

# SUBSTANTIVE AND PROCEDURAL SILENCE

ERIN SHELEY\*

INTRODUCTION.....	448
I. THE EFFECTS OF SILENCE ON THE WORLD.....	450
A. <i>Silence and the Mind</i> .....	451
B. <i>Silence and Cultural Narrative</i> .....	457
C. <i>Concluding Observations</i> .....	463
II. PROCEDURAL SILENCE.....	463
A. <i>Defendants</i> .....	464
1. Pre-Trial Silence and Confession.....	467
2. Silence at Trial.....	471
3. Conclusions.....	475
B. <i>Victims</i> .....	476
1. The Guilt Phase: “Victimless” Prosecutions.....	476
2. Victim Speech and Silence at Sentencing.....	480
3. Conclusions.....	485
III. SUBSTANTIVE SILENCE.....	486
A. <i>Victims</i> .....	486
1. Victim Silence as an Element of Offense Definition: Sexual Assault.....	487
2. Victim Silence as an Aspect of Culpability and Punishment.....	493
3. Conclusions.....	495
B. <i>Defendants</i> .....	496
1. Nolo Contendere and Alford Pleas.....	496
2. Deferred Prosecution Agreements.....	500
3. Conclusions.....	505
C. <i>Procedural Silence</i> .....	505
D. <i>Substantive Silence</i> .....	507
CONCLUSION.....	508

## ABSTRACT

*Empirical work shows that perceptions of the procedural fairness of the criminal justice system turns on whether it gives individuals and communities a “voice,” or a forum in which to tell their stories. If the system imposes unwanted silence on a party its legitimacy in the eyes of the public decreases. Despite the extensive literature on the many specific applications of silence in the justice system, no attempt has yet been made to break down the relationship between the victim’s*

*silence and the defendant's across the disparate doctrines of criminal law, or the importance of these interconnections to the expressive purposes of punishment, particularly in a world where punishment so frequently turns on the outcome of plea negotiations. Such an effort requires us to recognize a distinction between procedural silence, which is grounded in the individual rights of each party, and what should be understood as substantive silence, which can form part of both the definition of criminal conduct on the front end and, on the back end, of the judgment and sentence in a particular case. This article has two purposes. One, it provides the first full taxonomy of the role of silence in the criminal law and identifies the key interactions between procedural and substantive silence. And, two, it offers normative suggestions—particularly to prosecutors—for managing silence in a way that will better achieve justice in light of the cumulative relationship between substance and procedure.*

## INTRODUCTION

It is common knowledge that the plea bargain has come to drive the vast majority of criminal punishment.<sup>1</sup> Commentators observe that when attorney negotiations replace the jury they jeopardize an important community function.<sup>2</sup> This is because the community contributes to the expressive message of the criminal justice system primarily through assigning punishment.<sup>3</sup> Therefore, in the world without juries—95% of the current universe of prosecutions<sup>4</sup>—the public remains silent in the determination of culpability. The dominance of the plea bargain thus solidifies certain forms of silence in the expressive output of the justice system. Furthermore, the current universe of procedural rules encourages, at various points in the process, the formal silence of both the criminal defendant and the victim.

From psychology we know the general dangers of silence in the criminal justice system—that people's perceptions of the procedural fairness of the system turns on whether it gives them a "voice," or a

---

\* Assistant Professor, University of Calgary Faculty of Law.

1. See generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (stating that individuals accused of a crime in the American criminal justice system will almost never go through a jury trial).

2. Laura Appleman, *The Plea Jury*, 85 *IND. L.J.* 731, 737 (2010) (advocating creating a jury mechanism in the plea process).

3. *Id.*

4. *Id.* at 732.

forum in which to tell their story.<sup>5</sup> If the system imposes unwanted silence on a party its legitimacy in the eyes of the public decreases. But that silence can take many forms, and there is a separate legal literature on each. For example, Fifth Amendment jurisprudence has generated an ongoing controversy as to whether the “right to remain silent” provides a meaningful check on involuntary confessions,<sup>6</sup> and on whether that right is over-protected at trial.<sup>7</sup> On the question of *nolo contendere* pleas, scholars debate whether a defendant’s silence runs counter to the retributive and restorative purposes of punishment or if it is a justifiable third option for defendants, necessary in light of the coerciveness of the plea negotiation.<sup>8</sup> The Supreme Court’s recent Sixth Amendment holdings, which make it now difficult to introduce the out-of-court statements of domestic violence victims, illuminate an existing conflict as to whether the system hurts or helps such victims when it allows them to be silent at trial.<sup>9</sup> Furthermore, many scholars believe that a victim’s silence during the sentencing process is necessary to protect the due process rights of the defendant.<sup>10</sup>

Despite these many live debates around specific applications of silence, no attempt has yet been made to break down the relationship between the victim’s silence and the defendant’s across the disparate doctrines of criminal law, or the importance of these interconnections to the expressive purposes of punishment,

---

5. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163–65 (2006).

6. See, e.g. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 283 (1996); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 737 (1992); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 980 (2001); Charles Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1523 (2008).

7. See, e.g., R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 16 (1981); Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O’Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 560 (1996); Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1328 (2009).

8. Compare Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363–64 (2003) with Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1423 (2003).

9. See, e.g., Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 3 (2009); Tom Lininger, *Prosecuting Batters After Crawford*, 91 VA. L. REV. 747, 749–50 (2005).

10. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365–66 (1996); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1435 (1993); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1840 (2005).

particularly in a world where punishment so frequently turns on the outcome of plea negotiations.<sup>11</sup> Such an effort requires us to recognize a distinction between procedural silence, which is grounded in the individual rights of each party, and what should be understood as *substantive* silence, which can form part of both the definition of criminal conduct on the front end and, on the back end, of the judgment and sentence in a particular case. Under U.S. law, procedural silence relates to the relationship between the accused and the state. Substantive silence, insofar as it defines what (or who) *is* criminal, implicates the relationship between the public and the criminal justice system as a whole.

This article has two purposes. One, it provides the first full taxonomy of the role of silence in the criminal law and identifies the key interactions between procedural and substantive silence. And, two, it offers normative suggestions—particularly to prosecutors—for managing silence in a way that will better achieve justice in light of the cumulative relationship between substance and procedure. Part I analyzes the literature on the general psychological and cultural effects of silence to highlight the significant ways in which they might affect criminal adjudication. Part II identifies the aspects of criminal procedure driven by the silence of either the defendant or the victim and comments on the debates these issues have generated. Part III presents the distinct concept of substantive silence as silence arising in the expressive output of the criminal justice system, through either the definition of a crime or the judgment and sentence resolving a specific indictment. Part IV argues that the interaction between substantive and procedural silence creates problems for the fair administration of criminal justice and makes suggestions for how we might address them, with specific suggestions to prosecutors as they make the choices that drive plea outcomes. Part V concludes.

## I. THE EFFECTS OF SILENCE ON THE WORLD

This Part provides a brief overview of the existing literature on silence, specifically its effects, both psychological and cultural, on

---

11. The most comprehensive focused treatment of silence in the legal literature is Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 6 (1995). Tiersma looks at the legal significance of silence across all areas of public and private law and develops a distinction between communicative silence and inferences drawn from silence. He concludes that “[i]f silence is to communicate, meaning must be ascribed to it in fairly specific ways” and cautions that making inferences from silence is inherently dangerous. *Id.* at 99.

individuals as well as societies. While I remark upon the specific power of these effects in the criminal justice context, I defer deeper analysis of their application to specific problems of procedural and substantive criminal law until Parts II and III. In this Part, I discuss, first, the evidence of the psychological effects of silence, with a special emphasis on the phenomenon of collective memory and forgetting. Next, I consider the narrative effects of silence in cultural discourse, particularly as relates to the expressive function of criminal law.

### *A. Silence and the Mind*

A wrong-doer's silence about her conduct can be the product of denial, a well-known psychological defense mechanism.<sup>12</sup> Denial involves "cognitive distortion, the unwillingness of the conscious mind to recognize an aspect of reality for the sake of emotional protection."<sup>13</sup> It is related to other intrapsychic "defense mechanisms such as repression, suppression, and rationalization."<sup>14</sup> Denial as to one's own culpability is common among criminal defendants, and particularly among sex offenders.<sup>15</sup> It may have positive benefits for an individual insofar as it "limits anxiety[,] . . . maintains self-esteem and a sense of self-control," and acts as a buffer against shocking news.<sup>16</sup> Nonetheless, a number of legal scholars, particularly those with restorative justice goals, advocate

12. See, e.g., EVIATAR ZERUBAVEL, *THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE* 5 (2007).

13. Jeffrey R. Cohen, *The Immortality of Denial*, 79 TUL. L. REV. 903, 911 (2005).

14. *Id.* For case studies on denial across a range of individual and group contexts see generally SANDRA BUTLER, *THE CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST* (1996); STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001); JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1997); JEFFREY K. OLICK, *THE POLITICS OF REGRET: ON COLLECTIVE MEMORY AND POLITICAL RESPONSIBILITY* (2007).

15. See, e.g., BARRY M. MALTEZKY & KEVIN B. MCGOVERN, *TREATING THE SEXUAL OFFENDER* 27, 164–65, 253–55 (1991); ANNA C. SALTER, *TREATING SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE* 97 (1988); Howard E. Barbaree, *Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome*, 4 F. ON CORR. RES., 3, 30 (1991).

16. See MALTEZKY & MCGOVERN, *supra* note 15, at 164–65; SALTER, *supra* note 13, at 97; Barbaree, *supra* note 15, at 30. (citing Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 327, 331 (Dennis P. Stolle et al. eds., 2000).

that criminal defendants take responsibility for their actions due, in part, to the psychological benefits of avoiding denial. According to this theory, a defendant who avoids denial may potentially have a better chance at reintegrating into society.

Evidence also suggests that a wrongdoer's state of denial may complicate his victim's process of recovering from the trauma of his actions. From her work with domestic violence victims, psychologist Judith Herman has identified, as the second stage of recovery, the process of remembrance of a traumatic act, which suggests that the defendant's confession might facilitate in victim recovery.<sup>17</sup> Legal scholars have therefore argued that "on both a therapeutic and a symbolic level, a [defendant's] public admission can serve as a vindication for the victim, which can aid in her recovery."<sup>18</sup>

While psychologists consider denial to be an internal process of the mind, it should be noted that even business organizations, when faced with evidence of their own corporate wrongdoing, have been observed to demonstrate symptoms of denial, which tend to impose externalities on the world around them.<sup>19</sup> For example, one study finds that a corporation that has caused an oil spill needs, "like an individual," to "dose the pain it experiences, in order to survive from a blow" through psychological defense mechanisms.<sup>20</sup> This study suggests that for a corporation, as for a person, "denial gives time to comprehend what has happened, intellectualization makes the incident look logical, projection eases the guilty feelings and

---

17. JUDITH HERMAN, *TRAUMA AND RECOVERY* 175 (1992); *see also* C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Domestic Partner Violence*, 35 HARV. J. & GENDER 311, 322 (2012).

18. Hopkins, *supra* note 17, at 326; *see also* William O'Donohue & Elizabeth Letourneau, *A Brief Group Treatment for the Modification of Denial in Child Sexual Abusers: Outcome and Follow-Up*, 17 CHILD ABUSE & NEGLECT, 299, 299–300 (1993); Carrie J. Pertrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 BEHAV. SCI. & L. 337, 351–52 (2002).

19. *See, e.g.*, R. DE BOARD, *THE PSYCHODYNAMICS OF ORGANIZATIONS* (1978); Andrew D. Brown & Ken Starkey, *Organizational Identity and Learning: A Psychodynamic Perspective*, 25 ACAD. MGMT. REV. 102, 102 (2000); Andrew D. Brown, *Narcissism Identity and Legitimacy*, 22 ACAD. MGMT. REV. 643, 643 (1997) (finding that the "self esteem" of organizations is regulated through such ego defenses); Stephen Fineman, *Emotional Subtexts in Corporate Greening*, 17 ORG. STUD. 479, 480 (1996); Larry Hirschhorn & Donald R. Young, *Dealing with the Anxiety of Working: Social Defenses as Coping Strategy*, in *ORGANIZATIONS ON THE COUCH: CLINICAL PERSPECTIVES ON ORGANIZATIONAL BEHAVIOR AND CHANGE* 215, 215–16 (Manfred F. R. Kets de Vries et al. ed., 1991).

20. Tarja Ketola, *Corporate Psychological Defenses: An Oil Spill Case*, 65 J. BUS. ETHICS 149, 149 (2006).

rationalization provides justifications” and that these defense mechanisms “soothe the pain until the organi[z]ation is mentally ready to sublimate its wrongdoing through compensation.”<sup>21</sup> Both the corporate and individual examples suggest that, whatever the effects of denial on a wrongdoer, it can certainly impose harm on the rest of the world to the extent that it delays or prevents amelioration or, potentially, psychological recovery.

Psychologists frequently speak of silence as a symptom of intrapsychic denial, to the extent that a subject does not speak of whatever fact he is denying.<sup>22</sup> But silence also has active psychological impacts of its own, on both the speaker and listener. The failure to express a memory is known as “mnemonic silence.”<sup>23</sup> Such silence is public in nature as it assumes a listener and thus it is embedded in communicative acts.<sup>24</sup> (Imagine a defendant expressing a plea of *nolo contendere* and thereby avoiding allocation to specific facts—this plea would be communicative insofar as it expresses consent to a judgment and yet it contains a mnemonic silence as to the underlying conduct.) We must understand these concepts in order to understand the potential psychological effects of a party’s silence in an inherently communicative ritual such as a criminal trial and/or sentencing procedure.

First, silence may cause the speaker to forget the omitted material; specifically, *intentional* silence on the part of a speaker “may elicit greater forgetting than unintended silence.”<sup>25</sup> Thus, when an individual defendant refuses to speak about all or part of an offense, he may contribute to his own forgetting it, but generally only if he is also refusing to recollect it internally—or “covertly.”<sup>26</sup> The observed effect is the opposite if the silent party covertly remembers the event—as in the classic case of deception.<sup>27</sup> When a speaker covertly remembers a silenced memory she may actually reinforce her existing memories.<sup>28</sup>

---

21. *Id.*

22. *See generally* ZERUBAVEL, *supra* note 12, at 33–46 (discussing silence and its relation to denial).

23. Charles B. Stone et al., *Toward a Science of Silence: The Consequences of Leaving a Memory Unsaid*, 7 *PERSP. ON PSYCHOL. SCI.* 39, 39 (2012).

24. *Id.* at 40.

25. *Id.* at 48.

26. *Id.*

27. *See* SISSELA BOK, *LYING* (1978). *See generally* SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1999) (discussing the justifications and consequences of different kinds of deception and public and private morality).

28. Stone et al., *supra* note 23, at 48.

More importantly for the purposes of this paper, one person's silence affects not only himself but also his listener. Over the past decade or so, psychologists have identified a phenomenon known as "retrieval-induced forgetting" (RIF).<sup>29</sup> RIF is the tendency of a speaker's selective recounting of memories shared with a listener to induce both the speaker and the listener to forget unmentioned, related material.<sup>30</sup> To use an example from the literature, in a situation in which a speaker expresses (or "overtly remembers") where she was when she woke up on September 11, 2001, but not where she was when she learned of the terrorist attack, she and her listener should *both* subsequently have more trouble remembering where they were when they learned of the attack than they would if the conversation had never taken place at all.<sup>31</sup>

This phenomenon of listener forgetting has a particularly significant application in the setting of criminal procedure because it can also take place on a societal level. At this level it interacts with a phenomenon known as "collective memory," the memory of a group of people that can be passed from one generation to the next. Needless to say, this effect has wide-ranging social and cultural implications. Research on collective memory has shown how shared individual memories can bear on the identity of a community.<sup>32</sup> As Jeffrey Olick puts it, once "memory of . . . personally traumatic experiences is externalized . . . as narrative . . . it is no longer a purely individual psychological [trauma]" and therefore, for example, the trauma of what happened to Jews in concentration camps "will not disappear with the death of the last survivor . . . Auschwitz remains a trauma for the narratives of modernity and morality, among others."<sup>33</sup>

---

29. See generally Alexandru Cuc, David Manier & William Hirst, *Silence is Not Golden: A Case for Socially Shared Retrieval-Induced Forgetting*, 18 PSYCHOL. SCI. 727 (2007).

30. Alin Coman, et al., *Forgetting the Unforgettable Through Conversation*, 20 PSYCHOL. SCI. 627, 627 (2009). This effect on the speaker is known as "within individual" RIF (WI-RIF). When it is the listener forgetting it is known as "socially shared RIF" (SS-RIF). Charles B. Stone et al., *Building Consensus About the Past: Schema Consistency and Convergence in Socially Shared Retrieval-Induced Forgetting*, 18 MEMORY 170, 170 (2010).

31. Stone et al., *supra* note 23, at 29

32. David Manier & William Hirst, *A Cognitive Taxonomy of Collective Memories*, in CULTURAL MEMORY STUDIES 253, 253 (Astrid Erll & Ansgar Nünning eds., 2008).

33. Jeffrey Olick, *Collective Memory: The Two Cultures*, 17 SOC. THEORY 333, 345 (1999).

Sometimes societies form collective memory through shared access to permanent artifacts such as memorials and commemorations.<sup>34</sup> A particularly striking example of this effect is the extent to which World War II movies have subsumed the stories of individual soldiers into a “general script,” which some soldiers have subsequently internalized as personal memory.<sup>35</sup> Collective memory can also be formed through conversation, such as the shared memory formed by Lithuanians of Lithuanian descent around historical events left out of the Russian textbooks they would have studied at school.<sup>36</sup> Public events, such as a criminal prosecution, provide content for the formation of such collective memories, with their accompanying impact on cultural identity. And silence can affect the content of collective memory. Specifically, empirical scholarship has demonstrated the importance of collective *forgetting* to the formation of collective memory.<sup>37</sup> Recent work suggests the RIF consequences of silence are not confined to the interaction between individual speakers and listeners, but can “propagate through a network of individuals, thereby underscoring their role in the formation of a collective memory not just for conversing pairs but for whole communities.”<sup>38</sup> Researchers have found silence to have the same effect in the collective context as in the individual. For example, participants in one study who were asked to recall a story they had been shown at the outset collectively forgot the same elements that were omitted by a speaker who retold it.<sup>39</sup>

---

34. See generally JEFFREY OLICK, *THE POLITICS OF REGRET: ON COLLECTIVE MEMORY AND POLITICAL RESPONSIBILITY* 7 (2007) (looking at how catastrophic pasts, such as Nazi Germany and apartheid South Africa, are remembered, and arguing that the cultural process of commemoration shapes the dialogic process through which individuals remember the past); MARITA STURKEN, *TANGLED MEMORIES: THE VIETNAM WAR, THE AIDS EPIDEMIC, AND THE POLITICS OF REMEMBERING* (1997) (arguing that the Vietnam War and the AIDS epidemic have disrupted conventional American notions of community and culture and examining the relationship of camera images to the production of cultural memory and how discourses of healing can smooth over the tensions of political events).

35. STURKEN, *supra* note 34, at 6.

36. H.S. Schumann C Rieger, & V. Gaidys, *Collective Memories in the United States and Lithuania*, in *AUTOBIOGRAPHICAL MEMORY AND THE VALIDITY OF RETROSPECTIVE REPORTS*, 313, 316 (Norbert Schwarz & Seymour Sudman, eds., 1994).

37. See William Hirst & David Manier, *Towards a Psychology of Collective Memory*, 16 *MEMORY* 183, 193 (2008); Stone et al., *supra* note 23, 170–84.

38. Stone et al., *supra* note 29, at 48 (citing Alan Coman & William Hirst, *The Propagation of Socially Shared Retrieval Induced Forgetting in Social Networks*, *J. EXPERIMENTAL PSYCH.* (2011)).

39. Stone et al., *supra* note 23, at 180–81.

Thus, they formed a collective memory of the story without those portions. The authors of this study therefore posit that, through the mechanism of SS-RIF, silence can cause “collective amnesia.”<sup>40</sup> Another study, which considered the commemoration of the death of Israeli Prime Minister Yitzhak Rabin, found that overt silences can also give rise to social conflict as various collectives object to attempts to erase the past.<sup>41</sup>

A criminal trial cannot be described, exactly, as either a static cultural artifact such as a memorial or as a simple conversation of the sort under consideration in most of the empirical research on RIF. Rather, it straddles the space between them. On the one hand, a trial explicitly seeks to form the official truth of the matter in question. A trial aspires to normativity. Court records, sentencing opinions, transcripts, court television feeds and, perhaps most importantly, the verdict itself are public monuments to a newly created legal truth: one that says “guilty” or “not guilty.” Indeed, principles of social order depend on collective acceptance of these truths.

But a trial is also, at base, a series of conversations. While the general public will often hear much more about a case than what the actual transcripts contain, many times—particularly in less noteworthy cases—the official record will be all that is quoted in the media.<sup>42</sup> And, of course, in-court observers have the opportunity to listen directly. The greater complexity of a trial as compared to an actual conversation makes it problematic to extrapolate with confidence about the precise RIF effects of a defendant’s or a victim’s silence before a court proceeding. Yet the strong empirical support for SS-RIF urges us to consider the potential effects of silence—either the defendant’s, the victim’s, or another witness’—on a society’s collective memory of a particular crime. As does the shared quality to the affirmative legal narrative generated by the existence of a judgment in the first place. That which is left out of the official account risks omission from the collective memory, unless reiterated elsewhere (as was perhaps most

---

40. *Id.* at 171.

41. Vered Vinitzky-Serrousi & Chana Teeger, *Unpacking the Unspoken: Silence in Collective Memory and Forgetting*, 88 SOC. FORCES 1103, 1106–07, 1117 (2010); see also Jane L. Curry, *When an Authoritarian State Victimizes the Nation: Transitional Justice, Collective Memory, and Political Divides*, 37 INT’L J. SOC. 58, 58 (2007) (finding that in post-authoritarian Poland, the initial silence about state oppression “turned the past into a political football that soured the citizenry on political participation”).

42. See YVONNE JEWKES, *MEDIA AND CRIME* 35–62 (3d ed., 2015).

famously the case with the highly prominent counter-narrative to the O.J. Simpson verdict).<sup>43</sup> And, indeed, when the official and collective narratives conflict, as in the case of the Rabin commemorations, this can result in social unrest. We already know that when the legal system fails to represent, in the relative punishments it assigns for various offenses, socially shared norms about relative culpability, overall lawlessness increases.<sup>44</sup> The next section will consider the discursive (or “narrative-creating”) function of a criminal proceeding and the potential effects of silence on the particular systemic narratives that emerge from it.

### ***B. Silence and Cultural Narrative***

The criminal justice process contributes to the development of social or cultural meaning by sending messages about what conduct is illicit and what individuals should be excluded from society.<sup>45</sup> The law’s capacity for creating cultural narratives has been one of the reasons for the study of law “as literature,” or what has been referred to as the “law-as-narrative trope.”<sup>46</sup> When the legislature

43. See Angela Oswald, *If I Did It: How O.J. Simpson Says He Would’ve Murdered Nicole Brown and Ron Goldman*, BUSINESS INSIDER (Feb. 5, 2016), at <http://www.businessinsider.com/if-i-did-it-how-oj-simpson-2016-2>.

44. See Paul H. Robinson & John M. Darley, *Institutions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 11, 13 (2008).

45. See ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW 103 (1995); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendant*, 80 N.Y.U. L. REV. 1449, 1452–54 (2005).

46. Guyora Binder, *The Law-as-Literature Trope*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 72, 72–73 (Michael Freeman & Andrew D.E. Lewis eds., 1999) (arguing that law can be described as a story as it presents “one subjective rendering among many”); see also Ronald Dworkin, *How Law is Like Literature*, in LAW AND LITERATURE: TEXT AND THEORY 29 (Lenora Ledwon ed., 1996) (arguing that comparing legal interpretation to literary interpretation helps us understand legal interpretation as political, but distinct from personal politics); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 551–52 (1982) (critiquing Dworkin’s position that the meaning of texts can be construed without inquiring into the intentionality of the author); Bruce Lockwood, *On Doing Law and Literature*, in LAW AND LITERATURE PERSPECTIVES 1, 19 (Bruce Lockwood ed., 1996) (arguing that “by knocking the flint of literature against the steel of law, we can make some sparks that will illuminate our way to the future” in a “rapidly changing modern, or postmodern, world”); Michael Walter, *Literary Theories of Crime*, in 2 IMAGES OF CRIME 247–55 (HansJörg Albrecht & Telemach Serassis eds., 2004) (arguing that, despite the fact that they may not always be true, “lay theories of criminality” influence everyday actions and, thus, “our current theoretical understanding of criminality can be considerably enriched and improved by the integration of ‘literary theories’”); Richard Weisberg, *Literature’s Twenty-Year Crossing Into the Domain of Law: Continuing Trespass or*

criminalizes certain conduct; when a jury deems a defendant's actions to violate such a prohibition; when an appellate court refines the answer to a particular criminal law question; or when a sentencing judge announces a punishment—each of these moments produces some sort of narrative statement about who or what is criminal, and to what extent. And, in each case, the relevant legal decision-maker necessarily includes some facts as relevant to the resulting narrative statement and excises others.

Bernard Jackson puts it that legal rules derived from case law are “socially constructed narratives, accompanied by particular (and increasingly institutionalized) forms of approval or disapproval” where “‘law’ and ‘fact’ are reduced to the same level—of narrative structures—and the process of ‘application’ becomes one of comparison.”<sup>47</sup> While Jackson argues that this narrative phenomenon occurs in all legal contexts, it has a recognized formal role in the criminal justice system, given the explicitly expressive purposes of criminal punishment.<sup>48</sup> One of the retributive goals of punishment is denunciative: “to assert[] moral truth in the face of its denial.”<sup>49</sup> By imposing punishment for sufficiently rotten conduct, the system intentionally transmits a public moral message of condemnation.

If the criminal law is in the business of generating narratives, silences emerge and operate within these narratives as they would in any other text or discourse. Part of the work of lawyers involves the

---

*Right by Adverse Possession?*, in LAW AND LITERATURE 47, 47–62 (Michael Freeman & Andrew D. E. Lewis eds., 1999) (arguing that interdisciplinary work between law and the humanities is conducive to the goal of promoting justice); James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1669–70 (1984).

47. BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE 101–06 (1988). Jackson explains the discrepancies in the outcomes of three contract cases involving fraudulent misrepresentations (in which, despite the similarities between the facts, the court held only one contract to be void) as flowing from differing “tacit social evaluations” of the three plaintiffs as characters in their respective narratives. *Id.* According to Jackson, the courts perceived the identities of the parties in the three cases as relevant to realization of the legal rule itself: “Decision-making in adjudication consists in comparing a narrative constructed from the facts of the case with the underlying narrative pattern either explicit in or underlying the conceptualized legal rule.” *Id.*

48. *Id.*

49. Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 125 (1988); see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (through imposing criminal liability, “society says, in effect, that the offender’s assessment of whose interests count is wrong”).

inevitable silencing, for the purposes of doctrinal clarity, of particular aspects of the factual background of a legal case. Evidentiary and procedural rules deem certain facts to be legally irrelevant.<sup>50</sup> Textbook editors abridge cases and students abbreviate them even further when they create case briefs.<sup>51</sup> Witnesses, victims and defendants fail to, or cannot, testify.

Taken to the extreme, “the search for meaning from each case involves not hearing and understanding the original stories of the characters engaged in the conflict; rather, it becomes a constant striving for reduction of the text, reduction aimed ultimately at extrapolating the black letter law.”<sup>52</sup> As Debora Threedy puts it, “[l]egal stories told in judicial opinions are . . . told to justify a conclusion, they often leave out the messiness of life; the inconsistencies; the unknowable things; the things that don't fit and aren't material, relevant, or admissible.”<sup>53</sup> And, at the level of the individual trial, juries have been observed to perform an intuitive process of elision—they pick the most narratively coherent story told by either the prosecution or the defense. This means that silence, to the extent that it interferes with the narrative coherence of one side's story and results in a verdict for the other, may mean certain facts get excluded from the legal truth announced by that verdict.<sup>54</sup>

So what do we know about the general narrative function of silence that might be relevant to understanding its effects in the legal context? On the one hand, legal scholars have criticized the procedural silencing of subordinate groups within the system as a denial of their social power.<sup>55</sup> This perspective is consistent with the

50. FED R. EVID. 403.

51. Elizabeth Villiers Gemmette, *Filling in the Silence: Domestic Violence, Literature, and Law*, 32 LOY. U. CHI. L.J. 91, 92–93 (2000) (arguing that using literature to fill in the silence surrounding domestic violence, we see how our reactions and our responses to certain behaviors shift and change depending on how much of the underlying story is revealed).

52. *Id.*

53. Debora L. Threedy, *The Madness of a Seduced Woman: Gender, Law, and Literature*, 6 TEX. J. WOMEN & L. 1, 46 (1996).

54. Nancy Pennington & Reid Hastie, *The Story Model for Jury Decision Making*, in *INSIDE THE JUROR: THE PSYCHOLOGY OF JURY DECISION-MAKING* (Reid Hastie ed., 1993). A juror from the trial of Casey Anthony, the Florida mother accused of murdering her daughter, provides a good example of this.

55. See Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2118–19 (1991) (discussing the silencing of poverty law clients by their counsel); Bailey, *supra* note 9, at 4; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 533–35 (1992) (describing the

views of the feminist cultural studies theorists of the 1970's, such as Audre Lorde, who associated silence with disempowerment and sounded the call for subordinated groups to wage "a war against the tyrannies of silence."<sup>56</sup> Since then theorists have most frequently described silence as an absence of agency.<sup>57</sup> For example, in a 2003 study of black women between ages 18 and 88, sociologists Charisse Jones and Kumea Shorter-Gooden identified a practice of "self-silencing" as a strategy for navigating inequitable power relationships with both white professional colleagues and male romantic partners.<sup>58</sup>

Yet Cheryl Glenn challenged that dominant account in a 2004 interdisciplinary study of silence as an expressive and strategic form of communication.<sup>59</sup> By analyzing the political silences of everyone from Bill Clinton accuser Gennifer Flowers to "culturally taciturn" Native American groups such as the Navajo and the Apache, Glenn observes the rhetorical contributions of silence as a device with the potential to deploy, defer, and defeat power.<sup>60</sup> Glenn describes silence as a speech strategy as "an enforced position. . . . Just as a blurted-out statement or an alleged misstatement can reveal us, so can our silence, whether controlled or instinctive."<sup>61</sup> For Glenn, the question is whether our use of silence is our choice (whether conscious or unconscious) or that of someone else<sup>62</sup> and argues that "silence as a refusal to partake in the story does sometimes provide us with a means to gain a hearing."<sup>63</sup> Literary

silencing of the poor in Baltimore's rent courts); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329, 1329–31 (1991) (analyzing accent discrimination as a form of racial subordination); Natapoff, *supra* note 45, at 1453.

56. AUDRE LORDE, *SISTER OUTSIDER* 41 (2007).

57. See, e.g., Robin Tolmach Lakoff, *Cries and Whispers: the Shattering of Silence*, in GENDER ARTICULATED: LANGUAGE AND THE SOCIALLY CONSTRUCTED SELF 25, 29 (Kira Hall & Mary Bucholtz eds., 1995) (stating that in a heteronormative context "silence is analogous to invisibility"); Dorothy E. Roberts, *The Paradox of Silence: Some Questions About Silence as Resistance*, 33 U. MICH. J. L. REFORM 343, 356–57 (2000) (using black women's experiences in welfare and doctors' offices to argue that "silence is often the very objective of subordinating forces" and that "[r]emaining silent in the face of injustice may even turn people into accomplices in injustice").

58. CHARISSE JONES & KUMEA SHORTER-GOODEN, *SHIFTING: THE DOUBLE LIVES OF BLACK WOMEN IN AMERICA* 6–7 (2003).

59. CHERYL GLENN, *UNSPOKEN: A RHETORIC OF SILENCE* 8 (2004).

60. *Id.* at 8.

61. *Id.* at 13.

62. *Id.*

63. *Id.* at 25–26.

scholars have also made a distinction between positive and negative silences, and attempted to classify silences based on the wide range of effects they may have on the reader and other characters.<sup>64</sup> Margaret Montoya has pointed out similarly contradictory effects in the legal context.<sup>65</sup> The contradictory effects of silence in the face of power are nowhere more apparent than in the paradigmatic confrontation between an individual and state authority: the case of torture. Elaine Scarry has described the pain of torture as the absence of speech, and the effects of torture as, therefore, “world destroying.”<sup>66</sup> For Scarry this destruction and silence transfers power to the torturer: “the absence of pain is a presence of world; the presence of pain is the absence of world. Across this set of inversions pain becomes power.”<sup>67</sup> Yet this account of power is somewhat complicated by the fact that when a tortured prisoner remains silent he retains control over what the state wants most—knowledge. Torture is all about speech: it is a “biopolitical technique not merely because its goal is the preservation of human life but also because it uses the living, embodied, human ability to speak, to express internally held knowledge.”<sup>68</sup> In Foucault’s famous formulation there is a direct relationship between knowledge and power, based upon the latter’s capacity to define the former.<sup>69</sup> During the encounter between torturer and prisoner, continued silence

---

64. See *id.* at 16–17 (citing Sidney J. Baker, *The Theories of Silences*, 53 J. GEN. PSYCH. 145, 157–58 (1955) (describing “negative silence” as when “the silent person is either too overwrought to speak or cannot find the words to express his or her feelings” and “positive silence” as when “[w]ords are unnecessary because no tensions need to be resolved with conversation or words”); Richard Teleky, “*Entering the Silence*”: *Voice, Ethnicity, and the Pedagogy of Creative Writing*, 26 MELUS 205, 207 (2001) (observing that “[w]hen silence appears in literary texts it may be dramatized directly by characters who are either aware or unaware of its significance, it may be discussed as a subject by characters or by a narrator, and, finally, it may appear in metaphor”).

65. Margaret E. Montoya, *Silence and Silencing: Their Centripetal & Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 266 (2000).

66. ELAINE SCARRY, *THE BODY IN PAIN* 3 (1985) (“When one hears about another person’s physical pain, the events happening within the interior of that person’s body may seem to have the remote character of some deep subterranean fact, belonging to an invisible geography that . . . has no reality . . .”).

67. *Id.* at 37.

68. Matthew Hannah, *Torture and the Ticking Time Bomb: The War on Terrorism as a Geographical Imagination of Power/Knowledge*, 96 ANNALS ASS. AM. GEOGRAPHERS 622, 635 (2006); see also DANIEL ROSS, *VIOLENT DEMOCRACY* 165 (2004) (describing torture as “a form of communication”).

69. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* 78–92 (1980).

preserves knowledge and thus reduces the torturer's power even as his physical power over the prisoner's body intensifies.

Perhaps in part due to its contradictory power effects in the interrogation room itself, silence has also had a role to play historically in the legal discourse *about* torture. Torture was largely unknown under Anglo-American common law, even after the shift to public prosecutions in the twelfth century or so increased the importance of evidence-gathering and prompted the rise of state-sponsored torture on the Continent.<sup>70</sup> This changed for a time during the Elizabethan period when, between the years 1580 and 1600 (after Queen Elizabeth was excommunicated by the Roman Catholic Church), 80 instances of torture of Catholic prisoners were recorded in the records of the Privy Council.<sup>71</sup> Despite the fact that torture was suddenly commonplace during this time, however, scholars have noted a widespread silence about the topic in the legal discourse of the period.<sup>72</sup>

James Simpson has posited a dual explanation for this phenomenon. On one hand, state officials denied that torture occurred and instead insisted that it was illegal, precisely because it was in fact illegal.<sup>73</sup> On the other hand, Catholics did not make legal arguments against it either, relying instead on humanitarian arguments, due to the simple fact that their church tortured as well.<sup>74</sup> Simpson notes that the debate about the legality of torture, absent from official documents, took place, instead, on the Elizabethan stage (most famously during the torture of Gloucester in *King Lear*).<sup>75</sup>

Presently, the International Committee for the Red Cross (ICRC) has recognized a similar pattern of parallel silences between the victims and perpetrators of torture.<sup>76</sup> Victims have difficulty

---

70. See generally JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977) (providing an account of how European legal systems became dependent on torture as a core feature of criminal procedure from the medieval period through the eighteenth century).

71. James Simpson, *No Brainer: The Early Modern Tragedy of Torture*, 43 *RELIGION & LITERATURE* 1, 4 (2011).

72. *Id.* at 10.

73. *Id.*; see also Gunter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty* 56 *AM. J. COMP. L.* 403, 419–21 (2008) (discussing the structural and semantic moves used by states to deny violation of the legal taboo on torture).

74. Simpson, *supra* note 71, at 10.

75. *Id.* at 11–17.

76. Laurent Nicole, *Torture: The Need for Dialogue with its Victims and its Perpetrators*, 24 *J. PEACE RES.* 315, 315, 319 (1987).

speaking about it due to trauma and the fear of retaliation.<sup>77</sup> Officials, like their Elizabethan counterparts, more often than not deny the practice, which is usually conducted deep within military or police complexes.<sup>78</sup> In light of these circumstances, the ICRC's initiative for combatting torture focuses, specifically, on *dialogue* with both victims and perpetrators.<sup>79</sup>

The unspeakable quality of torture hovers in the background of contemporary criminal procedure as one of the motivating forces behind Fifth Amendment jurisprudence, including the unevenly theorized right of the defendant to remain silent at trial. The law creates pockets of silence to protect the rights of an accused, but the accused's silence interacts with victim silence in complex ways, with potentially unintended results.

### ***C. Concluding Observations***

A couple of ideas emerge from this survey. The first is that individual acts of silence can have cumulative societal effects, even at the fundamental level of memory. The second is that silence can have contradictory rhetorical effects on the personal power of both the speaker and the listener, whether individual or collective. The third is that, because the criminal justice system has the explicit goal of expression, it may convey unintentional moral narratives to the public, to the extent that such narratives incorporate the contradictory effects of silence. In Parts II and III I will break down how these effects flow from both victim and defendant silences, and how they affect the public function of criminal punishment.

## **II. PROCEDURAL SILENCE**

It is common to divide issues of criminal law into the categories of substance and procedure. While the two inform one another in important and sometimes problematic ways,<sup>80</sup> for the purposes of this section I define "procedure" as the law governing the flow of criminal investigation and adjudication, which, in the United States, has become heavily driven by constitutional law.<sup>81</sup>

77. *Id.* at 319.

78. *Id.*

79. *Id.* at 318–21.

80. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 54 (1997).

81. Bibas, *supra* note 8, at 1362 ("Criminal procedure has for too long treated itself as a subset of constitutional law . . .").

For better or for worse, discussions about criminal procedure have tended to focus on the fairness of process vis-à-vis the defendant as an individual, and particularly on Supreme Court decisions construing the rights guaranteed to defendants by the Fourth, Fifth, and Sixth Amendments and by the Due Process Clause of the Fourteenth Amendment. (By way of contrast, Canadian law treats the rights of crime victims as likewise constitutionally significant under the Canadian Charter of Rights and Freedoms.)<sup>82</sup> While part of the project of Part IV of this article will be to call for greater attention to the substantive effects of procedural law, for the purposes of this Part I will consider the function of procedural silence as a discrete topic.

### A. Defendants

The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>83</sup> Many scholars attribute the origin of this right to the Framers’ antipathy to two European and English abuses: judicial torture (as described above) and the ex officio questioning of witnesses before the courts of the High Commission and the Star Chamber.<sup>84</sup> These dual origins parallel the two primary forums in which the Fifth Amendment is relevant today—during the police investigation and during the trial—and the right raises distinct problems in each. The precise content and theoretical justification of the defendant’s “right to silence” have evaded scholars for many years.<sup>85</sup> Yet simultaneously, as the late Chief Justice Rehnquist put it, the prophylactic *Miranda*

---

82. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, PART I OF THE CONSTITUTION ACT, 1982, *being* SCHEDULE B TO THE CANADA ACT, 1982, c 11 (U.K.). In 1988 the federal and provincial ministers responsible for criminal justice endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crime, “in recognition that all persons have the full protection of rights guaranteed by the [Charter]” and “the rights of victims and offenders need to be balanced.” <http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/03/princ.html>

83. U.S. CONST. AMEND. V.

84. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 2250 (1904). *But see* R.H. HELMHOLZ, THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 109–43 (1997) (containing competing theories that the Fifth Amendment was actually the codification of early American practice).

85. See, e.g., William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 978–80 (2001) (describing the difficulty in defining the problem).

warnings derived from the right “have become part of our national culture.”<sup>86</sup>

Thirty years ago Kent Greenawalt considered whether “silence” as a constitutional right could be based upon an analogous moral right, in the same manner that a person’s Fourth Amendment right to be free from unreasonable searches by the state parallels his moral right not to have private persons rifle through his possessions.<sup>87</sup> For Greenawalt, the issue was not so much that constitutional rights must track all moral rights, but that the divergence between the two is problematic when a constitutional right is explicitly based upon a view of moral obligation, and no other bases for the constitutional right justify its scope.<sup>88</sup> While Greenawalt concedes the difficulty in grounding analysis on a concept as slippery as a “fundamental” moral right, he argues for the possibility of “judgments that are based on fundamental values of a culture, judgments that may subject crude social attitudes about behavior and institutions to demands of rationality, universality, and coherence with other views.”<sup>89</sup>

While Greenawalt does not provide specific cultural evidence of how silence may be morally perceived in society, the examples I provided in Part I may inform this part of his analysis. We know that an individual’s silence may elide events from the cultural memory, and that this may cause discord where the official, redacted memory of an event conflicts with collective memory of it developed elsewhere. We know both that an aversion to torture deployed to defeat silence has become embedded in our constitutional order, and that silence *about* torture has been an obstacle to the realization of human rights. We know that a defendant’s silence about his conduct can harm victims, and we know that both victims (disempowered by defendants) and defendants (disempowered by their positions vis-à-vis the state) may use both speech and silence to reassert their dignity, another significant cultural value. This conflicting material suggests that unlimited defendant silence in the criminal justice process would conflict with cultural values. Yet dignity-related values, particularly in a context structurally similar to torture, may also

---

86. *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

87. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 16 (1981).

88. *Id.* at 71.

89. *Id.* at 18.

require an individual to retain a sphere of silence under certain circumstances.

After considering hypothetical confrontations between private parties over a suspected theft, Greenawalt himself concludes that a natural rights argument might be advanced on behalf of a principle of self-preservation, the claim being that any individual has a basic right to avoid destructive consequences to himself even if submission would serve the welfare of others.<sup>90</sup> This conception of the right sounds more Hobbesian than culturally-derived, but, insofar as it is somewhat logically limited, it is consistent with the cultural evidence I surveyed above. Greenawalt's moral defense of the general right to silence has met some harsh criticism.<sup>91</sup> Yet, because it provides a focused and nuanced framework for identifying the potential conceptual divide between cultural and judicial understandings of silence, I use it here to briefly discuss the current state of the Fifth Amendment right during investigation and trial.

As a threshold matter, Greenawalt's moral right does not include the right to be thought innocent or to avoid all harmful consequences of the original conduct, only the right to avoid helping to bring those consequences about.<sup>92</sup> In the context of a public prosecution, Greenawalt suggests that the state, with its objective truth-seeking duty and obligation to respect the subordinate positions of its citizens, should not be allowed to draw adverse inferences from a suspect's silence prior to discovery of substantial evidence of wrongdoing.<sup>93</sup> After that point, however, adverse inferences become proper when a person refuses to respond to questions based on such evidence.<sup>94</sup> If accurate, his framework suggests that the current Fifth Amendment protection may be both over- and under-inclusive, at different points in the process, relative to cultural intuitions about silence as a moral right.

---

90. *Id.* at 29. Private/public expression of remorse—questions not directed to them. See Robert S. Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979); Robert Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970).

91. See, e.g., David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?* 33 UCLA L. REV. 1063, 1063 (1986).

92. Greenawalt, *supra* note 87, at 32.

93. *Id.* at 43.

94. *Id.*

### 1. Pre-Trial Silence and Confession

The earliest U.S. cases to consider the standards for admissibility of a confession applied an English common law “voluntariness” test, which turned on the unreliability of forced confessions.<sup>95</sup> While one late nineteenth-century case stated that the voluntariness test derived from the Fifth Amendment,<sup>96</sup> the Jim-Crow-era case best known for staunching the tide of forced confessions was actually decided on due process grounds. In *Brown v. Mississippi*,<sup>97</sup> the Supreme Court overturned the convictions of three black tenant farmers who had been convicted for the murder of their white landlord.<sup>98</sup> The prosecution’s case rested on confessions made under torture; all three defendants had been brutally whipped and one had been strung up by the neck.<sup>99</sup> The Court decided the case on Fourteenth rather than Fifth Amendment grounds, stating, “[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”<sup>100</sup> The Court continued to apply the due process analysis in some thirty cases after *Brown*, refining the relevant question into whether the defendant’s “will was overborne” by the circumstances of the confession.<sup>101</sup>

---

95. See, e.g., *King v. Rudd*, 1 Leach 115, 117–18, 122–23, 168 Eng. Rep. 160, 161, 164 (K. B. 1783) (Lord Mansfield, C. J.) (stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263–64, 168 Eng. Rep. 234, 235 (K. B. 1783) (“A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected”); *Hopt v. Territory of Utah*, 110 U.S. 574, 587 (1884) (stating that “a confession made to one in authority should not go to the jury unless it appears to the court to have been voluntary”); *Pierce v. United States*, 160 U.S. 355, 357 (1896) (“Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats”).

96. *Bram v. United States*, 168 U.S. 532, 542 (1897) (stating that the voluntariness test “is controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”).

97. 297 U.S. 278 (1936).

98. *Id.* at 287.

99. *Id.* at 281.

100. *Id.* at 287.

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

The *Brown* voluntariness test makes sense viscerally, but it turned out to be challenging to implement, simply because courts had difficulty distinguishing between good and bad police procedures.<sup>102</sup> After the protections of the Fifth Amendment were incorporated against the states by *Malloy v. Hogan*,<sup>103</sup> however, the field was ripe for a shift. In *Miranda v. Arizona*,<sup>104</sup> the Court shifted the focus from due process concerns over physical coercion to the defendant's affirmative Fifth Amendment right against self-incrimination.<sup>105</sup> The *Miranda* opinion focused less on direct coercion than on the realities of a custodial situation more subtly inducing the defendant to speak: "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."<sup>106</sup> To safeguard the defendant's Fifth Amendment rights, the Court devised four warnings police must provide, without which any confession would be inadmissible: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."<sup>107</sup> The Fifth Amendment's identity as a "right to remain silent" was born.

*Miranda* was immediately, and lastingly, controversial. In a vigorous dissent Justice Harlan warned that "only time can tell" the severity of the social costs that would result from hampering law enforcement with the new prophylactic requirements.<sup>108</sup> Whether this has proven to be the case for reasons unrelated to silence remains inconclusive.<sup>109</sup> What does seem clear, however, is

---

102. See Stuntz, *supra* note 85, at 980 (citing Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau & Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 742-859 (1963)).

103. 378 U.S. 1 (1964).

104. *Miranda v. Arizona*, 384 U.S. 436 (1966).

105. *Id.*

106. *Id.* at 455.

107. *Id.* at 479.

108. *Id.* at 504 (Harlan, J., dissenting).

109. In a series of empirical studies conducted during the 1990s, Paul Cassell presented data showing a sharp drop in the number of violent crimes solved by police, beginning in 1966, the year of *Miranda*. See, e.g., Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U.L. REV. 1084 (1996); Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV.

that, contrary to the expectations of both the majority and dissent, *Miranda* has not been effective at silencing suspects, as most waive their rights after receiving the warnings.<sup>110</sup> This is perhaps due in part to the fact that after the warnings have been given, the police may constitutionally engage in deceit and other aggressive strategies for obtaining confession.<sup>111</sup>

For this reason many scholars have criticized the decision for putting the suspect in a *worse* position than he was previously. The decision abolished interrogation only for suspects savvy enough to know to invoke it, an effect which critics suggest only increases inequality in the criminal justice system and chills further attempts at reform by providing a façade of protection.<sup>112</sup> Some propose a return to the voluntariness standard on the grounds that *Miranda* merely created a due process notice requirement within

---

1055 (1998); *see also* JOSEPH GD. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993) (arguing against *Miranda* on both constitutional and policy grounds). In a parallel series of articles, Stephen Schulhofer challenged many of Cassell's claims and disputed his assertions of causation. *See, e.g.*, Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U.L. REV. 278 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500 (1996). Called upon to evaluate Cassell's methodology, John J. Donohoe concluded that "the consistency of the size and signs of the post-1966 effects, particularly for the violent crime variable, does provide some evidence in support of an unexplained post-*Miranda* downward deviation from trend in various clearance rates" but that "some evidence of a drop in measured clearance rates is a long way from proof of a statistically significant drop in actual clearance rates caused by the Supreme Court's *Miranda* decision." John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1171 (1998).

110. *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275 (1996) (reporting the results of an empirical study of police interrogation practices); Richard Leo, *The Impact of Miranda Revisited*, J. CRIM. L. & CRIMINOLOGY 621, 632, 653 (1996).

111. Leo, *supra* note 110, at 270.

112. *See, e.g.*, WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 216-42 (2011) (criticizing *Miranda* as part of the broader Warren Court constitutional revolution in criminal procedure, which he argues raised the cost of criminal trials without making them more accurate, resulting in a lose/lose situation for poor defendants); L. Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673 (1992) (arguing that *Miranda* harms those it seeks to help, by creating a false sense that we no longer need to worry about official coercion as defendants have technically consented to their treatment); Stuntz, *supra* note 85, at 977; Charles Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1523 (2008) (concluding that following *Miranda*'s "hollow ritual" both forecloses deeper inquiry into the voluntariness of a statement, and has, furthermore, chilled legislative efforts to regulate interrogation practices).

the Fifth Amendment privilege, which does not address actual compulsion.<sup>113</sup>

While these critiques emerge from practical observation, beyond theoretical analysis, it turns out they support Greenawalt's theoretical conclusion that the constitutional right to silence in the investigative context is too narrow to realize the moral conception of silence he identifies. When the police browbeat, deceive, and threaten suspects, they "intentionally manipulate the environment to make rational, responsible choice more difficult."<sup>114</sup> This not only violates autonomy and dignity, but also works unevenly by tripping up an inexperienced suspect while having little effect on the "hardened criminal."<sup>115</sup>

If *Miranda* has arguably proven ineffective and unpopular amongst critics on both sides of the ideological spectrum, the warnings have yet acquired significant symbolic significance, due in part to their repetition throughout police procedural films and television shows.<sup>116</sup> *Miranda* can therefore be said to have created a pair of cultural narratives about police interrogation. The first is that "the right to silence" renders confessions voluntary, which the empirical literature suggests is false. The second is that the right to silence is itself a fundamental American value. In other words, the official narrative provided by the system is that a defendant's silence is sacred and absolute, which sounds so expansive as to conflict with other cultural values around victim welfare and empowerment, and the pursuit of the guilty. Yet at the same time, this narrative is false, in the sense that, for all this talk of silence, criminal defendants may be subject to greater coercion than required by the competing cultural values of individual autonomy and self-preservation.

---

113. RICHARD LEO & GEORGE C. THOMAS III, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 179 (2012). Indeed, in *Berkemer v. McCarty*, the Supreme Court observed that it would be a rare case where a suspect raises "a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* . . . ." 468 U.S. 420, 433 n.20 (1984).

114. Greenawalt, *supra* note 87, at 40–41.

115. *Id.* at 41.

116. See Ronald Steiner et al., *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219 (2011).

## 2. Silence at Trial

The core right of the Fifth Amendment is freedom from compulsion to testify at trial.<sup>117</sup> Courts and scholars frequently describe this right as central to the Anglo-American “accusatorial” system of justice, as opposed to the continental “inquisitorial” system.<sup>118</sup> At common law, defendants were not originally even allowed to take an oath to testify in their defense (for fear that the temptation would be too great for them to risk eternal damnation through perjury).<sup>119</sup> Yet they were hardly silent. During sixteenth through eighteenth century English trials, defendants presented their own defenses and responded to the prosecution’s evidence.<sup>120</sup> Indeed, this so-called “accused speaks” model affirmatively denied defendants the assistance of counsel in order to *encourage* their testimony.<sup>121</sup>

Barton Ingraham critiques the current commitment to “accusatorial” justice, asserting that practices maintained purely on the basis of tradition risk enshrining doctrines that conflict with the moral and practical intuitions of lay people.<sup>122</sup> The debate over the fundamental rationale for the right to silence is often characterized as a conflict between two classes of values—hard-to-define fundamental individual rights (such as Greenawalt’s natural rights conception or Gerstein’s privacy-based model) and the public’s utilitarian interest in convicting the guilty.<sup>123</sup>

---

117. *Pennsylvania v. Muniz*, 496 U.S. 582, 595 (2012); THE FOUNDERS’ CONSTITUTION 271–75 (Phillip B. Kurland & Ralph Lerner eds. 1987). 896 (1990) (discussing the influence of the Star Chamber on the Fifth Amendment’s right to silence).

118. *Griffin v. California*, 380 U.S. 609, 614 (1965); see also Gregory O’Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994).

119. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 34 (2003).

120. *Id.* at 35–36.

121. *Id.*; see also Sampsell-Jones, *supra* note 7, at 1332 (quoting 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN*, 400, *reprinted in* AMERICAN LAW: THE FORMATIVE YEARS (1972) (proposing that “the Innocent, for whose Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counsel. Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth . . .”).

122. Ingraham, *supra* note 7, at 561.

123. See generally Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996); Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329 (1991); Vincent Martin Bonventre, *An Alternative to the Constitutional*

Greenawalt's natural-rights-based moral conception of silence extends to trial, where a defendant without the right to silence would face the so-called "cruel trilemma" of deciding whether to lie, to help convict himself, or to be held in contempt of court.<sup>124</sup> According to Greenawalt, however, when the prosecution has marshaled sufficient evidence to make it to trial, it should be free from the role-specific obligations that should prevent it from taking a more adversarial role during the investigation. At this point, Greenawalt contends, the moral principles that would be applicable to private parties should apply. This means that, as with a pair of roommates quarrelling over a piece of missing jewelry, the moral right to silence no longer contains the right to be free from all adverse inferences from that silence, even if the possibility of the jury drawing them affects the defendant's choice to speak.<sup>125</sup> (England takes this approach in the present day. Since 1994, statutory rules have defined the circumstances under which adverse inferences may be drawn from silence.)<sup>126</sup>

The current approach of the U.S. is much broader than the moral right Greenawalt develops. Criminal defendants have the right either to testify in their defense, or to refuse to do so.<sup>127</sup> And the government may, under some circumstances, impose choices on the defendant that discourage him from exercising the right to silence.<sup>128</sup> However, since *Griffin v. California*,<sup>129</sup> prosecutors have been prohibited from arguing that juries should draw adverse inferences from the fact of a defendant's silence.<sup>130</sup>

---

*Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31 (1982); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

124. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

125. Greenawalt, *supra* note 87, at 40.

126. Criminal Justice and Public Order Act, c.33 1994 (U.K.).

127. *See Harris v. New York*, 401 U.S. 222, 225 (1971); *see also Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Ferguson v. Georgia*, 365 U.S. 570, 602 (1961) (Clark, J., concurring)). Unlike the Fifth Amendment right to silence, the right to testify has no specific textual source but "has sources in several provisions of the Constitution," such as the Due Process Clause and the Compulsory Process Clause. *Rock*, 483 U.S. at 51.

128. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973); *see also* Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1328 (2009) ("When a defendant takes the stand, for example, the prosecutor may cross-examine him. The prosecutor's ability to cross-examine a defendant chills the latter's right to testify." A rule to the contrary "would promote 'neutrality'" but would be "anomalous in evidence law, and it would impede the truth-seeking function of trial").

129. 380 U.S. 609 (1995)

130. *Id.* at 623.

Eddie Griffin was a houseguest of Essie Mae Hodson and her partner. He was accused of fighting with her partner and subsequently dragging Essie Mae into the alley and brutally raping her.<sup>131</sup> A witness had seen Griffin climb out of a large trash box in the alley, zip up his pants and walk away.<sup>132</sup> The witness then discovered the beaten and brutalized Essie Mae in the box; she died the next day of head injuries.<sup>133</sup> Griffin told the police the sex was consensual but did not testify at trial. During closing statements the prosecutor argued that his silence rendered that defense implausible:

What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left? He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. . . . These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't.<sup>134</sup>

The trial court instructed the jury that the inferences from silence most “unfavorable to the defendant are the more probable.”<sup>135</sup> The prosecutor’s account counteracts the potential RIF effect of an incomplete narrative; it insists upon filling the space left empty by the defendant’s refusal to testify and the victim’s absence by reminding the jury of the most probable logical relationship between the two.<sup>136</sup> The Warren Court ruled that the closing remarks and the court’s instructions violated the Self-Incrimination Clause because the adverse inference “is a penalty

131. *People v. Griffin*, 383 P.2d 432, 434 (Cal. 1963), *rev'd*, *Griffin v. California*, 380 U.S. 609 (1965).

132. *Id.*

133. *Id.* at 434–35.

134. *Griffin*, 380 U.S. at 610.

135. *Id.*

136. See Stephen Smith, *Defendant Silence and Rhetorical Stasis* 46 CONN. L. REV. ONLINE 19, 26 (2013) (“In the hands of either side to a dispute, silence disrupts the classic arrangement of argumentation. The traditional narrowing of issues may be lost. This creates burdens on the side against which silence is deployed.”).

imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”<sup>137</sup>

*Griffin* has drawn scholarly criticism, in part due to the fact that it states no basis for distinguishing adverse inferences from the various other permissible burdens on a defendant’s trial right to silence.<sup>138</sup> As Ted Sampsell-Jones has noted, other, less productive burdens have been allowed, such as the test for admitting evidence of prior convictions as impeachment evidence under Rule 609 of the Federal Rules, and the imposition of sentencing enhancements for a defendant’s perjury during his trial testimony.<sup>139</sup> Sampsell-Jones argues that, in light of optimistic empirical research about jurors’ ability to detect lies, we should be promoting the truth-finding function of a trial by encouraging, rather than discouraging, defendant testimony.<sup>140</sup> This proposal is sound insofar as it would encourage narrative coherence around the actual facts in dispute—either the defendant testifies, without juror distraction through evidence of prior bad acts not permissibly relevant to the fact of guilt, or he does not and the prosecution is allowed to fill in the narrative blanks in the manner attempted in *Griffin*. Either way, silence would not be permitted to limit the public account of the underlying crime in a manner inconsistent with the community’s understanding of the crime in reality.

---

137. *Griffin*, 380 U.S. at 614.

138. Sampsell-Jones, *supra* note 7, at 1343; see also Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: a Reply to O’Reilly*, 86 J. CRIM. & CRIMINOLOGY 559, 591 (1996).

139. Sampsell-Jones, *supra* 7, at 1329. While arguing that *Griffin* should be overruled Sampsell-Jones would curtail these two limitations on the right to silence. As to Rule 609 he points out how unlikely it is that “any human fact finder” would consider evidence of a prior rape conviction to only show that he was a liar but not that he was a rapist. *Id.* at 1358. As to enhancements for perjury he argues that their benefits do not outweigh the costs of chilling testimony.

140. *Id.* at 1333–34 (citing Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1100–01 (1991) (reviewing the research and concluding jurors are not effective at detecting lies through witness demeanor but are somewhat effective at detecting lies through the content of testimony); Bella DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERS. & SOC. PSYCHOL. REV. 346, 347 (1997); George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 578 (1997); Hee Sun Park et al., *How People Really Detect Lies*, 69 COMM. MONOGRAPHS 144, 145 (2002); Maria Hartwig et al., *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 LAW & HUM. BEHAV. 603, 604 (2006); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context* 29 CARDOZO L. REV. 2557, 2568 (2008).

### 3. Conclusions

If we apply Greenawalt's moral conception, the defendant's procedural right to silence appears inadequate at the investigative level and overbroad at the trial level. This is particularly significant due to the fact that only 4% of cases go to trial. In the 96% of cases not subject to the fact-finding process of a trial, *Miranda* does a weak job at preventing undue coercion. Yet the minority of cases that do go to trial provide the most public display of the Fifth Amendment right at its broadest. In these very public trial narratives, important elements of truth may be elided through silence (both the defendant's and the prosecutor's insofar as she may not fill them). But they also present the public with an inaccurate narrative of the silent defendant as constantly thwarting justice that may distract from inappropriate practices at the investigative level.

Peter Brooks has observed that there is something troublesome about the double nature of the criminal confession. On the one hand, a confession is a manifestation of the self-examination and inwardness that is essential to our psychic and moral health and our very definition as unique individuals.<sup>141</sup> On the other hand it has come to be known as the "queen of proofs"<sup>142</sup> in terms of legal significance, and police handbooks have institutionalized the psychological techniques for best extracting confessions from suspects consistent with *Miranda*. Drawing on the pop cultural fascination with and simultaneous revulsion from the public, televised confession, Brooks argues that "[w]hen it produces a confession, the confessor, and society as a whole, are reassured that they can pass judgment in good conscience," a belief in tension with the fact that the motives of confessing are indeterminate, and may implicate a complex of "shame, guilt, contempt, self-loathing, attempted propitiation, and expiation."<sup>143</sup> The very complexity of a confession urges that, if it is to occupy such an important place in both the public imagination and the legal disposition of cases, it ought to be forced into the open for more nuanced examination. The current arrangement, where confessions are relatively easy to obtain in the secrecy of a police station, under the banner of "the right to silence," while defendant narratives remain absent from the

---

141. PETER BROOKS, *TROUBLING CONFESSIONS* 4 (2000).

142. *Id.* at 4.

143. *Id.* at 6.

courtroom, at psychic cost to the public and the victim, thwarts this possibility.

### *B. Victims*

In Part IA, I summarized some of the literature supporting the psychological benefits to subordinated individuals, such as crime victims, of speaking out in the judicial process. Much of the literature on this subject deals with victim participation in the sentencing context.<sup>144</sup> Incorporation of the victim's voice during sentencing has been lauded as an important element of restorative justice, with benefits for the victim and, in some cases, the defendant. By contrast, as I have observed elsewhere, when victims participate during the *guilt* phase of a trial their formal role is to assist the prosecutor in fulfilling her obligation to the public.<sup>145</sup> This facilitative role sometimes results in the victim feeling objectified by the system itself, and the narratives victims tell during the guilt phase are usually directed more closely by the prosecutor due to the question-and-answer format of a direct examination.<sup>146</sup> Because victim silence has distinct implications during the guilt and sentencing phases I will discuss some of the issues arising from each in turn.

#### **1. The Guilt Phase: "Victimless" Prosecutions**

It has become a familiar story that, for much of the history of the United States, law enforcement did little to enforce the laws against domestic violence.<sup>147</sup> Traditionally the criminal justice system treated disputes between domestic partners as private matters, and the police officer's typical response to a call from a battered woman was to separate the parties and advise the batterer to calm down.<sup>148</sup> However, the women's right movement brought with it battered women's shelters and an educational campaign for the public, along with a spate of lawsuits against municipalities and police departments for their failure to protect the victims of domestic

---

144. See Part IIB, *infra*, and supporting citations.

145. See Erin Sheley, *Reverberations of the Victim's Voice*, 87 IND. L. J. 1247 (2012) (noting that victims often report a sense of being re-victimized by their functional role in the trial process).

146. *Id.* at 1258–59.

147. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as a Prerogative and Privacy*, 105 YALE L.J. 2117, 2170 (1996).

148. Bailey, *supra* note 9, at 7.

violence.<sup>149</sup> As a result, partner abuse moved into the sphere of public prosecution at long last.<sup>150</sup>

Public enforcement brought with it several policies that almost immediately raised the potential conflict between a prosecutor's duty to the victim and his duty to the victim. "Mandatory" and "pro-arrest" policies, funded in part by the Violence Against Women Act, required that a responding officer arrest a suspect if there was probable cause that he had committed a misdemeanor domestic violence offense.<sup>151</sup> Relatedly, prosecutors began to adopt "no-drop" policies, which would require them to proceed with a domestic violence case regardless of the victim's wishes.

Domestic violence advocates had conflicting responses to these policies. Some liked them, on the grounds that they send a clear message of zero tolerance, and remove incentives for batterers to coerce their partners into dropping the charge. Others felt that the potentially coercive nature of the policies operated as an institutional form of emotional abuse against the victim, by ignoring her perspective and the realities of her circumstances. The best numbers show, indeed, that 80 percent of domestic violence victims are uncooperative witnesses. To address this reality prosecutors came to rely upon victims' out-of-court statements, such as 911 calls and police reports, instead of putting them on the witness stand. Such cases have come to be known as "victimless prosecutions," although the term itself is controversial insofar as it suggests that the defendant did not actually victimize anyone.

The Supreme Court disrupted this state of affairs in *Crawford v. Washington*, which held that, under the Confrontation Clause of the Sixth Amendment, out-of-court statements that are "testimonial" cannot be admitted to prove the truth of the matter asserted unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross examine the declarant. In *Davis v. Washington* the Court considered the application of *Crawford* to victimless prosecutions, with famously confusing results.

The Court held that out-of-court statements are nontestimonial, and thus outside the ambit of *Crawford*, when they are "made in the course of police interrogation under circumstances objectively

---

149. Linda G. Mills, *Killing Her Softly: Intimate Abuse & the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999).

150. *Id.* at 561.

151. Bailey, *supra* note 9, at 9; see also Joan Zorza, *Mandatory Arrest for Domestic Violence: Why it May Prove the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 4 (1995).

indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”<sup>152</sup> However, “they are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>153</sup>

Even after *Davis*, the “forfeiture by wrongdoing” doctrine applies; there will always be an exception to the Confrontation Clause for out-of-court statements made when the victim is unavailable at trial because the defendant has taken steps to prevent her from testifying.<sup>154</sup> Nonetheless, the upshot of this line of cases is that many statements previously used in domestic violence prosecutions must now be excluded because they were prepared with some government involvement geared toward an eventual prosecution. And even the forfeiture doctrine is quite narrow; in *Giles v. California*, the Court held that out-of-court statements by the defendant’s ex-girlfriend that the defendant murdered were barred by the Sixth Amendment because he had not killed her with the intention of preventing her from testifying.<sup>155</sup> The costs of this line of cases, in terms of allowing batterers to walk free, have been measurable but unpredictable.<sup>156</sup> For that reason some have argued for a domestic violence carve-out to the *Crawford* rule, both to resolve uncertainties in its application and to facilitate the prosecution of batterers.<sup>157</sup>

Kimberly Bailey has used *Crawford* and *Davis* as an occasion to ask another question: “Are victimless prosecutions encouraging the systematic silence of women?”<sup>158</sup> She points out that when a victim speaks at trial only through her 911 call or police report, the system proceeds with no context for her experiences, including her relationship with the abuser, her resources for removing herself from the situation, and other factors relevant to determining her current

---

152. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

153. *Id.*

154. *See State v. Wright*, 726 N.W.2d 464, 479–82 (2007).

155. *Giles v. California*, 554 U.S. 353 (2008).

156. Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 176 (2011) (reviewing empirical data from lower courts and concluding “that state court judges take a relatively expansive but unpredictable approach to the *Davis* framework, allowing many testimonial statements while excluding others, with little consistency”).

157. *Id.* at 200–07 (arguing that out-of-court statements of domestic violence victims should be classified as “non-testimonial” for *Crawford/Davis* purposes).

158. Bailey, *supra* note 9, at 33.

and future danger and the reasons she has become a victim.<sup>159</sup> Bailey argues that three important questions must be answered in this regard: “whether domestic violence victims are ignored by the criminal legal system, whether more speech could lead to more effective domestic violence laws and policy, and whether silent domestic violence victims are complicit with their subordination.”<sup>160</sup>

With respect to the first, while Bailey concedes that prosecutors must often discount the views of victims when they conflict with their overall duty to the public, she argues that the needs of domestic violence victims are disproportionately ignored given that they face greater danger than others due to their ongoing relationship with the defendant.<sup>161</sup> As to the second, Bailey emphasizes the interaction between actual individual experiences and the “marketplace of ideas” that creates public policy.<sup>162</sup> She suggests that victim testimony will “provide more information about what women need from these laws” and help us “stop seeing domestic violence victims as a faceless stereotype and begin understanding the complexities of domestic violence that affect women from all races, cultures, and income levels.”<sup>163</sup> Finally, she concludes that by not testifying, victims are not only complicit with their batterers’ abuse but with “a legal and political system that historically has ignored women in pursuit of its own agenda.”<sup>164</sup>

Bailey’s solution is to encourage victim participation by addressing the roots of reluctance to testify—namely, lack of resources and protection and the negative response toward battered women of the justice system itself.<sup>165</sup> Alafair Burke has argued that the law restricts a victim’s ability to explain the repetitive structure of abuse as part of her narrative:

Cognizant of the statutory elements of the offense that must be proven, police and prosecutors hone in on only the

159. *Id.*

160. *Id.* at 35.

161. *Id.* at 37; see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1256 (1991) (observing that some African-American women fear that discussing domestic violence in their community will perpetuate the stereotype that African-American men are violent, and that commenters often focus on the experiences of white middle-class and upper-class communities, thereby silencing women of color).

162. Bailey, *supra* note 9, at 37–38.

163. *Id.* at 38–39.

164. *Id.* at 41.

165. *Id.* at 47–48.

severity of the physical contact involved in the discrete incident. . . . If she tells her story the way she perceives it, and continues to talk about legally irrelevant aspects of her relationships, she might be reprimanded as a bad witness.<sup>166</sup>

Basically, the system selectively imposes silence on certain types of victims. As a model for how to address these problems, Bailey points to Chicago's Target Abuser Call ("TAC") program, in which service providers, community advocacy groups, and civil attorneys work alongside prosecutors to help resolve a victim's immediate problems and prepare for the future, as part of an effort to encourage her testimony.<sup>167</sup> TAC targets high-risk victims and involves them in the process as much as possible to decrease the sense of alienation accompanying the legal process.<sup>168</sup>

The unique tendency of domestic violence cases to implicate the *Crawford* rule throws the issue of victim trial silence into the constitutional spotlight. But the problems these cases raise exist, to greater or lesser degrees, in most prosecutions. Because of the double-edged capacity of silence to both entrench and resist subordination, a victim might risk subordination vis-à-vis the defendant to simultaneously resist the prosecution's attempt to assert narrative authority over the victim's own experience. Suggestions like Bailey's may provide a solution to the prosecutor's conflicting duties in some cases, and in all cases prosecutors should be attentive to the plurality of meanings potentially attached to a victim's silence. Particularly in cases of deceased victims, however, *Crawford* may wholly enforce victim silence at the trial stage. In light of this fact, the ongoing debate about victim speech at sentencing takes on even greater significance.

## 2. Victim Speech and Silence at Sentencing

Beyond their participation during the guilt phase of a trial, victims also have an opportunity to speak or remain silent during the sentencing proceeding. The federal Crime Victims' Rights Act<sup>169</sup>

---

166. Alafair Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 577 (2007); see also Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 991–98 (2004).

167. Bailey, *supra* note 9, at 49–50.

168. *Id.* at 51.

169. Justice for All Act of 2004, Pub. L. No. 108–405, 118 Stat. 2260 (2004) (codified as the "Crime Victims' Rights Act" at 18 U.S.C. § 3771 (2012)).

and the victims' rights amendments of the constitutions of thirty-two states<sup>170</sup> provide the victim of a crime the opportunity to deliver an oral or written "impact statement" intended to present the sentencing judge (or, in a capital case, jury) with his narrative account of the effects of the crime on his life. The Supreme Court originally held such statements to violate the Eighth Amendment in *Booth v. Maryland*, when introduced in a capital sentencing proceeding.<sup>171</sup> In *Payne v. Tennessee*, however, the Court reversed course and overruled *Booth*, affirming the defendant's death sentence for the murder of a woman and her two-year-old daughter despite testimony and commentary on the effects of these deaths on a surviving three-year-old child who the defendant had also attacked.<sup>172</sup> In a 6–3 decision written by Chief Justice Rehnquist, the Court held that the Eighth Amendment created no per se bar on victim impact evidence in a capital trial and that such evidence is simply a means of informing the sentencing authority about the extent of the harm flowing from the defendant's act, the assessment

---

170. See ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. DECL. OF RIGHTS art. XLVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. Art. I, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8–A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m; see also DOUGLAS E. BELOOF, PAUL G. CASSELL & STEVEN J. TWIST, VICTIMS IN CRIMINALPROCEDURE 3–42 (2d. ed. 2006) (providing historical background on the victims' rights movement).

171. *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth*, a case arising from the slaying of an elderly couple during a burglary, the defendant's probation officer read the jury a prepared statement summarizing the effects of the elderly couple's murder on their children (including their son who had discovered them bound and stabbed to death). In a 5–4 decision, the Court found the reading of the statements improper under the Eighth Amendment because its inclusion created an unacceptable risk that the death penalty would be imposed in an arbitrary and capricious manner. In an opinion written by Justice Powell, the Court found that, in its focus on the "character and reputation of the victim and the effect on his family," rather than the defendant's conduct, a victim impact statement ("VIS") introduces factors that "may be wholly unrelated to the blameworthiness of a particular defendant." Because the defendant "often will not know the victim," the Court reasoned, he "therefore will have no knowledge about the existence or characteristics of the victim's family." *Id.* at 504.

172. *Payne v. Tennessee*, 501 U.S. 808 (1991).

of which “has been an important concern . . . in determining the appropriate punishment.”<sup>173</sup>

The victim impact statement (“VIS”) is deeply controversial. Its supporters argue that it promotes victim empowerment, truth, healing, and reconciliation.<sup>174</sup> Meanwhile, critics argue that it deploys unrestrained vengeance in the court room and that the subjective perspective of the victim is irrelevant to the purposes of criminal punishment.<sup>175</sup> Due to the use of VIS and the discourse of the victims’ rights movement in general, many victims are far from silent at sentencing; indeed, they have acquired an increasingly important cultural significance in punishing crime.<sup>176</sup> However, due

173. *Id.* at 819.

174. *See, e.g.*, Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims’ Rights Act*, 26 YALE L. & POL’Y REV. 431, 452 (2008) (citing Richard A. Bierschbach, *Allocation and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT’G REP. 44, 46 (2006)) (“By giving victims a clear and uninterrupted voice at this moment on par with that of defendants and prosecutors, a right to allocate signals both society’s recognition of victims’ suffering and their importance to the criminal process.”); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 124 (2004); Edna Erez, *Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV., July 1999, at 545, 551; Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135, 142–43 (Peter Brooks & Paul Gewirtz eds., 1996) (arguing that the defendant’s story and the victim’s or survivor’s story “can be seen as counterstories, which should both be available to the decision-maker” and asking “if particularized storytelling should have a greater place in the law, does not the particularized story of the murder victim and the victim’s survivors warrant that place?”);

175. *See, e.g.*, Elizabeth Lynett & Richard Rogers, *Emotions Overriding Forensic Opinions? The Potentially Biasing Effects of Victim Statements*, 28 J. PSYCHIATRY & L. 449 (2000) (suggesting that victim accounts may exert a biasing effect on criminal-forensic opinions); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 398 (1996) (arguing against victim impact statements because they bring into the criminal context “inappropriate” emotions such as “hatred,” “undifferentiated vengeance,” and “bigotry”); Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 361 (1996) (arguing that, in the capital context, VIS exacerbate the difficulty of a jury’s task of humanizing a defendant enough to decide his fate, against the backdrop of pro-prosecution biases likely to exist at that phase in the proceedings); Dina Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AM. CRIM. L. REV. 391, 428–29 (1989) (arguing that VIS should only be permissible where the defendant had the intent to cause the particular effects described and where the testimony is not overly prejudicial, requiring that it be “submitted in a straightforward, factual way”); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 986–1006 (1985).

176. *See* DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 121 (2001) (“[T]he aim of serving victims has become

to the unpopularity of VIS among many criminal law theorists, I include them in this article because they present a *potential* for silence, should they be excluded from a particular proceeding or from the system generally.

As I have observed elsewhere, “the supporters and detractors of [VIS] tend to face off across a bright line that puts the rights of the defendant and those of the victim into competition with one another, with the vindication of the former frequently conceptualized as a curtailment of the latter, and vice versa.”<sup>177</sup> For example, some critics argue that because VIS are so subjective and potentially idiosyncratic, they undermine sentencing certainty to the detriment of defendants.<sup>178</sup> Others characterize VIS as proceduralizing a base impulse of vengeance against the defendant,<sup>179</sup> or formalizing the victim’s identity as helpless.<sup>180</sup> Many critics accept subjective narratives as appropriate components of criminal proceedings in general but object to the specific policy ramifications of including VIS during sentencing.<sup>181</sup> Even scholars who discuss the “representative character” of victim testimony conceive of this character as primarily a rhetorical strategy devised by the state to justify increased police power by encouraging an “it-could-be-you” attitude toward victims on the part of jurors.<sup>182</sup> And for their part, supporters of the statements point to “therapeutic” benefits for victims, and the “fairness” of letting three discrete entities—“the

part of the redefined mission of all criminal justice agencies.”); HANS BOUTELLIER, *CRIME AND MORALITY: THE SIGNIFICANCE OF CRIMINAL JUSTICE IN POST-MODERN CULTURE* 47 (2000) (“Without exaggeration, the reinforced position of the victim is the most important post-war development in the practice of criminal law.”).

177. Erin Sheley, *Reverberations of the Victim’s Voice: Victim Impact Statements and the Cultural Project of Punishment*, 87 *IND. L.J.* 1247 (2012).

178. See, e.g., Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 *ARIZ. L. REV.* 143, 145 (1999).

179. See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 106 (2007); Bandes, *supra* note 10, at 405.

180. See, e.g., Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1413 (1993).

181. See, e.g., Kenji Yoshino, *The City and the Poet*, 114 *YALE L.J.* 1835, 1884 (2005); Bandes, *supra* note 10, at 409 (“[N]ot every story should be told, or every voice heard. . . . We do not need elaborate structures to assist us in feeling fear, pain, and grief for those like us who have suffered violence at the hands of the other. This is already the dominant narrative of the criminal trial.”).

182. GARLAND, *supra* note 176, at 11; Simon, *supra* note 156, at 183.

State, the defendant *and* the victim” be heard, as though the three occupy wholly separate spheres.<sup>183</sup>

I have challenged both this three-sided conception of the relationship between stakeholders in the VIS debate and the conclusions drawn from it that would exclude the VIS from sentencing.<sup>184</sup> “The legitimacy of the criminal justice system to a given populace flows from its representation of socially shared norms of justice.”<sup>185</sup> This reliance means that “formal criminal law institutions, if they are to do their job, cannot be selective about the narratives they consider in the vindication of these shared norms.”<sup>186</sup> Due to the processes of cultural memory formation described in Section I.A of this article, personal memories of individual harm, in their aggregate, already combine to shape the collective memory of a culture. The question is whether VIS transmit evidence of this collective memory in a way useful for fact-finders at sentencing.

In my study of the VIS made at the sentencing of Zayd-al-Safarini—one of the hijackers of Pan-Am Flight 73 in 1986—I concluded they do.<sup>187</sup> I identified some of the structural features of the VIS that enables it to translate these harms to institutional listeners such as judges and juries.<sup>188</sup> Furthermore, the Safarini sentencing demonstrates the diversity of victim “voices” in existence; rather than speaking about these voices as monolithic cries for “vengeance” or exercises in “victim speak,” it is more useful to scrutinize them on an individual basis to ensure the relevance of the harm they narrate to the purposes of sentencing. By continuing to include these narratives, the rules of criminal procedure—though inevitably, to a large degree, objectifying to its participants—can nonetheless facilitate factfinders’ access to an account of the specific harm that resembles and engages it as has been experienced in the culture from which our moral norms emerge. This approach will retain narratives of actual harm as a buttress against potential stereotypes of victims and defendants that offend the dignity of all

---

183. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 612 (2009).

184. *See generally* Sheley, *supra* note 177, at 1285–86.

185. *Id.* at 1285; *see also* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

186. Sheley, *supra* note 177, at 1285.

187. *Id.* at 1260–77.

188. *Id.* (describing how, among other strategies, the victims’ idiosyncratic use of chronology and symbolic objects helps them negotiate some of the barriers to articulation and render their suffering “present” as an object for the sentencing body to consider, in a manner otherwise impossible).

actors in the system. Furthermore, to silence victims by excluding VIS from sentencing would risk delegitimizing the institutions of criminal justice by severing the official account of a particular criminal harm from the collective memory of that harm. Strong evidence suggests that when the system fails to track with shared social norms about culpability, the resulting sense of illegitimacy actually increases crime and decreases law-abidingness across the board.<sup>189</sup>

### 3. Conclusions

Martha Mahoney, specifically addressing the cultural silencing of domestic violence victims, argues that the relationship between women's lives and the law is not linear, but interactive.<sup>190</sup> As she puts it:

[C]ultural assumptions about domestic violence affect substantive law and methods of litigation in ways that in turn affect society's perceptions of women; both law and societal perceptions affect women's understanding of our own lives, relationships, and options; our lives are part of the culture that affects legal interpretation and within which further legal moves are made. Serious harm to women

---

189. People obey the law less due to fear of criminal punishment than to a combination of normative social influence and internal moral rules, the latter of which can be shaped by the former as children are shaped as moral actors in part by their social worlds. MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* 12 (1992). Interdisciplinary work in the fields of law and psychology has shown that intuitions about just punishment are shared among common citizens at an extremely nuanced level. See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007). Robinson and Kurzban argue that these intuitions generate specific determinations of deserved punishment for particularized crimes. *Id.* at 1832–36. Robinson and Darley have demonstrated that, due to the strength of these shared intuitions about guilt, when punishment deviates from those institutions it poses substantial systemic risks under utilitarian models of punishment, but becomes more effective at preventing crime when it is perceived by the community to assign liability in “just” proportion to the moral blameworthiness of the offender. See Robinson & Darley, *supra* note 185. Reviewing the social science literature, Robinson and Darley assert that this is because “the ability of the criminal justice system to harness the power of stigmatization, to avoid subversion and vigilantism, to gain compliance in borderline cases, and to have a role in shaping societal norms is directly related to its ability to gain moral credibility from those to whom it applies.” *Id.* at 29–31 (internal citations omitted).

190. Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991).

results from the ways in which law and culture distort our experience.<sup>191</sup>

Mahoney does not distinguish between how the law treats female victims during the trial phase and the sentencing phase, but her point underscores the fact that at *all* phases of the process the law has the capacity to affect social beliefs about the victims it ostensibly protects.

When a prosecutor overrides victim silence to secure a conviction, she may unintentionally contribute to social assumptions about a victimized group as subordinate. With its looser evidentiary rules and greater space for victim narrative individuality, however, the sentencing proceeding provides an opportunity to restore some of the agency the victim potentially lost during the trial. Furthermore, in light of the *Crawford* ruling, the victim might remain silent throughout the trial no matter what—particularly when she has died at the hands of the defendant. In such cases, the sentencing hearing becomes even more important as a way for the victim's voice to be heard even if indirectly, through family and loved ones. This is not only important, as I argued above, for capturing social norms about punishment, but also to positively impacting cultural views about victims through the dialectical process Mahoney describes.

### III. SUBSTANTIVE SILENCE

Part II identified many of the social and cultural effects of procedural silence. Procedural rules serve an expressive function to the extent that they are perceived to embody values of fairness, equality, rule of law, and other moral and constitutional norms (or the lack thereof). Procedural rules are not intended, however, to serve an explicitly expressive function when it comes to the definition of criminality, the assignation of culpability, or the condemnation resulting from a verdict and punishment. In this part, I turn to the questions raised by substantive silence: to what extent does silence arising in the definition of a crime or moral message flow from a defendant's conviction and punishment?

#### A. *Victims*

Earlier I advanced the argument that we omit victim voices from sentencing proceedings at our peril—not specifically because

---

191. *Id.*

excluding them harms the victims themselves (though the evidence suggests that it does),<sup>192</sup> but because it also excludes from the inside of the courtroom the narratives about the crime circulating in the world outside of the courtroom. To omit such narratives, I suggested, is to undermine public perceptions of the justice system's legitimacy. I categorized VIS as an element of procedural rather than substantive law: although given at sentencing, VIS do not directly determine sentences; they are merely one source of information to which the sentencing judge or jury has access. Yet VIS exemplify how procedural and substantive law can bleed together: the content of a VIS, if given significant weight by a factfinder, can affect the expressive message about the defendant's culpability transmitted by the sentence imposed.

Victim speech and silence can also manifest in purely substantive contexts. In cases where a victim's lack of consent is an element of an offense, silence forms part of the criminal prohibition itself. Where the state fails to prosecute cases involving certain types of victims, or where a criminal sentence omits an available restitutionary component, the substantive judgment also contains victim silence. In both of these cases, victim silence not only affects the law's denunciative message (as in a case where the victim did not speak at sentencing), but becomes a part of that denunciative message or lack thereof.

### **1. Victim Silence as an Element of Offense Definition: Sexual Assault**

In today's legal discourse, the question of substantive victim silence is perhaps nowhere as relevant as in the debate over the proper definition of sexual assault. Under the common law, rape could be proved with a showing of intent to penetrate and some evidence of "force," usually requiring resistance on the victim's part.<sup>193</sup> Because rape is a general intent crime, the resistance element of the *actus reus* has functioned as a stand-in for the *mens rea* requirement as to the victim's lack of consent.<sup>194</sup> After extensive

---

192. See Cassell, *supra* note 183, at 621–23.

193. SUSAN ESTRICH, *REAL RAPE* 5 (1987). For an extreme articulation of this requirement, see *People v. Dohring*, 59 N.Y. 374 (1874) ("The resistance must be up to the point of being overpowered by actual force, or of inability, from loss of strength, longer to resist, or, from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be dread or fear of death.").

194. Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 958 (2008).

efforts by feminist legal scholars and activists, courts and legislatures are coming to recognize the reality that lack of physical resistance hardly equates to consent to sexual contact. Thus, many jurisdictions have replaced the force element of rape with a requirement that the sexual contact be non-consensual.<sup>195</sup> In a substantial minority of these jurisdictions, consent is defined purely subjectively, meaning that the court may not even instruct the jury about a mistake-of-consent defense.<sup>196</sup> In other states the defense is allowed but the standard is somewhat high; in California for example, it requires “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.”<sup>197</sup> Even in states that retain the force requirement, courts have softened it in cases where consent clearly did not exist by recognizing theories like “psychological force” and “constructive force.”<sup>198</sup> Despite these changes, other provisions often weaken the concept of consent as embodied in the law of sexual assault; only four states deem consent vitiated by deception when it is used with the intent of achieving sex,<sup>199</sup> a state of affairs which “would be criminal if the commodity were anything but sex.”<sup>200</sup>

It can generally be said, however, that consent changes the legal status of a sexual act from prohibited to permitted.<sup>201</sup> Therefore, in jurisdictions that have adopted the consent theory, we can think of a victim’s silence, in certain cases, as an element of the *actus reus* of sexual assault. While there are ample evidentiary problems attendant to determining whether consent has been given, in many cases that issue may nonetheless be clearer than that of whether force has been used. Indeed, evidence suggests that overt speech acts can more clearly determine whether the law has been violated.<sup>202</sup>

---

195. There are currently twenty-eight “non-consent” states, although in twelve of them, the non-consent provisions do not apply to cases involving penetration, instead applying to lesser forms of sexual contact. John F. Decker & Peter J. Baroni, “No” Still Means “Yes”: The Failure of the “No-Consent” Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081 (2011).

196. Dripps, *supra* note 194, at 37.

197. *Id.*

198. *Id.* For example, the Supreme Court of New Jersey held that the act of penetration itself is sufficient as a showing of force. *Id.*

199. Decker & Baroni, *supra* note 195, at 1168.

200. Robin West, *Comment on “Beyond Rape”*, 93 COLUM. L. REV. 1442, 1443 (1993).

201. See Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 ETHICS 50 (2016).

202. Dan Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases*, 158 U. PENN. L. REV. 729, 796–97 (2010).

Beyond pragmatic benefits, however, consent proponents argue that the standard better captures the moral truth that “humans have a central interest in their sexual integrities not being violated.”<sup>203</sup> Much of the feminist discourse has consequently criticized the law’s treatment of women’s sexuality as a form of cultural silencing.<sup>204</sup> This suggests the importance of ceasing to legally co-opt a victim’s silence in fact with the implication of consent. We can understand the consent standard to change the substantive law to protect the victim’s silence in the face of sexual aggression: regardless of whether it is the silence of fear, of dignity, or any of the myriad other emotional reactions to the trauma of sexual assault. Today, most criminal law scholars favor of the consent standard over that of force.<sup>205</sup>

Nonetheless, the consent standard has both pragmatic and theoretical critics. John Decker and Peter Baroni argue that it has been ineffective at capturing genuine consent, both due to doctrinal problems such as the allowance of deceit and the reality that, as applied, it has tended to require a showing of at least “verbal resistance” in order for non-consensual sex to be criminal.<sup>206</sup> They would prefer an affirmative “yes means yes” standard, which they note would also allow flexibility in prosecutorial charging decisions by simplifying proof requirements.<sup>207</sup> Similarly, Donald Dripps fears that juries will never appropriately apply the consent standard in fact due to tension between “elite opinion,” which values sexual autonomy and condemns sexual aggression, and “popular opinion,” which supposes that sexual autonomy “may be forfeited by female promiscuity or flirtation, and views male sexual aggression as natural, if not indeed admirable.”<sup>208</sup> Dripps suggests that the

203. David Archard, *The Wrong of Rape*, 57 PHIL. Q. 374, 392 (2007).

204. See, e.g., ANDREA DWORKIN, INTERCOURSE 130 (1987) (“[T]he fear could and does keep millions quiet: millions of women; being fucked and silent; upright and silent; waiting and silent; rolled over on and silent; pursued and silent; killed, fucked, and silent. The silence is taken to be appropriate. The fear is not perceived as compromising or destroying freedom. The dictators do flourish: fuck and flourish.”); CATHERINE MACKINNON, WOMEN’S LIVES, MEN’S LAWS 350 (2007) (discussing the legality of porn and urging “it is time to face the role of public rape in silencing women”).

205. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 234–35 (1982); David P. Bryden, *Redefining Rape*, 3 BUFFALO CRIM. L. REV. 320, 321 (2000); Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 64 (1992).

206. Decker & Beroni, *supra* note 195, at 1167.

207. *Id.*

208. Dripps, *supra* note 194, at 958.

disconnect between popular opinion and law urges that prosecutors try close cases before judges, even if that constitutionally limits them to seeking only six-month prison terms.<sup>209</sup>

Theoretical critiques of the consent standard have made varying observations concerning its expressive messages about the victim and her position vis-à-vis society and the criminal justice system. Deborah Tuerkheimer has identified a “discrepancy between competing rape definitions,” which associates non-forcible sexual violations by acquaintances with the particular setting of college, and perpetuates the force requirement in most other settings.<sup>210</sup> She argues that this dichotomy discounts non-forcible violations against victims outside of college, who are actually even more vulnerable to violation than undergraduates.<sup>211</sup>

Lisa Gotell argues that, while the new consent standard may avoid the particular sort of silencing associated with the old order, it still risks legitimizing only particular sorts of victim stories, those that demonstrate the capacity for a certain kind of “risk management.”<sup>212</sup> According to Gotell, the standard creates new forms of exclusion because, “while the idealized masculine sexual citizen, constituted in and through an affirmative consent standard, is he who rationally responds to the risks of criminalization through consent seeking, the idealized feminine sexual subject is she who actively manages her behavior to avoid the ever-present risk of sexual violence.”<sup>213</sup> Gotell’s critique seems more justified as to the application of the consent standard than the content of the standard itself. As the Decker and Baroni survey suggests, and as illustrated by the recent commentary of Alberta Court of Appeals Justice Robin Camp,<sup>214</sup> decision-makers can apply the standard in such a manner that seems to require heightened vigilance and behavior modification on the victim’s part. Yet this problem seems to flow not

---

209. *Id.*

210. Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 5 (2015).

211. *Id.*

212. Lisa Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865 (2008).

213. *Id.* at 879.

214. Alice Woolley, Jennifer Koshan, Elaine Craig & Jocelyn Downie, *Complaint to the Canadian Judicial Council Regarding the Conduct of Justice Robin Camp of the Federal Court Trial Division* (Nov. 9, 2015), <http://s3.documentcloud.org/documents/2510250/cjc-complaint-r-camp.pdf>; Kathleen Harris & Alison Crawford, *Federal Court Judge Under Review for Berating Sex Assault Complainant*, CBC NEWS (Nov. 10, 2015, 6:35 PM), <http://www.cbc.ca/news/politics/canada-judge-judicial-review-robin-camp-1.3311574>.

from the standard itself but from its misapplication. The cultural narratives associated with silence are varied, as outlined in Section I.B, and to legally protect silence as to consent is precisely to recognize that the individual circumstances of a victim that lead her to silence can vary.

Scott Anderson proposes another standard altogether, on the grounds that “non-consent” fails to adequately capture the full social context of the power dynamics between victim and assailant.<sup>215</sup> He would define sexual assault as containing an element of “coercion,” which “is best understood as a use of asymmetric power that one sort of agent may hold over another sort based in the former’s ability to inhibit broadly the ability of the latter to act, by means such as killing, injuring, disabling, imprisoning, or drugging.”<sup>216</sup> In Anderson’s view, simply disrespecting an agent’s non-consent in a violent and bodily harmful way—which also describes simple assault—fails to rise to the level of psychic damage common in cases of rape.<sup>217</sup> Anderson appears concerned that the consent standard will create overly broad liability at the risk of degrading the deeper structural harms associated with forcible and more coercive instances of non-forcible rape. As one of the examples of less than coercive sex, Anderson describes the hypothetical case of a girlfriend who tells her boyfriend “she doesn’t want to have sex because she is not in the mood for sex, but he persists, and though she relents (in that she stops pushing him away and telling him ‘no’), she is somewhat peeved, and never explicitly gives consent to sex.”<sup>218</sup> Anderson asserts that while this case “may evidence problematic behavior by the male aggressor involved,” it “pale[s] in comparison of to the badness of the behavior” of a man who has sex with an acquaintance who repeatedly says “no, no.”<sup>219</sup>

While the second man may be the worse actor, it is not at all clear that the first man’s behavior would not qualify as rape even under the traditional force model, albeit where the element of force would be the psychological pressure the woman felt to satisfy her boyfriend’s sexual needs even at the cost to her bodily autonomy. While one can assume that in most cases the imposed-upon girlfriend would not bring charges—due in part to her overriding feelings of love for her boyfriend trumping her concerns of personal

---

215. Anderson, *supra* note 201, at 58.

216. *Id.*

217. *Id.* at 63.

218. *Id.* at 64.

219. *Id.* at 65.

autonomy—it is still the case that if the law fails to define that particular fact pattern as an offense it allows a victim's silence to be co-opted into the service of her partner's sexual needs. (Indeed, one could argue that in cases of intimate partners, silence should deserve even greater respect because of the personal incentives a victim may have not to continue to say "no" to someone she (or he) loves). By criminalizing the first scenario, the law contributes to a norm of respect for silence in cases where it can have a range of meanings (one of them being "no, no!" even if not stated explicitly as in the second case).

Part of the law's work in these cases is to thrust the question of silence into the light. The law's norm-generating function may induce generally well-meaning parties to understand that, even in the ellipsis produced by a silence, their partner's subjective experience of a sexual encounter may vary from their own. Silence may obscure the relationship between Anderson's two hypotheticals, but the law can clarify it. Along these lines, psychologist Cheryl Koopman has suggested viewing rape through the lens of political psychology—in the way the trauma of the Holocaust or the Vietnam War has been studied—for the purposes of alleviating trauma.<sup>220</sup> Rape may be conceptualized as a form of political trauma even if not caused by a formal political decision-maker, for example as an indication of a social ideology of male supremacy or gender inequality.<sup>221</sup> In the Holocaust context, researchers have identified a "conspiracy of silence" preventing survivors from having a chance to fully discuss their experience, due to other peoples' reluctance to hear about extreme trauma.<sup>222</sup> Although comparing nonconsensual sex while "not in the mood" to the magnitude of trauma represented by the Holocaust is problematic, the structural operation of silence between the two cases is similar. In both cases, a personal experience of violation has a broader political context, as victims can benefit from the reasons for silence being drawn into the light; in the case of rape, such reasons are brought forth through the mechanism of judicial discourse.

---

220. Cheryl Koopman, *Political Psychology as a Lens for Viewing Traumatic Events*, 18 POL. PSYCHOL. 831, 843 (1997).

221. See, e.g., JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* (1981); DIANA RUSSELL, *THE POLITICS OF RAPE* (1975).

222. *Id.* at 838.

## 2. Victim Silence as an Aspect of Culpability and Punishment

In the last section I noted how, in sexual assault cases, fraud is rarely held to vitiate consent. This means that where the defendant's deceit precluded the sort of "meeting of the minds" that would be necessary for a contract to be upheld, he will nonetheless avoid prosecution.<sup>223</sup> The variable relevance of deceit to criminal liability embeds certain types of victim silence into the substantive meaning of criminal fraud.<sup>224</sup> If a man lies to a woman about his income or position in order to benefit from her consent to sex, her consent to intercourse would not be vitiated in most jurisdictions, despite the fact that she has been silent as to her willingness to have sex in the world as it truly is, as opposed to what she believed it to be. There may be perfectly good policy reasons for limiting criminal liability in this manner, at least much of the time.<sup>225</sup> But the point remains that, even in consent jurisdictions, when the law makes this distinction in offense definitions, it protects only certain forms of victim silence.

The law of fraud implicates victim substantive silence even in business and corporate contexts, where the definition of the offense makes no formal distinction between certain types of victims. This is true due to prosecutorial enforcement decisions between different types of fraud defendants, as well as sentencing decisions that may or may not take victim restitution into account. For example, health care fraud, which usually involves false billings or kickbacks, is often prosecuted under 18 U.S.C. § 1347, which criminalizes the knowing and willful execution or attempted execution of any scheme to defraud a health care benefit program if the scheme relates to the delivery of or payment for health care benefits, items, or services.<sup>226</sup> Anthony Kyriakakis has observed how the internal dynamics within the criminal justice bureaucracy, including those driven by governmental interests, as well as the individual interests of agents and prosecutors, have contributed to the prevailing tendency to treat health care fraud as just another flavor of fraud against the

---

223. Except in certain cases, such as those involving medical professionals.

224. Fraud is generally defined as "criminal deception intended to result in personal or financial gain." Definition of Fraud, GOOGLE, <https://www.google.com> (last visited Feb. 5, 2017) (search for "fraud" on Google search page).

225. For example, concerns about the law over-policing domestic and personal interactions or moral reluctance to implicitly validate a person's agreement to sex in exchange for financial or professional gain.

226. See 18 U.S.C. § 1347 (2012).

government or private insurers.<sup>227</sup> In other words, prosecutors tend to make charging decisions based upon harm to collective entities, with little regard for harms suffered by the patients themselves, despite the fact that they are the most vulnerable stakeholders in the fraudulent transaction. Kryiakakis asserts that this has caused the harms suffered by patients to be minimized, overlooked, or ignored.<sup>228</sup> If this is the case, victims of health care fraud are silent within the justice system's eventual expression of culpability against fraudulent health care providers, whose punishment does not increase in severity relative to the extent of victim harm.

By contrast, the prosecution of corporate entities for their role in the 2008 financial crisis has been more victim-focused. In corporate fraud cases, defendants have typically used deceptive accounting to conceal the true state of their financial health from individual and institutional investors alike.<sup>229</sup> The crisis lost over 15% of the value of public pension plans<sup>230</sup> and 26% of private pension plans,<sup>231</sup> much of it due to fraud. As a result, the FBI's pursuit of corporate fraud cases rose dramatically between the years 2005 and 2011 and resulted in orders of restitution to victims totaling \$2.4 billion.<sup>232</sup>

The status of victim restitution as a component of criminal punishment has raised controversies of its own. Since the rise of the victim's rights movement in the 1980s, various federal statutes have imposed a defendant's obligation to pay restitution to victims of certain types of offenses.<sup>233</sup> Courtney Lollar has pointed out that restitution has come to be used for more than simply restorative purposes, and courts now impose it in the manner of civil damages—not only for concrete financial losses but “as compensation for

---

227. Anthony Kyriakakis, *The Missing Victims of Health Care Fraud*, 215 UTAH L. REV. 605, 611 (2015).

228. *See id.*

229. SAURAV DUTTA, STATISTICAL TECHNIQUES FOR FORENSIC ACCOUNTING: UNDERSTANDING THE THEORY AND DATA ANALYSIS 5 (2013).

230. Douglas J. Elliott, *The Financial Crisis' Effects on the Alternatives for Public Pensions*, BROOKINGS (Apr. 20, 2010), [https://www.brookings.edu/wp-content/uploads/2016/06/0420\\_public\\_pensions\\_elliott.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0420_public_pensions_elliott.pdf).

231. BRIAN KEELEY & PATRICK LOVE, FROM CRISIS TO RECOVERY: THE CAUSES, COURSE AND CONSEQUENCES OF THE GREAT RECESSION 71 (2010).

232. DUTTA, *supra* note 220, at 4–5.

233. *See, e.g.*, Victim and Witness Protection Act of 1982, Pub. L. No. 97–291, 96 Stat. 1248 (codified as amended in scattered sections of 18 U.S.C. and FED. R. CRIM. P. 32(c)(2)); 18 U.S.C. §§ 2248, 2259 (2012); 18 U.S.C. § 3663A (2012) (mandating victim restitution, regardless of defendant's ability to pay, in cases the cause monetary losses or bodily injury to the victim); 18 U.S.C. § 3771 (2012).

abstract emotional and psychological injuries.”<sup>234</sup> Lollar proposes that, because restitution is imposed “subsequent to a criminal allegation, pursuant to a statute motivated by morally condemnatory intent, and resulting in a substantial deprivation or obligation,” it should receive the same protections under the Sixth and Eighth Amendment as any other form of criminal punishment.<sup>235</sup> Lollar makes a strong case for the condemnatory nature of criminal restitution. If she is correct, this means that—in addition to requiring certain constitutional obligations to defendants—the presence or absence of restitution as a remedy becomes part of the expressive function of the judgment. Thus, cases where victim restitution is available but not ordered present additional examples of substantive victim silence.

Despite the fact that several federal statutes now make restitution mandatory in certain types of cases, prosecutors do not always seek it.<sup>236</sup> Warren Binford has pointed out, for example, that victims of child pornography distribution frequently lack the resources to obtain adequate psychological care, in part due to the combination of prosecutorial decisions and the fact that they do not have access to state victims’ funds reserved for victims of violent crimes.<sup>237</sup> This, of course, creates a severe practical problem for the victims themselves, which involves additional complications in the process for civil recovery.<sup>238</sup> But it also provides an example of how both statutory decisions about restitution requirements and the operation of prosecutorial discretion can inadvertently silence certain victim experiences more than others in the process of substantively condemning the accused.

### 3. Conclusions

This section has dealt with substantive silence at the two polar ends of the criminal process: the legislative definition of a criminal offense and the expressive message sent by an individual criminal conviction and sentence. It should hopefully be clear that the system’s substantive message about victim silence may be the

---

234. Cortney Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 100 (2014).

235. *See id.* at 93.

236. Warren Binford, *Beyond Paroline: Ensuring Meaningful Remedies for Child Pornography Victims at Home and Abroad*, 35 CHILDREN’S LEGAL RIGHTS J. 117, 133 (2015).

237. *Id.*

238. *Id.*

product of multiple layers of meaning. A crime might be defined in such a way as to prevent victim silencing by the offender by refusing to fill in his interpretation of such silence. Yet, if the government does not pursue certain types of offenders, or the offenders of certain types of victims, the ultimate expressive message of the criminal justice system may still contain embedded victim silence. Only by looking at each phase of this process can we trace the overall substantive effect of such silences.

### *B. Defendants*

In this section I consider two very different contexts in which a defendant's substantive silence is problematic. It is important to remember at the outset that the 96% of cases resolved by plea bargains all involve some degree of substantive silence, at least insofar as the defendant chooses not to probe the prosecution's account of his misconduct in open court. This is a massive liability of the system in general. However, the two cases I describe constitute extreme cases of total defendant silence embedded in the justice system's formal expression of culpability and condemnation.

#### **1. Nolo Contendere and Alford Pleas**

While the practice of plea bargaining was well established in the United States by the 1800s,<sup>239</sup> it was not held formally constitutional until the 1970s.<sup>240</sup> The fact that 96% of all criminal prosecutions are resolved through plea agreements gets attributed to the overall limitation on resources in the criminal justice system.<sup>241</sup> Critics of the plea bargain's ascendance point to its potential to encourage factually innocent defendants to plead guilty in order to escape more severe punishment.<sup>242</sup> This possibility arises, in part, from the breadth of prosecutorial discretion and the severity of punishments on the books, which allow prosecutors an enormous amount of room

---

239. See JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS, CRIMINAL PROCEDURE 9 (Hiram E. Chodosh ed., 2009).

240. See *Brady v. United States*, 397 U.S. 742 (1970).

241. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea Based Ceilings*, 82 TULANE L. REV. 1237, 1259 (2008); see also Warren Burger, *The State of the American Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (“A reduction from 90 per cent to 80 per cent in guilty pleas requires twice the judicial manpower and facilities . . . . A reduction to 70 per cent trebles this demand.”).

242. See generally John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

to threaten defendants with lengthy prison sentences.<sup>243</sup> Furthermore, the plea process has limited judicial supervision.<sup>244</sup> The Federal Rules of Criminal Procedure require judges to ascertain whether there is a “factual basis” for a plea, yet that inquiry has tended to focus only on whether the plea was knowing and intelligent.<sup>245</sup> Whether or not the defendant knew what he was doing in making the plea sheds little light on his guilt or innocence of the underlying conduct. Due in part to the potential gap between bargained-for pleas and cases of actual guilt, scholars such as Gregory Gilchrist have argued that a guilty plea should be classified as distinct from a trial conviction for post-trial purposes.<sup>246</sup>

Above and beyond the general issues raised by plea bargaining, a particular subset of pleas incorporate the defendant’s silence as to the underlying offense into the system’s formal expression of his guilt. In *nolo contendere*, or “no contest,” pleas, the defendant admits guilt for the purposes of the case at hand but the plea creates no estoppel (which is particularly important in cases where the victim subsequently seeks civil damages).<sup>247</sup> In *nolo* cases the defendant does not contest the imposition of punishment but makes no formal admission of guilt.<sup>248</sup> The Federal Rules of Criminal Procedure allow such pleas, subject to the district court’s permission, as does the law of 38 states and the District of Columbia.<sup>249</sup> Such pleas are controversial and not permitted under the law of Canada.

Even more controversial are so-called “*Alford*” pleas, recognized as constitutional (though not required as the defendant’s right) in *North Carolina v. Alford*.<sup>250</sup> In an *Alford* plea, the defendant submits a guilty plea and accepts its consequences, while simultaneously proclaiming his innocence.<sup>251</sup> The Supreme Court held that an *Alford* plea represented the reasonable choice of a defendant to limit his maximum sentence, and that it was similar enough to a *nolo contendere* plea as to be constitutional, subject to the court’s decision

243. *Id.* at 164–65; see also William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2475–76 (2004).

244. Blume & Helm, *supra* note 242, at 165.

245. FED. R. CRIM. P. 11.

246. See Gregory M. Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143, 158–59 (2011).

247. See G. NICHOLAS HERMAN, PLEA BARGAINING §§ 7.12, 8.06 (1997).

248. *Id.*

249. See Bibas, *supra* note 8, at 1371 n.44.

250. *North Carolina v. Alford*, 400 U.S. 25 (1970).

251. See *id.* at 26–27, 37–38.

to accept it.<sup>252</sup> A trial judge may only accept an Alford plea on a finding of “strong evidence of actual guilt.”<sup>253</sup> These pleas are allowed in forty-seven states and the District of Columbia.<sup>254</sup>

In a 2003 study of *nolo contendere* and *Alford* pleas, Stephanos Bibas found that they arise with particular frequency in cases of sex offenses and white-collar crimes.<sup>255</sup> In Bibas’ sample of 18,500 *nolo* pleas, 26% involved drug crimes, 25% involved property crimes including embezzlements, 23% involved sex crimes, and 14% involved white collar crimes.<sup>256</sup> In his sample of 2,500 *Alford* pleas, 27% involved sex offenses, 27% involved other violent offenses, and 12% involved white collar offenses.<sup>257</sup> Bibas’ interviews with defense counsel, prosecutors, and judges revealed that “the most common barrier to a classic guilty plea is the defendant’s fear of embarrassment and shame before family and friends.”<sup>258</sup>

Reflecting on these phenomena, Bibas makes a cogent argument against the acceptance of both types of pleas, on the grounds of both systemic accuracy (real and perceived) and substantive criminal law values.<sup>259</sup> His case deserves detailed examination. On the accuracy point, Bibas argues that innocent victims should be deterred from pleading guilty to crimes they did not commit.<sup>260</sup> While other scholars such as Frank Easterbrook and Albert Alschuler have pointed to the benefits a defendant derives from a wider range of options, Bibas asserts that defendants likely overestimate their odds of conviction at trial and, beyond that, utilitarian concerns should not trump the moral obligation not to intentionally facilitate injustice.<sup>261</sup> Furthermore, he points out that public confidence and faith in the justice system will be undermined by the common perception that innocent defendants are being punished.<sup>262</sup> As I discussed earlier in my account of victim impact statements, the scholarship on the utility of desert show that the perceived

---

252. *Id.* at 36–38.

253. *Id.* at 37.

254. *See* Bibas, *supra* note 8, at 1372 n.52.

255. *Id.* at 1376.

256. *Id.*

257. *Id.*

258. *Id.* at 1377.

259. *Id.* at 1377–1407.

260. *Id.* at 1382.

261. *Id.* at 1384.

262. *Id.* at 1387 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 210–11 (1988)).

legitimacy of the criminal justice system is crucial to maintaining the law's moral force and popular obedience.<sup>263</sup>

On the values point, Bibas argues that the pleas “muddy the denunciation of the crime” and fail to vindicate community moral norms such as honesty and responsibility.<sup>264</sup> They also allow the defendant to persist in a state of psychological denial about his actions, which contravenes the restorative purposes of criminal punishment.<sup>265</sup> Bibas asserts that, for defendants who are unwilling to recognize the harm caused to their victims and participate in the public repentance of a classic guilty plea, the appropriate alternative is a trial, which will “bring catharsis and closure to the victim and the community.”<sup>266</sup> By contrast, *Alford* and *nolo contendere* pleas “in the name of efficiency and autonomy subvert the substantive moral messages that unambiguous trial verdicts send.”<sup>267</sup>

Bibas' critics focus on the fact that, given the entrenched nature of plea agreements and the prosecution's ability to incentivize pleas, abolishing *nolo* and *Alford* pleas would only increase the pressure on defendants to confess or else risk added punishment when they refuse to.<sup>268</sup> As Alschuler puts it “[b]locking defendants from declaring in public, ‘I didn't do it but I want to take the deal,’ does not send a moral message. It only increases the system's hypocrisy.”<sup>269</sup>

Gilchrist shares Bibas' concern with perceived systemic legitimacy, but it leads him to the opposite conclusion.<sup>270</sup> For Gilchrist, requiring a defendant with a good-faith belief in her innocence to confess is at odds with all of the factors Tom Tyler has identified as promoting procedural justice of a legal system:

(1) It prevents the defendant from stating his case; (2) it fails to treat the defendant with dignity; and (3) from the defendant's perspective it reflects poorly on the character of the legal authorities. First, being compelled to state something that the defendant believes to be untrue is much worse than merely not being able to tell one's story . . . . Second, few subjected to such coercion would feel that the compulsion to lie about one's own guilt is consistent with being

---

263. See *id.* at 1387; *supra* Section II.B and supporting citations.

264. *Id.* at 1389.

265. *Id.* at 1393–1400.

266. *Id.* at 1402.

267. *Id.* at 1402–03.

268. Albert Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1423 (2003).

269. *Id.* at 1424.

270. See Gilchrist, *supra* note 246, at 166.

treated with dignity. And third, the person subject to this treatment is unlikely to feel that it reflects positively on the character of the legal authorities.<sup>271</sup>

Gilchrist proposes, therefore, that because all plea bargains involve a disconnect between the formal evaluation of evidence and the fact of conviction, no pleas should require an admission of guilt.<sup>272</sup>

Bibas' critics are rightly concerned with the enormous risk to innocent defendants posed by the incentives of the overall plea process, many of which may doubtless be attributed to the façade of the right to procedural silence created by *Miranda*.<sup>273</sup> Yet Bibas' primary point—that *Alford* and *nolo* pleas undermine the substantive purposes of punishment—is even more significant when we consider such pleas in light of what we know about the RIF effects of silence in general. Allowing crimes—particularly classes of crimes with uniquely silent victims, such as white collar and sex crimes—to be resolved through an official expression of the defendant's substantive silence, is to facilitate collective forgetting of the underlying conduct. (This would, of course, be even more dramatically true in a world where *no* pleas required an admission of guilt—meaning that 96% of crimes would generate expressive messages conducive to forgetting). While the plea process subjugates criminal defendants, the officially sanctioned forgetting facilitated by *nolo* and *Alford* pleas contributes to precisely the effect Mahoney describes: cultural devaluation (in this case in the form of potential collective amnesia) of crime victims.<sup>274</sup> In the next section, I turn to another example of substantive silence in the corporate context.

## 2. Deferred Prosecution Agreements

I have already discussed how corporations demonstrate similar symptoms of denial as individual defendants, as well as the comparatively high incidence of *Alford* pleas in cases of white collar crime.<sup>275</sup> The phenomenon of corporate denial would seem to be encouraged by the Department of Justice's (DOJ) prosecutorial charging guidelines, which turn, in significant part, on a corporation's post-offense behavior that “may bear little

---

271. *Id.* (citing Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007)).

272. *Id.* at 174–76.

273. *See supra* notes 103–114 and accompanying text.

274. Mahoney, *supra* note 190.

275. *See supra* Parts Sections I.A and III.A.

correspondence to the underlying offense.”<sup>276</sup> In other words, federal prosecutors do not make charging decisions primarily on the basis of a corporation’s substantive culpability, but on the extent to which the corporation is willing to assist in its own investigation after the fact.<sup>277</sup> This means that, in the denunciative public message sent by a guilty plea and resulting punishment, the story of substantive corporate criminality may be eclipsed by the story of post-offense cooperation.

Within this framework, perhaps the most extreme example of corporate substantive silence is the current dominance of the deferred prosecution agreement (DPA) and non-prosecution agreement (NPA) in federal criminal enforcement actions. In both types of agreements,<sup>278</sup> the DOJ agrees to hold off on prosecution in exchange for the corporation’s agreement to pay fines and submit to changes in practice such as improving internal controls or submission to a compliance monitor. The DPA and NPA are used in a range of criminal contexts, including fraud, accounting fraud, tax evasion, and antitrust violations.<sup>279</sup> Most famously, they have become the favored enforcement mechanism for the Foreign Corrupt Practices Act.<sup>280</sup> Since 2010, 86% of FCPA enforcement actions against corporations have been resolved through a DPA or an NPA.<sup>281</sup>

Observers have noted that, due to the almost total lack of judicial oversight of DPAs and NPAs, the meaning of the FCPA itself has been developed not through case law but through internal DOJ

---

276. William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1311 (2007).

277. *Id.*

278. SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, U.S. SEC. & EXCH. COMM’N (Jan. 13, 2010), <https://www.sec.gov/news/press/2010/2010-6.htm>.

279. Gibson Dunn, *2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, 13–14 (July 6, 2016), <http://www.gibsondunn.com/publications/documents/2016-Mid-Year-Update-Corporate-NPA-and-DPA.pdf>.

280. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. § 78); Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100–418, 102 Stat. 1415 (codified as amended at 15 U.S.C. §§ 78dd–1 to 78dd–3, 78ff); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd–1 to 78dd–3, 78ff).

281. Mike Koehler, *DOJ Enforcement of the FCPA—Year in Review*, FCPA PROFESSOR (Jan. 27, 2011), <http://fcpaprofessor.com/doj-enforcement-of-the-fcpa-year-in-review/>.

charging guidelines and memoranda.<sup>282</sup> (Because the statute creates both civil and criminal liability, the SEC brings civil enforcement actions against issuers, particularly in cases where there is not enough evidence of intentional wrong-doing to bring a criminal case).<sup>283</sup> The primary justification for these agreements is that they provide a middle ground between giving the corporation a free pass and creating another “Arthur Andersen situation”—i.e., the presumed death of a corporation in the wake of criminal prosecution.<sup>284</sup>

Scholars have objected to such agreements due to the fact that they are made under “economic duress,”<sup>285</sup> that the lack of trial opens the door to prosecutorial abuse,<sup>286</sup> and that in the FCPA context the DOJ’s aggressive interpretations of the Act would not survive judicial scrutiny.<sup>287</sup> According to a recent empirical study by Mike Koehler, DPAs and NPAs appear to be responsible for the much greater number of indictments against corporations instead of individuals: because individuals are more likely to force the DOJ to pursue its legal theory in court, it frequently fails to prosecute

---

282. See, e.g., DEPARTMENT OF JUSTICE, U.S. ATTORNEY’S MANUAL §9-28.000 (2015), available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>; see also U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 25 (2009) (reporting that most judges said they were “generally not involved” in the DPA process); Mike Koehler, *The Facade of FCPA Enforcement* 41 GEO. J. OF INT’L L. 907, 929 (2010) (“In the past two decades, no corporation has publicly challenged either enforcement agency in an FCPA case; thus these resolutions vehicles have been the sole means by which corporate FCPA enforcement actions have been resolved during the current facade era of FCPA enforcement.”).

283. Koehler, *supra* note 282, at 923.

284. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI-KENT. L. REV. 77, 79 (2010).

285. Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 38–40 (2007) (citing *United States v. Stein I*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006)) (“But for the threat of possible prosecution by the government and its resulting consequences, these terms would not normally be agreed to by the corporation.”).

286. Erik Paulsen, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1436, 1457, 1459 (2007) (“It has become increasingly clear that the government holds all the cards in negotiations over these agreements. As long as the threat of prosecution lingers over a company, the corporation is compelled to agree to the prosecutor’s terms, vesting nearly absolute power in the government’s hands. . . . Without the threat of trial, however, there is no assurance that the prosecutor is acting in a judicious manner”).

287. Koehler, *supra* note 282, at 946.

individuals at all.<sup>288</sup> Koehler found that, while DPAs have resulted in a greater *quantity* of FCPA enforcement, it has been at the expense of *quality* of enforcement.<sup>289</sup>

While much of the concern about DPAs appears to have focused on the potential unfairness to defendants, a recent case helps clarify how these agreements may unfairly impact the public by unjustifiably *protecting* defendants. In *United States v. Fokker Services*, the defendant aircraft manufacturer was accused of illegally selling equipment to the governments of Sudan, Burma, and Iran.<sup>290</sup> District Judge Richard Leon rejected the combined arguments of both the government and the defendant calling for him to rubber stamp the resulting DPA, which would have required Fokker to pay \$21 million in combined forfeiture and civil penalties.<sup>291</sup> In his opinion, Judge Leon found “it would undermine the public’s confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country’s worst enemies.”<sup>292</sup> Judge Leon’s concern is with the potentially inadequate size of the punishment. But the *Fokker* case is only one example of a pervasive problem with DPAs: the justice system never produces a message of actual criminal condemnation of the corporate defendant’s conduct, even in the form of a guilty plea without trial. While the DOJ issues a press release upon each agreement to a DPA, outlining its evidence against the defendant in language that presumes liability, the corporation itself is permitted to remain silent.

I have argued elsewhere that FCPA cases highlight how the current prosecutorial emphasis on a corporation’s post-indictment behavior, such as cooperation, undermines the expressive benefits of corporate criminal liability by divorcing punishment from the harm

---

288. Mike Koehler, *Measuring the Effects of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcements*, 49 U.C. DAVIS L. REV. 497, 556 (2015).

289. *Id.*

290. *United States v. Fokker Services B.V.*, 79 F.3d 160 (D.C. Cir. 2015).

291. *Fokker Services B.V. Agrees To Forfeit \$10.5 Million For Illegal Transactions With Iranian, Sudanese, and Burmese Entities Company Will Pay Additional \$10.5 Million In Parallel Civil Settlement*, U.S. DEPT. OF JUST. (June 5, 2014), <https://www.justice.gov/usao-dc/pr/fokker-services-bv-agrees-forfeit-105-million-illegal-transactions-iranian-sudanese-and>.

292. *Fokker*, 79 F.3d, at 167.

actually imposed by the misconduct.<sup>293</sup> I used the examples of victim testimony about the harm they suffered through corporate misconduct to show how part of that harm comes from the perception of corporations as structurally aligned with sources of legal power.<sup>294</sup> As the citizens' commission organized to investigate the Pittston Corporation's criminal misconduct leading to the tragic mining flood in Buffalo Creek, West Virginia stated, "the fact of the matter is that these are all laws on the books which the company felt completely free to ignore, which says something about the relationships between coal companies and state governments . . . just this complete freedom to ignore these laws with no fear of any kind of prosecution."<sup>295</sup> If this is the case, then the blurring of the line between prosecutor and corporate management occasioned by the DPA mechanism's focus on post-hoc cooperation risks solidifying this problem.<sup>296</sup> In essence, these pleas creates the same problem as *nolo* pleas in the individual context: the court allows the corporation to remain silent as to the underlying conduct and, instead, distract from questions of culpability with press releases about cooperation and remediation. This effect is heightened by the additional fact that individual defendants are less likely to go to jail when the case against the corporation has been resolved by a DPA; with no media images of individual executives taking accountability, the entire criminal enforcement against the corporation looks more like civil regulation. We know from the literature reviewed in Part I that a speaker's selective recounting of memories shared with a listener can induce collective forgetting of unmentioned, related material.<sup>297</sup> While obviously it would be an even greater injustice for prosecutors to ignore corporate misconduct entirely, it is a significant problem that in the current world of corporate DPAs the corporation gets to tell a story about cooperating while omitting the related details of the underlying misconduct. This has the capacity to encourage both corporate denial and collective forgetting.

---

293. Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225 (2013).

294. *Id.* at 261–63.

295. Appalshop's Buffalo Creek Film Preservation & Digital Outreach Project, *The Buffalo Creek Flood: An Act of Man Transcript 5* (1975), available at <http://www.buffalocreekflood.org/media/BCF-transcript.pdf>.

296. Sheley, *supra* note 293, at 267.

297. *See supra* Section I.A.

### 3. Conclusions

What we know about the psychological and cultural effects of silence supports Bibas' concern about *nolo* and *Alford* pleas. The eclipse of substantive values by procedural rules not only affects the expressive function of punishment at a symbolic level but, to the extent that this creates pockets of substantive silence, it risks distorting a community's ability to recognize and remember a criminal action, or else sending an official message that conflicts with collective memory formed outside of the courtroom. Furthermore, the DOJ's current reliance on DPAs and NPAs duplicates this problem in the federal corporate context. In Part IV I will show how we might balance concerns about defendant autonomy with the criminal justice system's duty to maintain expressive legitimacy by paying closer attention to the distinct roles of procedural and substantive silence.

## IV. SUGGESTIONS FOR MANAGING VARIETIES OF SILENCE

While this article has raised a number of doctrinal issues that each warrants individual detailed treatment, it has also sought to paint an overall picture of the interconnections between procedural and substantive silence and what we know about how silence operates, individually and collectively, in the world at large. At the theoretical level, it urges that scholars, courts, and stakeholders take a step back and look at how these relationships play out, rather than to focus only on particular doctrinal problems. Yet at the same time it also urges that we resist the temptation to speak monolithically about the silencing of victims or defendants, but rather look at the distinctions between and implications of substantive and procedural silence. More specifically, I offer here a list of proposed changes to the status quo to improve the quality of criminal justice based upon how the system channels silence.

### C. Procedural Silence

First, the Supreme Court should restore the due process coercion standard for custodial interrogation to replace the fig leaf created by the *Miranda* decision. *Miranda* has elevated the concept of "silence" into a false constitutional narrative, which manages, simultaneously, to fail at protecting defendants from being strong-armed into confession, while simultaneously enshrining an overly expansive concept of defendant silence as a monolithic right, which

may lead to popular perceptions of injustice. (To appropriately implement a coercion standard, courts should review empirical evidence on good and bad policing techniques, particularly on the question of what lines of questioning are most likely to lead to false confessions.)

Second, the Court should reverse its holding in *Griffith*, thereby allowing prosecutors to comment on a defendant's failure to testify as part of their closing argument to the jury. What we know about socially shared, retrieval-induced forgetting suggests that public trials that omit certain material from their truth-finding process risk not only arriving at bad verdicts but also contributing to collective forgetting of the excluded material, with the attendant potential costs of either victim disempowerment or social perceptions of illegitimacy. This is an even bigger problem in the wake of *Crawford*, with its potential to wholly remove victim perspectives from the evidentiary record. Prosecutors should be allowed to connect the evidentiary dots to give narratively coherent accounts in place of silent victims. Furthermore, this would not exceed any social or moral conception of the defendant's trial right to silence identifiable in the literature. However, to accompany this change, legislatures should also consider Ted Sampson-Jones' suggestions on how to lower the unfair costs of defendant testimony, particularly as they relate to the admission of prior bad acts for impeachment purposes. Such evidence already poses a high risk of distracting the jury from the determination of culpability, which is much less substantively just than the prosecutor's commentary on relevant facts.

Third, prosecutors should take into account the individual and systemic effects of victim silence at trial, when considering whether to put victims on the witness stand. With respect to the individual victim, silence may empower or disempower, particularly when he is selectively silenced by the prosecutor's line of questioning. This may or may not be counterbalanced by the social utility of obtaining a conviction. Additionally, within the calculus of social utility, the prosecutor should consider the SS-RIF effects resulting from either total or partial silencing of the victim's story. In other words, the prosecutor's general responsibility to protect the public from criminal harm may include the imperative to prevent the systemic silencing of certain types of victims suffering certain types of harm, even when the individual victim might prefer silence. Prosecutorial handbooks and training materials should be adapted to include information about the effects of victim silence and the complications it poses, beyond the important—but already clear—conflict between an individual victim's needs and the public interest. Finally, in

sentencing contexts, the use of VIS should be respected as important, not only to individual victim empowerment, but to combatting collective forgetting and perceived systemic illegitimacy at the cultural level. This is even more true in cases where Crawford constitutionally requires victim silence during the guilt phase.

#### *D. Substantive Silence*

First, the definition of sexual assault should be standardized around the concept of consent. A proper understanding of the many operations of silence makes it clear that, from the perspective of a victim, silence can have a wide range of meanings. The burden should not be on the victim to articulate them clearly in the heat and confusion of a sexual encounter. Rather, the law's expressive function should protect this form of substantive silence. We should not, however, ignore the fact that the consent standard raises potential risks of injustice for both victims and defendants. As to victims, there will always be evidentiary problems associated with proving a lack of consent from silence. At least some of these problems can be mitigated by courts refraining from mischaracterizing silence as the victim's failure to adequately protect him or herself. As for defendants, the prosecution's burden of proof and other procedural rights—such as the Sixth Amendment confrontation right—cannot be suspended in sexual assault cases. To suggest as much would be to improperly blur procedural and substantive silence with the result that the rule of law would cease to apply to certain classes of defendants. These cases will never be easy to resolve, but legally treating silence as lack of consent may have the additional benefit of contributing to positive cultural norms in this area.

Second, prosecutors and judges must be more attentive to the potential for discretionary charging and sentencing decisions to enshrine certain forms of victim silence systemically, at the law's expressive level. While limited resources will always require prosecutor's offices to make decisions about priorities in their enforcement regimes, they must not overlook the pervasive collective problems that will arise from the widespread silence of certain classes of victims. The same goes for imposition of criminal restitution. Such decisions should be made—both for the defendant's sake and the victim's— as part of the criminal law's overall condemnatory project, and not as simply a form of civil enforcement. This means not only looking to the defendant's constitutional rights, but also paying attention to the expressive message being sent by

leaving victims inconsistently compensated for the criminal harm they have suffered.

Finally, in the absence of a trial process, *nolo* pleas, *Alford* pleas, and the widespread use of DPAs and NPAs should be reconsidered for similar reasons. These devices have a particularly heightened potential to enshrine defendant silence as part of the formal expression of criminal condemnation. (This is particularly problematic in white collar cases where corporate silence in DPAs provides additional cover for individual bad actors to avoid prosecution altogether.) While these effects are bad enough on a case-by-case basis, concentrated use of these mechanisms in particular types of cases runs a particularly high risk of inducing collective forgetting of entire classes of misconduct. No discernable constitutional right requires that any of these agreements be available, and they raise enormous problems for systemic legitimacy and public recognition of culpability. Furthermore, with respect to individual defendants, if the constitutional protections for procedural silence were greater than *Miranda* provides, there would be less of a need for these forms of substantive silence overall.

### CONCLUSION

The preceding suggestions are non-exhaustive and necessarily limited by the general problem that the pervasiveness of plea bargaining in our criminal justice system has entrenched an unhealthy amount of substantive silence into the expressions of culpability it produces. In the current world, however, we can at least partially mitigate some of the problems I identify if the various actors in the system have a greater awareness of the effects of silence on individuals and society. This article has hopefully provided a starting point for this discussion.