enslaved people, and only enslaved people, be appointed counsel.[155] This practice of assigning counsel to speak for Blacks continued, albeit in another form, during Reconstruction. After the Civil War, at a time when white defendants were still speaking for themselves, the Freedman's Bureau made a point to assign counsel or advocates to Black defendants.[156] To be sure, this was likely done with the best of intentions—an attempt to level the playing field. Still, one cannot help but observe what this likely meant in practice: At a time when whites spoke for themselves in court, Blacks were instead spoken for by white lawyers.

There is another correlation worth noting. The shift from defendants speaking for themselves to lawyers speaking for them also coincided with depictions of newly freed Blacks as dangerous and criminal—see, e.g., *Birth of a Nation*[157]—in an apparent effort to claim victimhood status for white southerners, curry favor with

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Friedman, "[t]he further we look back in time, the dimmer the world gets, and the stranger." FRIEDMAN, *supra* note 137, at 21. Larson makes a similar point:

> The subject of defense counsel in seventeenth- and eighteenth-century America poses nearly intractable challenges to the legal historian. For the most part, legislation can be readily accessed, but court records from this period have survived in only the most haphazard manner. Even more frustratingly, the court records that do survive do not typically indicate the presence or absence of defense counsel.

Larson, *supra* note 142, at 11.

153. Significantly, competency turned not only on whether one was enslaved or free, but on race itself, as evidenced by the fact that even freed Blacks were often deemed incompetent to testify, as well as other non-whites. *See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2247–48 (2017); Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT L. REV. 1209, 1209–10 (1992).

154. *See* Capers, *supra* note 104, at 1857; *see generally* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 239–48 (1996); Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017). As George Fisher observes, these competency rules were not uniform:

> Some barred testimony by all nonwhites, some only testimony by African Americans and those of mixed black-white blood. Some barred all testimony by the specified class, while some permitted such testimony when not offered against whites.
>
> Louisiana did not have a racial exclusion law per se, but rather provided that nonwhite status could be used to impeach a witness. An act of March 13, 1867, at once eliminated this provision of Louisiana's code and made civil parties competent, with the same proviso that status as a party "may diminish the extent of [the witness's] credibility."

George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 671 n.451 (1991) (citations omitted).

155. *See* Ossei-Owusu, *supra* note 142, at 20–21 ("Most notably, Missouri and Arkansas maintained regimes specifically assigning counsel to slaves in cases where everyone else was only granted the right to retain counsel."); THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 268 (1858) ("Counsel is not only allowed, but if the master fails to afford it, by the laws of all and the Constitutions of some, the Courts are bound to appoint counsel.").

156. Ossei-Owusu, *supra* note 142, at 22–23.

157. THE BIRTH OF A NATION (DAVID. W. GRIFFITH CORP. 1915).

northern whites,[158] and most importantly take advantage of the Thirteenth Amendment's exception for "involuntary servitude" to create "slavery by a different name."[159] In many ways, this had the effect of not just linking Blackness to criminality but also criminality to Blackness. It changed the way people came to imagine the prototypical criminal defendant.[160] A change that we are still living with today.

All of this—the history of Blacks being barred from testifying, the practice of providing lawyers to Blacks and Blacks alone, the linking of criminality with Blackness—likely fed into notions about what types of voices *should* be heard in our "hallowed" courts of justice and how they should be mediated, notions which likely accorded with another norm: segregated courtrooms. Indeed, well into the 1960s, it was still common for Blacks to be relegated to the back gallery or balcony of courtrooms.[161]

Consider another data point: Race is integral to the development of many of our current criminal procedure protections,[162] including the right to counsel. Race was at the heart of *Powell v. Alabama*, the infamous Scottsboro Boys case in which Black youths, convicted and sentenced to death for allegedly raping two white women, were assigned no counsel until the morning of trial.[163] Race was at the heart of cases that came after *Powell* establishing a right to counsel as a due process

158. ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877, at 250, 258 (2d ed. 2014).

159. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

160. *See generally* MUHAMMAD, *supra* note 14.

161. *See* Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405, 410 (2021). It was not until 1963 that the Supreme Court ruled in *Johnson v. Virginia* that segregated spectator seatings in courtrooms was a denial of equal protection. *See* 373 U.S. 61, 62 (1963). Before then, segregated courtrooms were not uncommon. As the Mississippi Supreme Court noted in 1948 in rejecting a challenge to the practice, such segregation was "a custom whose immemorial usage and sanction has made routine." Murray v. State, 33 So.2d 291, 292 (Miss. 1948). For more on segregated court facilities, see A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 521–26 (1990). This perpetuated the notion of the courtroom as a "white space."

162. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000) (asserting that "the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity"); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841–44 (1994) (describing the evolution of Fourth Amendment doctrine as a "response to the problems of racial discrimination that it and the nation as a whole were forced to confront forthrightly in the middle of [the 19th] century"); Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 230 (2003) ("[I]t is simply impossible to understand the foundation of constitutional criminal procedure without understanding that racial inequality played a key role in the Court's decision to intervene in the administration of southern justice."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones. Warren-era constitutional criminal procedure began as a kind of antidiscrimination law."); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) ("[C]riminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race.").

163. 287 U.S. 45, 50, 56 (1932). For more on the case and the innocence of the defendants, see generally I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1 (2006).

right.[164] Even in *Gideon*, which involved a white defendant, the idea that appointed counsel was needed to "protect" Black defendants was just below the surface.[165] The same is true of *Miranda v. Arizona* and its predecessor *Escobedo v. Illinois*,[166] both of which involved minority defendants. Again, these decisions were intended to at least give racial minority defendants some "protection," especially in the South.[167]

The result was the system we have today: Defendants (especially those who are appointed counsel, again disproportionately people of color) sit silent while counsel speak for them. What was also understood at the time was that the overwhelming majority of lawyers would be elite white men of a certain class and milieu, indeed "gentlemen lawyers."[168] Viewed this way, maybe *Gideon* and the rules developed around it should be thought of as an example of "preservation-through-transformation," to borrow a phrase from Reva Siegel.[169] It preserved, in large part, the whiteness[170] of authorized voices in the courtroom.[171] And as the next Part makes clear, all of this has consequences.

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164. *See* Ossei-Owusu, *supra* note 142, at 46–50; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 86 ("[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.").

165. *See* I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 8 n.56 (2011) ("[F]ailure to provide adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black." (quoting Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 83 (1995))). It is telling that England never developed a counterpart to *Gideon*. There, the appointment of counsel remains discretionary, except in cases where the defendant is charged with murder or where the prosecution appeals or applies for leave to appeal from the Court of Appeal Criminal Division to the House of Lords. *See* Paul R. Mattingly, Note, *Right to Counsel: A Comparative Analysis of the United States and Great Britain*, 50 NOTRE DAME L. REV. 117, 119 (1974).

166. 378 U.S. 478, 492 (1964) (ruling that the refusal of police to honor defendant's request for attorney violated the Sixth Amendment, a decision later modified by *Miranda*).

167. Capers, *supra* note 165, at 4–12.

168. *Cf.* LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 68 (1997) (describing the barriers to entry for women, and how even at law school, the women were referred to as "gentlemen"). Even today, the overwhelming majority of public defenders are white. *See* Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 962 (2023).

169. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (arguing that "status-enforcing state action evolves in form as it is contested" in a process of "preservation-through-transformation").

170. Here, I am using "whiteness" in a way that goes beyond phenotype. A Black person—indeed anyone—may speak in a white voice. Indeed, it is arguable that this is part of our current system of legal education, part of learning to think and speak like a lawyer, and part of having a "bleached out identity"—as I have explored in other work. *See* Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 11 (2021); *see also* David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1504 (1998) ("Bleached out professionalism is central to the dominant model of American legal ethics.").

171. Indeed, it is not only who gets to speak. It is also who gets to decide. Largely as a result of Rule 1.2 of the ABA's Model Rules of Professional Conduct, a defense lawyer has *carte blanche* to make nearly every decision. MODEL RULES OF PRO. CONDUCT r. 1.2. A criminal defendant's decision-making authority is limited to just three decisions: the choice of whether to plead, whether to waive a jury trial,

III. CONSEQUENCES AND HARMS

Having set forth, in Part I, the many ways we silence defendants and having shown, in Part II, that this silence is not preordained but has a history, indeed a racial history, obvious questions remain. What happens when we silence defendants? Who benefits, and who does not? What are the consequences and harms? This Part takes up these questions.

Speak to any prosecutor, and, if she is honest, she will tell you that when a defendant sits silently at the defense table, it becomes easier not only to control the narrative and present just the state's version of what happened.[172] It also becomes easier to control the jury's perception of the defendant. To reduce him to an object. Or to a shadowy figure onto which the state's view can be projected. It is a way to more easily render him a monster, an animal, a miscreant, a criminal. Or, to borrow a phrase from Karen M. Tani, simply someone "who is not our concern."[173]

Part of this is attributable to language itself. If one believes complex language is what separates humans from animals, then it follows that when defendants are rendered mute, it makes it easier to depict them as something less than human and thus easier to lock away behind bars.[174] If, as Anna Roberts has written, testifying "permits a criminal defendant to remind—or show—the jury that he is a human being,"[175] sitting mute does the opposite. Or at least makes the opposite possible. Barbara Babcock adds, "It is almost impossible to see the defendant as a deserving person unless he testifies, partly because the natural order of the trial dehumanizes him."[176]

Beyond this, there is something to hearing a person's voice. Studies have found that merely *hearing* another's voice can trigger empathy.[177] But of course, this empathy through voice is impossible when a defendant is rendered voiceless, which is precisely what a host of judicial decisions and trial rules do.

I will return to defendants momentarily, but first it is worth pointing out the ways silencing also harms victims. Imagine being a victim of a crime. An increasing number of studies show that, *when given the option*, many crime victims, including victims of violent crime, prefer pursuing restorative justice rather than

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and whether to testify. *Id.* All of this prompts the question: What role does the client have in their own advocacy? My answer is sobering: practically no role at all.

172. I was a federal prosecutor for close to a decade, and this is certainly consistent with my conversations with other prosecutors.

173. Tani, *supra* note 113, at 8.

174. *See* Roberts, *supra* note 59, at 2031 (noting that in silencing defendants, we deny the defendant the ability "'to let the jury know who he is.'" (quoting State v. Stokes, 523 P.2d 364, 366 (Kan. 1974)).

175. Roberts, *supra* note 59, at 2002.

176. Barbara Allen Babcock, *Taking the Stand*, 35 WM & MARY L. REV. 1, 5–6 (1993).

177. *See, e.g.*, Michael W. Kraus, *Voice-Only Communication Enhances Emphatic Accuracy*, 72 AM. PSYCH. 644, 644 (2017); Jamil Zaki, Niall Bolger & Kevin Ochsner, *Unpacking the Informational Bases of Empathic Accuracy*, 9 EMOTION 478, 479 (2009). Along these lines, there is a reason why we find hearing voices of loved ones so important and often value such voices as "precious beyond measure." Bruce Grierson, *The Human Voice Is Medicine. So Why Aren't We Talking?*, PSYCH. TODAY (Oct. 10, 2018), https://www.psychologytoday.com/us/blog/the-carpe-diem-project/201810/the-human-voice-is-medicine-so-why-arent-we-talking.

incarceration.[178] But our system of encouraging defendants to remain silent makes restorative justice harder to achieve. Even for victims who want justice through the traditional criminal process, the point holds true: For many of these victims, closure may require being able to speak to the defendant and have the defendant speak back, to have the defendant explain why and how come.[179] But a host of decisions and evidentiary rules discourage this. To be sure, the offender encouraged to speak might deflect or even shift blame onto the victim. *You started it. You deserved it. I'd do it again.* But it is also true that, in other cases, the offender might try to explain. *I was on drugs. I needed money. I was having a bad day.* And in a few cases, apologize. *I understand. I was wrong. I'm sorry.* But again, everything works against such closure in a system where rules and norms and decisions encourage, indeed compel, defendants to remain silent.

In addition, "we, the people" are harmed by silence. When we silence defendants, we lose out on learning why people offend and in turn lose one avenue for learning how to reduce crime. The defendant accused of domestic violence might tell us he was laid off and unable to find work. Or something about his own upbringing. The low-level drug dealer might tell us he wanted to help his mom, to give her the life she deserves, "payin' the rent when the rent is due," if I may channel Tupac Shakur.[180] We can imagine learning something similar from a domestic terrorist or a mass shooter or, more mundanely, the person accused of stealing baby formula from a drug store. Of course, some of this we know anecdotally. But imagine if this information were quantified and datafied. The point isn't that we would nullify or decide they were not actually guilty—though we might. Rather, the point is learning this information can help us figure out the steps we can take to reduce offending in the first place.[181] It might further a fundamental goal of our criminal system: to prevent harm. A quick example: A burglar describing why he targeted a particular neighborhood or a particular store might help us better design neighborhoods or rethink the store's layout, emphasizing a point Neal Katyal brilliantly made years ago regarding the importance of architecture in managing crime.[182] More radically, listening to the burglar might spur us to address wealth inequality.

There is something else that happens when we silence defendants. "We, the people" lose our power. Part of this is we lose our power to show mercy because we are shielded from information that might activate feelings of empathy and compassion. But more significantly, we lose our power to decide.[183] Or rather, we have

178. *See generally* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 42 (2019).

179. As Nils Christie notes, a system that facilitated, rather than frustrated, a discussion between victims and offenders where both are willing would give the offender the opportunity to explain himself, to be forgiven, and to be a participant in a discussion "of how he could make it good again." Nils Christie, *Conflict as Property*, 17 BRIT J. CRIMINOLOGY 1, 9 (1977).

180. TUPAC SHAKUR, *Dear Mama*, *on* ME AGAINST THE WORLD (Interscope Recs. 1995).

181. Natapoff makes a similar observation. *See* Natapoff, *supra* note 2, at 1498.

182. *See generally* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002).

183. On the historic role of jurors to decide blameworthiness, see Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316–30 (2003); Meghan J. Ryan, *The Missing Jury: The*

been deprived of our power to decide. The rules, after all, not only discourage defendants from speaking. They also discourage us from hearing. Just consider: Historically, juries of peers were not only common; they also heard everything. They would decide guilt or innocence based on all of the facts, including the "why" and the "how come" that the Rules of Evidence today exclude.[184] And based too on the defendant speaking. Now, with defendants silenced, jurors are deprived of the ability to hear the other side, to hear the whole story, and decide accordingly. As Ted Sampsell-Jones notes, "[c]riminal defendants themselves are often a critical source of information about what happened."[185] Vida Johnson adds, "When defendants testify, more crucial information gets to the fact finder."[186] But much, if not all, of that information remains unsaid and unheard when defendants are silenced. Our criminal legal systems, Russell Gold observes, "flatten[]" and oversimplify the narrative.[187] All of this suggests an epistemic injustice, with "we, the people" also being the ones deprived and harmed.

This brings me back to how defendants are harmed. To be sure, for some readers, any harm to defendants might be immaterial or, worse, considered a good, part of their "just desserts." Certainly, we are living at a time when it is entirely acceptable, and in some circles even expected, to not care about the wellbeing of defendants or to think of them as "animals," "inhuman," "thugs," and "monsters." To some, the disdain of nineteenth century law reformer James Fitzjames Stephen will seem about right—it is "highly desirable that criminals should be hated, [and] that the punishments inflicted upon them should be so contrived as to give expression to that hatred."[188]

This Article takes a different tack. It cares about defendants' dignity. Not just dignity in the narrow American legal sense: the dignity of *Trop v. Dulles*,[189] of *Furman v. Georgia*,[190] or of *Brown v. Plata*.[191] While dignity in the American legal sense of "rights" is important,[192] dignity is also fundamental to what it means to be human and to see others as humans. When we erect and reinforce a

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Neglected Role of Juries in Eighth Amendment Punishment Clause Determinations, 64 FLA. L. REV. 549, 575–79 (2012).

184. The bulk of common law evidence rules—including rules that had the "net result" of "suppress [ing] great chunks of truth"—were largely developed in the nineteenth century. FRIEDMAN, *supra* note 137, at 248. Prior to this and other changes in procedure, a jury would have known "the context of the crime and maybe even knew something of the crime itself." *Id.* A similar practice existed in England, where prior to the mid-nineteenth century, "judges showed scant disposition to filter evidence from the jury." Langbein, *supra* note 121, at 301.

185. Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1336 (2009).

186. Johnson, *supra* note 6, at 338.

187. Gold, *supra* note 52, at 3.

188. 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (1883).

189. 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); *see also* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting *Trop*, 365 U.S. at 100); Atkins v. Virginia, 536 US. 304, 311–12 (2002) (same).

190. 408 U.S. 238, 270 (1972) ("A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.").

191. 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons."); *see also* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens.").

192. For a cataloguing of dignity as related to legal rights, see generally Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

legal structure of rules and decisions that encourage and even compel silence, we deprive defendants of their dignity.

But even for readers who are reluctant to grant defendants dignity, there is another instrumental argument that might persuade. Silencing also frustrates a defendant's ability to come to terms with what he has done, which is critical to rehabilitation. Can one truly accept responsibility and come to terms with what one has done if one must remain silent? Is rehabilitation truly possible if one is forbidden from adding context or discussing why, either at sentencing or beforehand? If talking is therapeutic,[193] then isn't our norm of silencing defendants anti-therapeutic? Add to this that silencing frustrates a defendant's perception of legitimacy,[194] which as Tom Tyler's studies demonstrate, so often turns on being heard, being able to have one's say.[195] And if the defendant is not rehabilitated, if he believes the system that punished him is itself illegitimate, isn't he more likely to offend again?

For some readers, the fact that we provide attorneys to indigent felony defendants who can then speak for them should be enough to counter these harms. But a defendant's right to be heard through his attorney is akin to a right that has become "other people's property—primarily the property of lawyers."[196] It is a way to entrench what philosopher Olúfẹ̀mi Táíwò describes as elite capture—here, the elites are the lawyers—which he describes as "the control over political agendas and resources by a group's most advantaged people."[197] As noted earlier, we have devised professional rules so that for almost every decision, it is the defense lawyer who has the ultimate say[198] and who has the last (and only) word. The defendant may have a lawyer who speaks *instead of him*. The lawyer may even claim to speak *on his behalf*. But to say the lawyer speaks *for him*, voicing his views, is nothing more than a legal fiction. It is a substitution most of us would not countenance for ourselves in our daily lives. Moreover, we should meet any assertion that things are best when the lawyers do all the talking with a healthy dose of skepticism, especially when lawyers themselves are making this claim. To borrow from the criminologist Nils Christie, "[l]awyers are particularly good at stealing conflicts."[199]

193. *See* Paul Corcoran, *Therapeutic Self-Disclosure: The Talking Cure*, in DISCLOSURES 118, 118 (Paul Corcoran & Vicki Spencer eds., 2000) ("The act of confiding personal feelings, intimate experiences and closely guarded memories to another person has long been considered an effective therapy for troubled and sorrowing minds.").

194. *See* Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMPAR. L. 871, 887–89 (1997) (finding that personal participation by parties in pre-trial and trial proceedings enhances perceptions of legitimacy); *see also* Natapoff, *supra* note 2, at 1496–97.

195. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 118 (2006) (discussing the importance of feeling one's views are being considered to perceptions of legitimacy).

196. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 5 (1977).

197. Olúfẹ̀mi Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, THE PHILOSOPHER, https://www.thephilosopher1923.org/post/being-in-the-room-privilege-elite-capture-and-epistemic-deference [https://perma.cc/GT22-3C4F] (last visited Mar. 10, 2026).

198. *See supra* note 171 and accompanying text.

199. Christie, *supra* note 196, at 4.

Finally, there may be those who worry that defendants who speak will more likely convict themselves than assist themselves. But these objectors are still thinking *within* the system they know. They are thinking only of an adversary system where relevancy rules and party-opponent rules and impeachment by prior conviction rules work against defendants and where no one is allowed to speak naturally, in narrative form. They are imagining plea allocutions and sentencing proceedings that are still scripted, where a defendant's role, though necessary, is really that of a bit player. They are imagining an adversarial system that relies on the too-simple dichotomy of innocent or guilty. They are failing to imagine justice outside the system they know. In short, they are thinking conventionally. But there is no need to think so narrowly, as I demonstrate in Part V. But first, there is another argument I want to make: that in many ways, silencing is blackening.

IV. AND BLACKENING

> **blacken**/ˈblak(ə)n/*v*. ME. [f. BLACK *a*. + -EN.] **1.** *v.i.* Become or grow black(er); darken. ME. **2** *v.t.* Make black(er) or dark(er); defame, speak evil of. LME.
>
> —Oxford English Dictionary[200]

It was only recently, as I was reading Toni Morrison's *Playing in the Dark*,[201] that I began to think of silencing itself as a type of blackening. And now, I cannot unthink it. This is not to say silencing as blackening is limited to Black and Brown defendants. After all, to blacken someone is to sully their reputation, to cast them as violating community norms, to subject them to public opprobrium. For example, in *McDaniel v. City of Iuka*, the court noted a discharged employee's liberty interest can be infringed "when he is denied the opportunity to clear his name of 'charges that *blacken* his reputation.'"[202] In *Brown v. United States*, the Supreme Court reversed a murder conviction because the trial judge's charge to the jury on how they should evaluate the testimony of a prosecution witness—the defense had attempted to "*blacken* his name"—was too narrow.[203] In *Thomas v. State*, a court reversed a conviction on seduction charges where the trial court had improperly limited the defendant's ability to "*blacken* . . . the character" of the prosecutrix.[204] Other examples abound.[205] In this sense, even for a white defendant,

200. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 237 (Lesley Brown ed., 4th ed. 1993).

201. TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION (1992).

202. No. CIV. A.95CV32, 1996 WL 408153, at *2 (N.D. Miss. Apr. 30, 1996) (emphasis added) (quoting Rosenstein v. City of Dallas, 876 F.2d 392, 398 n.10 (5th Cir. 1989)).

203. 164 U.S. 221, 223 (1896) (emphasis added).

204. 91 S.E. 247, 248–50 (Ga. Ct. App. 1917) (emphasis added).

205. *See, e.g.*, Com. ex rel. Platt v. Platt, 404 A.2d 410, 415 (Pa. Super. Ct. 1979) (discussing the physician–patient privilege as a bar to disclosure of information that would "tend to blacken the patient's character"); Grimminger v. Maitra, 887 A.2d 276, 280 (Pa. Super. Ct. 2005) (same); Keys v. Interstate Circuit, Inc., 468 S.W.2d 485, 486 (Tex. Civ. App. 1971) (observing that libel includes expressions that "tend [] to blacken the memory of the dead"); Walker v. Bee-News Pub. Co., 240 N.W. 579, 582 (Neb. 1932) ("Words are libelous per se where they charge an offense which blackens one's character . . . .").

silencing can enable a type of blackening, depriving him of his opportunity to "clear his name," while giving the state authorial control to portray the defendant as guilty—as having a black heart, as being the black sheep—and deserving of condemnation.[206]

Our silencing of defendants, regardless of race, functions as a type of blackening for another reason. This reason leans into another connotation of blackening: that it darkens to impede sight, that it leaves in the dark. In a sense, this is what silencing defendants does with respect to jurors, judges, victims—indeed, to all of us. It is a way to keep the defendant in the shadows *and* to keep us in the dark about why the defendant offended in the first place. It is akin to blinders, forcing us to see only what the prosecutor wants us to see. This is especially true with respect to evidentiary rules. Returning to Judy Norman, who was convicted of killing her abusive husband, it is a way to keep jurors from asking why, on the day of the killing when her husband was beating her again and her mother called the sheriff's office, no help arrived.[207] Or why Judy Norman seemed to have no place to go, why it seemed no shelter could protect her.[208] And of course it is not just Judy Norman. It is every defendant. For the defendants who go to trial and remain silent, it is the jurors left in the dark. For the far greater number of defendants who plead guilty to a "script," it is the judges who are left in the dark. And for both, "we, the people" are left in the dark. The carceral logics of the system are kept out of sight so that justice seems both "fair" and "enlightened." So that the state can say, "justice was done," even when it wasn't.

Beyond this, silencing as blackening seems apt because we tend to prefigure defendants as Black. Merely the words "criminal defendant" can conjure Blackness.[209] (My students, for example, assume Judy Norman is Black, until I show them a photograph.) And in many instances, when we are presented with a defendant who is white but is poor, or disabled, or neurodivergent, we recast them as not-white, as somehow not living up to the ideals of whiteness, of how whites want to see themselves.[210] That just as Blacks may recast other Blacks as essentially

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206. For legal scholarship engaging with the legal and racial impact of our historical association of the color white with purity and goodness and the color black with evil and noninnocence, see Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 34–39 (1990); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 471–73 (1993).

207. State v. Norman, 366 S.E.2d 586, 588 (N.C. Ct. App. 1988).

208. *See* Martha R. Mahoney, State v. Norman*, Justice Martha R. Mahoney, Dissenting*, *in* FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS 250 (Bennett Capers et al. eds., 2022) ("The credible threat of death, combined with fear for the well-being of her children, cut off every avenue for help. The family did not believe she could get away; she did not believe she could get away or get help; and Dr. Tyson saw no options for help that she had overlooked.").

209. *Cf.* NAZGOL GHANDNOOSH, SENT'G PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), https://www.sentencingproject.org/app/uploads/2022/08/Race-and-Punishment.pdf; Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff & Paul G. Davies, S*eeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

210. Carrie Buck, the "feeble minded white woman" at the center of *Buck v. Bell*, 274 U.S. 200, 205 (1927), is a prime example. The Supreme Court famously authorized her forced sterilization stating that: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 207. The case only comes into full view,

white, for example using the term "oreo" to describe Justice Clarence Thomas[211] or invoking the expression "all skinfolk ain't kinfolk," whites may recast whites who engage in lawbreaking as no longer white, and even as essentially Black.

In fact, one could argue that silencing functions as blackening in yet another respect. Recall that, historically, Blacks—whether free or enslaved—were essentially barred from testifying in court.[212] Add to this that, historically, Black people—whether free or enslaved—were generally denied the free speech protections of the First Amendment.[213] The silencing we encourage through a host of rules, decisions, and norms replicates this earlier *de jure* bar. All of this points to another aspect of silencing as blackening. Regardless of a defendant's race, it is citizenship-diminishing.[214] It is another way of reducing defendants to "custodial citizens," individuals who are no longer constituted "as participatory members of the democratic polity, but as disciplined subjects of the carceral state."[215]

That said, the concept of silencing as blackening has particular salience with respect to Black (and Brown and Indigenous) defendants. Given the implicit biases we have about Blackness, and given studies demonstrating our association of Blackness with criminality and criminality with Blackness,[216] silencing Black defendants gives the state an extra advantage, tips the scales even more. It further enables the state, by rendering defendants voiceless, to "other" them. To depict them as subhuman. As subalterns. To depict Black defendants as more bestial,[217] and

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however, when one recognizes that it coincided with the eugenics movement and efforts to prove white supremacy. As such, the very whiteness of Carrie Bell was part of the problem. The Court's response was to, in a way, treat her as non-white or no longer white. For more on this, see I. Bennett Capers, *Reading Back, Reading Black, and* Buck v. Bell, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 13, 15–16 (Lovalerie King & Richard Schur eds., 2009).

211. *See* Josh Blackman, *WaPo Describes Justice Thomas: "The Black Justice Whose Rulings Often Resemble the Thinking of White Conservatives."*, REASON: THE VOLOKH CONSPIRACY (Feb. 17, 2022, at 01:12 ET), https://reason.com/volokh/2022/02/17/wapo-describes-justice-thomas-the-black-justice-whose-rulings-often-resemble-the-thinking-of-white-conservatives [https://perma.cc/3VCF-444B]; Stephen B. Presser, *Reading the Constitution Right,* CITY J. (Spring 2007), https://www.city-journal.org/article/reading-the-constitution-right [https://perma.cc/KG2L-GA74].

212. *See supra* note 154 and accompanying text.

213. *See* William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1083–88 (2021).

214. *Cf.* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 670 (2018) (arguing that "the Court's 'citizenship talk' is heard and interpreted" in a non-race neutral manner, leading to "racial minorities, especially those who are black or brown, often find[ing] themselves having to 'work' their citizenship in ways that are citizenship-diminishing").

215. AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 111 (2014).

216. *See* Eberhardt, *supra* note 209, at 876; Capers, *supra* note 19, at 885–93; Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 874 (2015); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–528 (2005).

217. *See generally* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) ("This article seeks to explain the judicial travesty in the Central Park case by contextualizing it in view of the myth of the Bestial Black Man: a myth, deeply imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape.").

more incorrigible, as more of a "super-predator,"[218] as more of a "problem."[219] In short, as blacker.[220] And all of this is accomplished by simply pointing to the silent defendant at the defense table.[221] It is on par with when attack ads darkened Barack Obama's skin during the 2008 presidential campaign, presumably as a way to frighten voters.[222] (A Stanford University study found that 45% of those who viewed a darker Obama completed a word prompt game with a negative stereotype, compared to 33% of those who saw a lighter image.[223]) Or when Hugo Black, before he became a Supreme Court justice, secured the verdict he wanted by, among other things, "darkening the courtroom to make [a] Puerto Rican's skin appear darker than in reality."[224] Silencing emphasizes difference—here, racial difference—not commonalities. Kendall Thomas has persuasively argued that race is better thought of as a verb rather than a noun, that we constantly make and remake race, already a social construct.[225] If that is true, then silencing Black defendants is also a type of race-making, a type of blackening.

That silencing contributes to race-making is another reason to question our norm of silencing defendants and to ask who benefits from this silencing, and who does not. And it provides another reason to consider the possibilities that might open up if we modified our rules to provide defendants more opportunities to speak, and for us to listen. This is the task taken up below.

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218. For more about the super-predator label, see Ingrid Yin, Comment, *Young and Dangerous: The Role of Youth in Risk Assessment Instruments*, 120 MICH. L. REV. 545, 560–64 (2021); Daniel S. Hawara, *Black Redemption*, 48 FORDHAM URB. L.J. 701, 712–13 (2021).

219. This is a reference to W.E.B. Du Bois's famous question, "How does it feel to be a problem?" *See* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 7 (John Edgar Wideman ed., 1990).

220. Equally importantly, this blackening occurs even though we tell ourselves that a criminal defendant enters the courtroom with a clean slate, innocent until proved guilty. We even tell ourselves Rule 404 of the Federal Rules of Evidence insures this, since it bars a prosecutor from introducing evidence of a defendant's character. *See* FED. R. EVID. 404.

221. The legal historian James Whitman has written that to forestall "conviction of the innocent and more broadly to preserving liberty, we agree—on both the American left and the American right—that we must make it difficult for the state to prove its case and difficult for the state to blacken the jury's perception of the defendant." James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 952 (2016). And yet if to depict someone negatively is to "blacken" their character, what does this mean for the defendant who is already black in skin?

222. *See* Joan E. Solsman, *Obama's Skin Looks Darker in Negative Ads, Study Finds*, THE WRAP (Dec. 30, 2015, at 06:40 ET), https://www.thewrap.com/obamas-skin-looks-darker-in-negative-ads-study-finds [https://perma.cc/4KN7-Q5SE].

223. *See* Solomon Messing, Maria Jabon & Ethan Plaut, *Bias in the Flesh: Skin Complexion and Stereotype Consistency in Political Campaigns*, 80 PUB. OP. Q. 44, 57 (2016).

224. Robert R. Kracke, *Lawyers in a New South City: A History of the Legal Profession in Birmingham*, 61 ALA. LAW. 272, 273 (2000) (book review).

225. *See* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 53, 61 (Mari J. Matsuda et al. eds., 1993) (quoting Kendall Thomas, Comments at Frontiers of Legal Thought Conference, Duke Law School (Jan. 26, 1990)); *see also* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Backward to Move Forward*, 43 CONN. L. REV. 1253, 1262 (2011).

V. UN-SILENCING

My argument to this point has been that there are a host of rules and norms and decisions that have the effect of lulling defendants into silence, indeed even coercing them into silence. The argument too is that none of this is pre-ordained. Instead, we have created these rules. I have argued too that the history of the right to counsel, and in turn the right of counsel to speak instead of defendants, comes into clearer focus through the lens of race. Indeed, that we should think of silencing as a type of blackening. But even if one does not accept my racial history argument, or blackening argument, what should remain beyond dispute is that much is lost when we silence defendants, regardless of race. This includes closure for victims, rehabilitation and legitimacy for defendants, and finding out why defendants offend so that we can address the drivers of crime.

This Part suggests a different way. Instead of a system bent on silencing defendants, it imagines and limns out a system that puts the ball in the defendant's court, that gives him full agency to decide when and how to speak. It borrows from the past, where defendants speaking was the norm. And it improves upon the present, modifying rules and norms. There are a few points to be made before starting. First, given the multifaceted nature of the means of silencing, and the harms of silencing, the solutions this Part offers are multifaceted as well. Some solutions address the cathartic and redemptive benefits of speaking, for example, while others address crime reduction. Second, the proposals put forward here are necessarily preliminary. They are meant to begin a conversation, not end one. We should all be thinking about ways to make our criminal system just. We should also open ourselves to allowing jurisdictions to try new things, along the lines of Justice Brandeis's idea of states as laboratories of experimentation and innovation.[226] The last thing to say before beginning is this: Recognizing the political legal-economy we are in and the resistance to radical change,[227] this Part starts by offering several modest proposals. At the same time, it is possible "we are in the midst of a criminal justice 'moment,' when extraordinary reform may be possible."[228] Open to that possibility, this Part concludes by sketching out some more radical solutions.[229]

226. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 359 (2004).

227. The resistance progressive prosecutors have faced is but just one example. For more on this phenomenon, see generally Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365 (2021) (book review).

228. John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 721 (2020).

229. As I have written previously, given that the country is projected to become, by the year 2044, a "majority-minority" country with people of color making up more than half of the population, now is the time to imagine, and prepare for, a more diverse world which recognizes the status quo does not serve us well and instead advance new rules to make this country fair and just to everyone. In short, now is the time to imagine radical, liberatory change. *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 26 (2019); *see also* I. Bennett Capers, *Afrofuturism and the Law: A Manifesto*, 112 GEO. L.J. 1361 (2024).

A. BEGINNING MODESTLY

1. Pretrial Un-silencing

First, we can imagine carving out spaces for defendants to speak and to speak without fear of their words being used against them. One such space could be during pretrial intake—the process by which many defendants are processed and interviewed by pretrial services staff to assist the judge in deciding bail.[230] Even though the federal pretrial statute provides for confidentiality,[231] caselaw makes it clear that anything a defendant says during his pretrial interview can be admitted at trial for impeachment purposes.[232] But here of all places we should want defendants to be able to speak freely. To say their piece and have their peace and begin the processes of internally accepting responsibility and rehabilitation. Imagine the benefits that would flow if pretrial services provided a separate "off the record" opportunity for arrestees to unburden themselves, an opportunity in which anything they say is privileged.[233] And an opportunity in which the pretrial services officer can push back where appropriate, and both the defendant and pretrial services officer can engage in open dialogue. Indeed, carving out a privilege for such speech is entirely consistent with why we have evidentiary privileges in the first place—sometimes "a public good transcend[s] the normally predominant principle of utilizing all rational means for ascertaining truth."[234] Since evidentiary privileges generally last in perpetuity,[235] this privilege would allow the defendant to speak freely without fear that their words could later be repeated at trial or sentencing.

We could similarly protect pretrial conferences in court. The defendant could be invited to speak at each pretrial conference and told that his words will not be used against him later. Imagine the procedural justice and dignitary benefits not only to the defendant but also to his family and community if, at each conference, the court turned to him and asked if there was anything he would like to say. Even if most defendants decline the offer, comfortable having their lawyer speak on their behalf, just extending the opportunity to them—assuming it is sincere and meaningful—has procedural justice and dignitary value.

2. Plea Un-silencing

For the defendants who plead guilty—again, very few cases go to trial—the modification here is similarly easy. Even allowing the defendant to talk freely about why he offended, rather than cabining his speech to an admission of guilt,

230. *See* 18 U.S.C. § 3153.

231. *See* 18 U.S.C. § 3153(c)(1).

232. *See, e.g.*, United States v. Balogun, 463 Fed. App. 476, 483 (6th Cir. 2012); United States v. Stevens, 935 F.2d 1380, 1395–97 (3d Cir 1991); United States v. Griffith, 385 F.3d 124, 126 (2d Cir. 2004); United States v. De La Torre, 599 F.3d 1198, 1205 (10th Cir. 2010).

233. Such a privilege could be created legislatively, or by courts under Federal Rule of Evidence 501. For an interesting discussion along these lines about creating new privileges, see Tom Lininger, *Underprivileged: A Classcrit Perspective on Evidentiary Privileges*, *in* CRITICAL EVIDENCE (Bennett Capers et al. eds.) (forthcoming 2026).

234. Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

235. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998) (noting that it has been generally accepted that privileges survive even death).

can further dignitary and cathartic interests. It can certainly get us closer to Antony Duff's suggestion that a liberal state should use a criminal conviction not just to communicate condemnation, but also to engage the defendant in a "dialogue about the justice of the charge which she faces, and to persuade her. . . to accept and make her own the condemnation which her conviction expresses."[236] This would promote a "public good" by helping us understand what drives some individuals to offend in the first place and what we can do to dissuade or prevent others from offending in the future.

3. Trial Un-silencing

The spaces I have carved out so far are spaces where the defendant would be able to speak unhampered by the fear that evidentiary rules will allow his words to be used against him. These are spaces where defendant-speech can benefit the defendant, victims, and all of us. That said, such protected speech, or speech without repercussion, is likely impossible at trial. But even at trial, we can imagine making defendant-speech easier. As numerous scholars have noted, one of the biggest impediments to defendant-speech at trial is Rule 609, which permits a defendant to be impeached with evidence of his prior convictions, a rule that likely applies to about 60% of all defendants.[237] There is even evidence that Rule 609 might contribute to wrongful convictions by silencing factually innocent defendants who happen to have criminal records.[238] To address this silencing, there is a burgeoning movement—including the Coalition for Prior Conviction Impeachment Reform of which I am a part[239]—to repeal Rule 609 so that more defendants would feel free to speak at trial.[240] This Article joins that movement.

In addition to reforming Rule 609, we could also imagine relaxing the other impeachment rules that discourage defendant testimony. This includes relaxing relevancy rules, as Erin Collins has recently suggested, so that a defendant's speech, should he choose to testify, is not narratively constrained.[241] Given that we routinely relax relevancy rules to permit the admission of background information testimony from witnesses,[242] there is no reason why we cannot relax relevancy rules to permit defendants more freedom to contest their guilt or contextualize it.[243] This alone can help disrupt "the acceptability of [guilty]

236. R.A. DUFF, TRIALS AND PUNISHMENTS 233 (1986).

237. *See, e.g.*, Roberts, *supra* note 59, at 1982–87; Bellin, *supra* note 18, at 398 n.11 (citing BRIAN A. REAVES, U.S. BUREAU OF JUST. STAT., U.S. DOJ, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 8 (2013)).

238. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 488–92 (2008).

239. *The Coalition*, REFORMING PRIOR CONVICTION IMPEACHMENT, https://www.reforming-pci.org/the-coalition [https://perma.cc/8SL2-R9XQ] (last visited Mar. 10, 2026).

240. *See generally, e.g.*, Jeffrey Bellin, *Eliminating Rule 609 to Provide a Fair Opportunity to Defend Against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence*, 92 FORDHAM L. REV. 2471 (2024).

241. *See* Erin R. Collins, *Evidence Rules for Decarceration*, 50 FORDHAM URB. L.J. 353 (2023).

242. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 849 (2013).

243. *See, e.g.*, Michele Gilman, *The Relevance and Prejudice of Poverty Evidence*, *in* CRITICAL EVIDENCE (Bennett Capers et al. eds.) (forthcoming 2026) (on file with author) (arguing that judges

verdicts"[244] that the Rules of Evidence facilitate. Along these same lines, it makes sense to retire the practice of instructing jurors to view the testimony of the defendant, and the defendant alone, with "special scrutiny."

4. Sentencing and Un-silencing

Finally, at sentencing—and later at any parole hearing—we could easily carve spaces for defendants to speak freely. First, as with pretrial services, we can carve out space during probation interviews for defendants to speak freely, an improvement from the current process where a defendant's statements can sometimes be used against him.[245] Similarly, we can carve out space at sentencing itself. For example, to eliminate the carrot/stick problem, we can give the defendant two opportunities to speak: one before sentence is imposed and a second opportunity to have his say after sentence is decided.

5. More Un-silencing

These are just a few of the modest changes we could imagine. There are certainly others. For example, one can imagine liberalizing the *Miranda* warnings to make clear that these spaces exist and that the defendant will later have opportunities to speak freely, without fear that anything he says can and will be used against him. *You have the right to remain silent. Should you choose to waive that right, anything you say to us right now can be used against you in a court of law. Should you wish to speak without your words being used against you, there will be separate opportunities for that later*. At the other end of cases, one can imagine permitting defendants to speak freely at parole hearings, or encouraging other means by which victims and offenders, if they so choose, can communicate. These are modest changes, and these suggested changes are by no means exhaustive. But even these can do much to further perceptions of legitimacy, to contribute to dignity and rehabilitation and closure, and to help us begin the process of reducing crime.

B. MAKING NEW SPACES

One limitation of the proposals offered so far is that they work within a system that many, including myself, view as fundamentally flawed. Each of the above

should "expand notions of relevance to give litigants and their advocates space to explain the underlying causes and social context that led them to court") (manuscript at 17); *cf. generally* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937 (2022) (arguing that it is time to reimagine the Rules of Evidence).

244. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358–60 (1985) (arguing that evidentiary rules facilitate the transformation of evidence heard and seen by the jury into "an acceptable statement about what happened," which in turn aids the state in maintaining order); *see also* Collins, *supra* note 241, at 355 (suggesting that the Rules of Evidence "stack the deck against people accused of crimes" and can function as "part of the carceral state apparatus").

245. While 18 U.S.C. §3153(c) provides some limitations on when a defendant's statements to pretrial services can be used against him, courts have admitted such statements for impeachment purposes. See, e.g., U.S. v. Griffith, 385 F.3d 124, 126 (2d Cir. 2004); U.S. v. Balogun, 463 Fed. App. 476 (6th Cir. 2012); U.S. v. De La Torre, 599 F.3d 1198 (10th Cir. 2010).

proposals may reform the system but perhaps as a "reformist reform," rather than a "non-reformist reform"[246] that embraces the goal of "the eventual dismantling of that system."[247]

For this reason, this Section sketches out a reform that I think of as non-reformist. It works outside the carceral logics of state power. The proposal is straightforward and simple. It is about empowering communities but without the police, without prosecutors, and without defense lawyers. It is about allowing communities to come together to create their own systems of accountability. For example, we can imagine communities deciding to allow offenders—both those who have been charged, and those who haven't been and may never be—a safe space to tell their stories, to say their piece. In short, instead of carving out space within a fundamentally flawed criminal system, I am imagining putting communities at the helm to create their own spaces for justice, accountability, and keeping each other safe. To again borrow from Táíwò, it is less about inviting community members to a preset table and more about allowing them to create their own table and even create their own room and standpoint epistemology.[248] To be sure, some communities might create a space where the state is entirely absent. Others might prefer a space where the state, though absent, can be invited in. Either way, this would shift power away from the state and to the people, especially those most impacted, which in itself is a good.[249]

To some, especially those who can't imagine "punishment without the state,"[250] this may sound frightening, like justice run amok or no justice at all. They may fear that victims will suffer. (They won't, since a victim would always be free to seek state intervention on their own.) Or that offenders will go unpunished. (They might, if the community and victim so choose, which might be a good.) But really, we have become so used to the idea of state power, and the state's monopoly on justice, that we have forgotten the power of communities to keep each other safe and to hold each other to account. Earlier, I was tempted to call this proposal new. Even radical. But of course, it is neither radical nor new. If anything, it is suggesting a return to the way things once were, except with a modern sensibility. It is part of reclaiming rights. It is part of reclaiming power.

Still, one can imagine the hesitation. How will communities treat outsiders? What if there are factions in the community? If it turns out the offender stole baby formula for his newborn and the community sides with him, won't the store owner suffer more than under the current system? Maybe, if the current criminal

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246. The distinction between reformist reforms and non-reformist reforms originated with André Gorz in the context of labor reform. *See* ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967). For discussion of reformist/non-reformist reforms in the context of abolishing the criminal system, see, for example, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1826 (2020) and Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).

247. Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45 (2021).

248. Táíwò, *supra* note 197.

249. For more on the benefits of shifting power to impacted communities, see generally Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

250. But of course, punishment without the state is possible. Indeed, to some extent, it already exists. *See generally* I. Bennett Capers, *Punishment Without the State*, 2023 U. ILL. L. REV. 1753 (2023).

system were set up to make the store owner whole through restitution, but it isn't. And if we are faced with a choice between trusting the state or trusting communities, we should at least give communities a chance. Perhaps that is the most radical thing about this project. Because although I have framed this project as listening to defendants, it is also about returning power to us.

C. ON LISTENING TO DEFENDANTS

This is my hope. That if we carve out space where defendants can speak freely, and if we listen the same way many Americans heard the narratives of the enslaved people during the movement to abolish slavery,[251] we will develop "a sense of compassion for the miseries"[252] that our current criminal system inflicts.

With respect to how we punish, listening to defendants will force us to reckon with what it means to be incarcerated.[253] This would include the dehumanization of not just prisons but also jails, where we detain defendants awaiting trial notwithstanding our boasts that, in our system, everyone is presumed innocent. It would include the indignity of being reduced to a number, working for pennies to pay for basic necessities,[254] the constant threat of rape and other violence, the risk of death, the fact that our prisons and jails are places where justice seems entirely absent and indifferent. Or more mundanely—though it is not mundane to them at all—what it smells like when fifty-four men share one toilet.[255] What it feels like to be incarcerated in a jail or prison in Texas during a heatwave, say, where there is no air conditioning.[256] Or what it's like to walk around with a blanket in winter because a jail is so cold everyone is shivering.[257] What it's like to be afraid to go in the shower, and yet more afraid to go to a guard, for fear of rape.[258]

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251. *See generally* TERESA A. GODDU, SELLING ANTISLAVERY: ABOLITION AND MASS MEDIA IN ANTEBELLUM AMERICA (2020).

252. OLAUDAH EQUIANO, THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO 112 (Robert J. Allison ed., Palgrave Macmillan 2006) (1789).

253. *See* M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1219 (2020); *see also* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 500–01 (2021) ("A defendant's silence is costly to both the defendant and our understanding of the injustices perpetrated by criminal legal practices.").

254. *See* James Davis III, *Law, Prison, and Double-Double Consciousness: A Phenomenological View of the Black Prisoner's Experience*, 128 YALE L.J.F. 1126, 1131 (2019).

255. *See* Brown v. Plata, 563 U.S. 493, 502 (2011) (describing prison conditions in California resulting from overcrowding).

256. *See* David Montgomery, *In a Sweltering Texas Jail, Cool Towels but No Air-Conditioners*, N.Y. TIMES (Aug. 26, 2022), https://www.nytimes.com/2022/08/26/us/texas-prisons-heat-air-conditioning.html; Mattea Mrkusic & Daniel A. Gross, *Incarcerated People Remain Vulnerable to the Worst Ravages of a Warming World*, PBS: NOVA (Dec. 5, 2018), https://www.pbs.org/wgbh/nova/article/climate-change-mass-incarceration-prison [https://perma.cc/Q3WS-GMCP].

257. *See* Roxanna Asgarian, *Why People Are Freezing in America's Prisons*, VOX (Dec. 13, 2019, at 09:20 EST), https://www.vox.com/identities/2019/12/13/21012730/cold-prison-incarcerated-winter.

258. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1269 (2011) (describing the prevalence of male victim rape in jails and prisons); Alysia Santo, Joseph Neff & Tom Meagher, *Guards Brutally Beat Prisoners and Lied About It. They Weren't Fired.*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/19/nyregion/ny-prison-guards-brutality-fired.html.

What it's like to give birth while shackled to a hospital bed.[259] What it feels like to slowly lose one's mind.[260]

Listening to defendants can also better help us see and understand ourselves. If we listened to defendants, their voices would not only contextualize their offenses but also would prompt us to reckon with the conditions that led to their offending in the first place. For the person who stole three golf clubs and, because of three-strike laws, faced a life sentence,[261] we would have to confront addiction issues and poverty.[262] For the person who brought an AK-47 to school, we would have to confront how we dropped the ball on gun regulation and mental health issues. For the youth selling drugs to survive, we would need to address not just poverty but the reality of "survival labor."[263] For the mother who lied about her address to get her child into a better school district, we would have to confront the role white flight and local funding of schools continue to play in entrenching inequality. We would have to reckon with the fact that, as the sociologist Matthew Desmond has written, we make poverty happen; we are its beneficiaries.[264] That Justice Ketanji Brown Jackson got it right when she wrote, in *SFFA v. Harvard*, "History speaks."[265] And so on. I am hoping their voices and stories would show the flaws in the argument that we can reform our way out of our broken criminal system, that we merely need to tinker more with the machinery of justice. Their voices may even prompt us to reconsider all the ways we criminalize poverty—as in the Court's recent decision in *City of Grants Pass v. Johnson* permitting the criminalization of houselessness[266]—and all the ways we protect wealth and privilege. Listening to defendants will contribute to what Lani Guinier and Gerald Torres call "demosprudence," or action instigated by "ordinary people" to change "the people who make the law and the landscape in which that law is made."[267] This "demosprudence" might even "blacken" the rights we have, if I can tap into how Paul Gowder uses blacken as a positive.[268]

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259. *See generally* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012) (documenting the practice of shackling pregnant prisoners during labor).

260. *See* Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 370–75 (2018) (collecting studies on the crippling effects of solitary confinement).

261. This is a reference to Gary Ewing, who was sentenced to twenty-five years to life under California's three-strike law after he stole three golf clubs. Ewing v. California, 538 U.S. 11, 28 (2003). The Supreme Court upheld his sentence as not "cruel and unusual." *Id.* at 30–31.

262. As Stephen Wexler observes, living in poverty creates a likelihood of being caught in the system. It "creates an abrasive interface with society; poor people are always bumping into sharp legal things." Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970).

263. Yvette Butler, *Survival Labor*, 112 CALIF. L. REV. 403, 408–11 (2024) (making the argument that crime is labor when it is done to provide for dependents or to make ends meet and that we should see these individuals not as criminals, but as workers engaged in survival labor).

264. *See generally* MATTHEW DESMOND, POVERTY, BY AMERICA (2023).

265. Students for Fair Admissions v. Harvard, 600 U.S. 181, 393 (2023) (Jackson, J., dissenting).

266. 603 U.S. 520, 560 (2024).

267. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–50 (2014).

268. Paul Gowder, Constitutional Democracy for Time Travelers: An Critical Race Afrofuturist Reading of the American Project 1–2 (arguing that "the democratic way to do constitutional

As should be obvious by now, all of this could get us closer to a different kind of criminal system, one where offenders are held to account but where there are fewer prisons. In short, all of this can get us closer to what Amna Akbar calls an abolitionist horizon.[269] But another argument runs alongside this abolitionist one, and perhaps even supersedes it. That argument is this: Maybe, if we listen to defendants, we will cease to see them as "others" and start to see them as "us." In listening—and seeing—them, we will also see ourselves. Listening to defendants can help get past the things that we imagine divide us, like race, and might even help us eventually undo race. And maybe, just maybe, spur us to let race go.

CONCLUSION

On October 29, 1969, something extraordinary happened. During the trial of the Chicago 8 for violating and conspiring to violate the Federal Anti-Riot Statute—essentially for organizing protests at the 1968 Democratic Convention[270]—the trial judge ordered one of the defendants to be "bound and gagged."[271] In the words of the Seventh Circuit Court of Appeals reviewing the trial court's decision, this was done merely "to maintain courtroom decorum."[272] The object of this need for decorum was Bobby Seale, the co-founder and national chair of the Black Panther Party, and the only Black defendant among the Chicago 8. This is how Seale later described it.

> They took me back to the lock-up right outside the courtroom. They got some tape and put it across my mouth. They handcuffed my hands down close to the legs of a metal folding chair and put the irons on my legs. They looped the chain through one of the rods running across the front of the folding part of the chair and brought it out and clasped it to my right leg.[273]

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interpretation—the only way to do so consistent with the claim that we are actually ruling ourselves—is to integrate the claims and the demands and the interests of the long Black liberation movement into our constitutional doctrine" and in doing so "Blacken" the constitution to make it more democratic) (accepted book proposal, on file with author); *see also* Paul Gowder, *Constitutional Sankofa*, 112 GEO. L.J. 1437, 1440 (2024) (arguing for a "constitutional Sankofa," a Black-centric "interpretation of the constitutional past," "rooted in the insights of critical race theory").

269. Akbar, *supra* note 246, at 1787 (describing an abolitionist horizon as "reimagin[ing] and redirect[ing] reform toward the political, economic, and social transformations necessary to confront the enduring realities of police violence").

270. The trial started off with eight defendants. *See* United States v. Seale, 461 F.2d 345, 349 (7th Cir. 1972). The other seven defendants were Rennie Davis and David Dellinger of the National Mobilization Committee to End the war in Vietnam, Abbie Hoffman and Jerry Rubin of the Youth International Party, Tom Hayden of the Students for a Democratic Society, and John Froines and Lee Weiner, two additional activists. *"Chicago Eight" Plead Not Guilty to Federal Conspiracy Charges*, HISTORY (May 28, 2025), https://www.history.com/this-day-in-history/april-9/chicago-eight-plead-not-guilty [https://perma.cc/5WRL-Q2RC]. However, after the sole Black defendant, Bobby Seale, was severed from the case six weeks into the trial, the case became known as that of the Chicago Seven. For more on the Chicago Seven case, see JOHN SCHULTZ, THE CHICAGO CONSPIRACY TRIAL (Univ. of Chi. Press 2009) (1970); CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO SEVEN (Jon Weiner ed., 2006); JUDY CLAVIR & JOHN SPITZER, THE CONSPIRACY TRIAL (1970).

271. *Seale*, 461 F.2d. at 350.

272. *Id.*

273. BOBBY SEALE, SEIZE THE TIME: THE STORY OF THE BLACK PANTHER PARTY AND HUEY P. NEWTON 337 (1970).

For several days Seale remained bound and gagged in front of the jury, and though I am not aware of any record of what they thought of this point, I cannot help but wonder if seeing Seale at defense table conjured images of all the other Black men and women who had been bound and gagged throughout history,[274] or of the iron-bits that were placed in the mouths of enslaved people to discipline them,[275] as in Toni Morrison's *Beloved*,[276] as if time had collapsed, as if this, too, was part of the "afterlife of slavery."[277] On November 3, the trial judge finally ordered the restraints removed, and two days after *sua sponte* declared a mistrial as to Seale and severed his trial from that of his co-defendants,[278] making the Chicago 8 the Chicago 7.[279] Even then, Judge Hoffman was not yet done with Bobby Seale. He announced he was finding Seale guilty of sixteen counts of contempt and sentenced him to three months on each count, in short, a total of four years' imprisonment.[280] None of this—ordering Seale bound and gagged and then sentencing him to four years' imprisonment for contempt of court—was for the crime for which Seale was being prosecuted, at least not directly. For that, after all, he was innocent until proven guilty. Instead, it was about Bobby Seale's in court "crimes": his repeated attempts to speak.[281] The trial judge had earlier

274. At one point, the marshals even tried to put something in Seale's mouth to prevent him from speaking in court. Seale refused to cooperate. *Id*. at 342–45. Had the marshals been successful, the result would have conjured a tableau vivant from slavery. One of the most poignant images of the use of a muzzle to punish and silence an enslaved person comes from the narrative of Olaudah Equiano:

> I had seen a black woman slave as I came through the house, who was cooking the dinner, and the poor creature was cruelly loaded with various kinds of iron machines; she had one particularly on her head, which locked her mouth so fast that she could scarcely speak; and could not eat nor drink. I was much astonished and shocked at this contrivance, which I afterwards learned was called the iron muzzle.

EQUIANO, supra note 252, at 112; *see also* JOHN WOOD, INJURED HUMANITY; BEING A REPRESENTATION OF WHAT THE UNHAPPY CHILDREN OF AFRICA ENDURE FROM THOSE WHO CALL THEMSELVES CHRISTIANS (1805) (describing the horrific experiences of enslaved individuals).

275. An image of such an iron-bit can be found here: *Slave with Iron Muzzle*, PBS, https://www.pbs.org/wgbh/aia/part1/1h308b.html [https://perma.cc/ZY3Q-DF99] (last visited Mar. 10, 2026).

276. In *Beloved*, the character Paul D. is so traumatized by the experience that he has difficulty telling Sethe about it, though she senses he wants to tell her:

> He wants to tell me, she thought. He wants me to ask him about what it was like for him—about how offended the tongue is, held down by iron, how the need to spit is so deep you cry for it. She already knew about it, had seen it time after time in the place before Sweet Home. Men, boys, little girls, women. The wildness that shot up into the eye the moment the lips were yanked back. Days after it was taken out, goose fat was rubbed on the corners of the mouth but nothing to soothe the tongue or take the wildness out of the eye.

TONI MORRISON, BELOVED 71 (1987). For more on the use of the iron-bit in *Beloved*, see generally Irena Popescu, *Biting Iron, Forever Smiling: The Iron-Bit, the Wounded Mouth, and Un-Silencing in Toni Morrison's* Beloved, *in* THE TIMELESS TONI MORRISON (Agnieszka Łobodziec & Blossom N. Fondo eds., 2017).

277. SAIDIYA HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE 6 (2007).

278. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972).

279. SEALE, *supra* note 273, at 349.

280. *See id.*; *Seale*, 461 F.2d at 350.

281. *See* SEALE, *supra* note 273, at 349.

refused to grant a continuance of trial while Seale's attorney underwent a gall-bladder operation.[282] As a result, Seale repeatedly attempted to represent himself. He tried to make his own opening statement.[283] He tried to question witnesses and argue points of law.[284] The judge rebuffed these attempts.[285] It was not lost on Seale that the lawyers for the other defendants—the defense lawyers included such heavyweights as Michael Tigar and William Kunstler[286]—were permitted to speak, that the prosecuting attorney was allowed to speak, but he was expected to remain mute: "I get up to argue, and he gets up to argue, too, and that is where the disrupting was."[287] Nor were the racial dynamics lost upon Seale. "You think black people don't have a mind," he told the judge. "Well, we got big minds, good minds, and we know how to come forth with constitutional rights . . . ."[288] Joining a long tradition of Blacks claiming the rights spelled out in the Constitution,[289] Seale continued to assert his right to speak, demanding of the judge, essentially, "Do I have a right or do I not have a right to stand up and make requests and motions and speak in behalf of myself on those requests and motions?"[290] For his part, the judge continued to order him to remain

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282. *Id.* at 324–27; *Seale*, 461 F.2d at 349–50.

283. *Seale*, 461 F.2d at 350; SEALE, *supra* note 273, at 327. Seale's description of his attempt to make his own opening statement speaks volumes.

> I got up from my chair and walked to the podium. I was just getting ready to reply to what [the prosecutor] had said about how he would prove that I was guilty and that I had made a speech telling people to get pistols, rifles, and shotguns, and then told them to riot. What I really said [during the speech the prosecutor was referring to was]—and we have a transcript of the speech—was that every black man should put a .357 Magnum pistol, a shotgun, and an M-1 rifle in his home. . . . [W]e have a right to defend ourselves against unjust attacks by pigs . . . . That's what I was going to say at first, and move on from there.
>
> But all I said was, "Mr. Schultz . . . ." At that point, Hoffman said, "Just a minute, young man," and peered down at me. I looked up at him. "Who is your lawyer?" . . . . Hoffman said something to the effect that he didn't want to listen to me, that I would not be allowed to make an opening statement because Kunstler was my lawyer.

Id. at 327–28.

284. *Id.* at 347–48.

285. *Id.*

286. *Seale*, 461 F.2d at 349. Kunstler enjoyed the distinction of being "the most hated lawyer in America." *See generally* DAVID J. LANGUM, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA (1999).

287. CLAVIR & SPITZER, *supra* note 270, at 180 (quoting Bobby Seale at the trial).

288. *Id.* at 143 (quoting Bobby Seale at the trial). Although often cast as lawbreakers, the Black Panthers were also demanders of equal citizenship and rights asserters. *See generally* JOSHUA BLOOM & WALDO E. MARTIN, JR., BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY (2013). This included their assertion of Second Amendment rights. *See, e.g.*, Alicia L. Granse, *Gun Control and the Color of Law*, 37 LAW & INEQ. 387, 392–93 (2019). As Seale wrote in his autobiography, "We just carried the guns in the open at that time to show the people that it was legal to carry these guns. . . . It's perfectly legal for a person to arm himself, and have a shotgun." SEALE, *supra* note 273, at 316–17. With respect to his own trial, Seale repeatedly asserted his Sixth Amendment right to choose his own attorney, *id.* at 326, 328–29, and his "right to speak out in behalf of myself." *Id.* at 334. He invoked the Eighth Amendment's cruel and unusual punishment clause to contest his treatment. *Id.* at 346–47.

289. *See* Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1761 (1997).

290. SEALE, *supra* note 273, at 334.

silent.[291] Eventually, the judge had had enough and directed the marshals to "[t]ake that defendant into the room in there and deal with him as he should be dealt with."[292] In short, the judge ordered him shackled and gagged.[293] The judge silenced him.

In a sense, all of this was extraordinary.[294] There was the publicity of the trial. The stark image of the co-founder of the Black Panther Party being bound and gagged. As one commentator noted, the "image of Seale's gagged face cast a rather long shadow. Journalistic accounts were widely published, courtroom sketches were broadcast on television, and political cartoons were printed in newspapers."[295] The trial judge's actions became lines in Graham Nash's song "Chicago" and in Gil Scott-Heron's song "H_2Ogate Blues."[296] And there have been numerous film versions depicting the arresting image of Seale being chained and gagged, most recently 93rd Academy Awards Best Picture nominee[297] *The Trial of the Chicago 7*.[298]

But in another sense, the silencing of a criminal defendant was not extraordinary at all. Every day, thousands of times a day, defendants are encouraged, lulled, tricked, and coerced into silence: by *Miranda*'s ominous warning that anything they say "can and will be used against them in a court of law," by warnings from defense attorneys and judges "to shut it and keep it shut," by evidentiary rules and sentencing enhancements that too often operate as landmines whenever a defendant tries to speak, by the roadblocks we erect to discourage defendants from representing themselves, and by the roadblocks that continue on to sentencing, parole hearings, and beyond.

The goal of this Article has been to call attention to what is too often taken for granted, what has been so normalized that, for many, it passes by unnoticed: a silencing of defendants that is so complete, so thorough, that the typical juror will never once hear a defendant's voice. The goal has been to show that none of this is pre-ordained and that this silencing has its own racial history and effects, such that it makes sense to think of silencing as blackening. And the goal has been to imagine something different, a different system that benefits defendants, victims, and the rest of us too, one that might even prompt us to rethink our criminal

291. *Id.* at 336 (noting that the judge continued to deny him the right to defend himself.).

292. CLAVIR & SPITZER, *supra* note 270, at 162.

293. United States v. Seale, 461 F.2d 345, 350 (7th Cir. 1972).

294. Although Seale's gagging was unique, the literal gagging of defendants continues to happen, including recently in Ohio. *See* Kaelyn Forde, *Judge Apologizes for Taping Defendant's Mouth Shut, Says He 'Exhausted Every Other Attempt to Restore Order'*, ABC NEWS (Apr. 7, 2018, at 18:59 ET), https://abcnews.go.com/US/judge-apologizes-taping-defendants-mouth-shut-exhausted-attempt/story?id=57081658 [https://perma.cc/R92G-SA8Y].

295. Greg Burris, *Prometheus in Chicago: Film Portrayals of the Chaining and Gagging of Bobby Seale and the "Real-lization" of Resistance,"* 54 CINEMA J. 26, 28 (2015).

296. *Id.* at 28 & n.11 (citing GRAHAM NASH, *Chicago*, *on* SONGS FOR BEGINNERS (1971) ("So your brother's bound and gagged, and they've chained him to a chair, won't you please come to Chicago just to sing?") and GIL SCOTT-HERON, *H_2Ogate Blues*, *on* WINTER IN AMERICA (Strata-East Records 1974)).

297. *The 93rd Academy Awards | 2021*, OSCARS, https://www.oscars.org/oscars/ceremonies/2021 [https://perma.cc/8JXN-HCUK] (last visited Mar. 10, 2026).

298. THE TRIAL OF THE CHICAGO 7 (Netflix 2020).

system and one that might move us closer to a society without prisons, or at least far fewer prisons.

All along, what has motivated this project is the hope that by listening to defendants, we will see them not as monsters, or as mute bodies, or as subalterns, or as "others," but as us, which can get us closer to undoing race. But even as I write this, I realize I have another ambition in mind. That not only will we see defendants as us. But that we will see that we too need to change. And maybe that is the real ambition: that in listening to defendants, we will be transformed.