

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2022

Bringing up the Bodies

I. Bennett Capers

Fordham University School of Law, capers@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

I. Bennett Capers, *Bringing up the Bodies*, 2022 U. Chi. Legal F. 84 (2022)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/1264

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Bringing Up the Bodies

Bennett Capers[†]

Allow me to begin with a scene from one of my favorite novels of the last twenty years. The novel is Hilary Mantel's *Bring Up the Bodies*,¹ the second in her award-winning trilogy of historical novels about Thomas Cromwell and King Henry VIII.²

By the start of *Bring Up the Bodies*, King Henry VIII has had his first marriage annulled and is now married to Anne Boleyn. Indeed, Anne Boleyn is pregnant, and the king is optimistic about a male heir. But the king already has eyes on Jane Seymour, and when Anne Boleyn miscarries, the king is determined to rid himself of her. This proves easier said than done, until the king and Cromwell hatch a plan to show Anne has been unfaithful. By the end of the novel, Anne Boleyn has been arrested, as have several of her suspected lovers. They are to be tried for treason. And it is only here, in the last pages of the novel, that the meaning of the novel's title becomes clear. Here is the line: "The order goes to the tower, 'Bring up the bodies.'" ³ In the wording, it is as though the prisoners are already just that, bodies, dead men walking. It seems an afterthought that their names are added: "The order goes to the tower, 'Bring up the bodies.' Deliver, that is, the accused men, by name, Weston, Brereton, Smeaton, and Norris, to Westminster Hall for trial." ⁴

[†] John D. Feerick Research Professor of Law and Director of the Center on Race, Law, and Justice, Fordham School. B.A. Princeton University; J.D. Columbia Law School. E-mail: capers@law.fordham.edu. Claudio Rezende provided invaluable research assistance.

¹ HILARY MANTEL, *BRING UP THE BODIES* (2012).

² The first in the trilogy, *Wolf Hall*, was hailed as a modern masterpiece upon its publication and won the prestigious Booker Prize. Motoko Rich, *Historical Novel about Henry VII Wins Booker Prize*, N.Y. TIMES (Oct. 6, 2009), www.nytimes.com/2009/10/07/books/07booker.html [<https://perma.cc/274T-MKZJ>]. In a rare feat, *Bring Up the Bodies* won the Booker Prize as well, making Mantel the first British novelist to win the award more than once. Ron Charles, *Hilary Mantel Wins Man Booker Prize for 'Bring Up the Bodies'*, WASH. POST (Oct. 16, 2012), https://www.washingtonpost.com/entertainment/books/hilary-mantel-wins-man-booker-prize-for-bring-up-the-bodies/2012/10/16/490642d2-148a-11e2-be82-c3411b7680a9_story.html [<https://perma.cc/8RD6-U7V9>].

³ MANTEL, *supra* note 1, at 364.

⁴ *Id.* Indeed, that the prisoners' fate had already been determined, rendering them little more than bodies awaiting execution, is made even more clear by the preceding sentence. The fuller

I open with this scene—and have used the title of Mantel’s novel as inspiration for the title of this essay—because it captures so much of what I hope to explore in these pages. We are used to thinking of convicted men (and women) as merely bodies, known by their inmate numbers, dressed in identical prison garb to strip them of individuality. But what interests me, and what I hope to explore, is how we reduce defendants to bodies long before a verdict is announced. Or, since we have become a system of pleas, well before a plea of guilty is entered.

For some readers, the idea that defendants—in a system that constantly extols the presumption of innocence, no less—are treated as just bodies will come as little surprise. Recently, when I was describing this project to a former New York City public defender, and telling him about Hilary Mantel, he responded that detained pretrial arrestees are referred to as bodies still, at least in New York criminal courts. It’s not uncommon, he told me, for prosecutors, and even judges, to use the term.⁵ “Are the bodies here from Riker’s yet? Let’s hope they didn’t forget any of the bodies.”

Beyond this, the fact that we are living during a time of *mass* incarceration—the emphasis on mass is deliberate—facilitates this reduction. We have grown accustomed to speaking in terms of numbers. For those of us who write about criminal justice, the recitation of numbers may even seem *de rigueur*. There are about 2.2 million people behind bars, several multiples of the incarceration rate just a handful of decades ago.⁶ Although we have about 5 percent of the world’s population, we have about 25 percent of the world’s incarcerated population.⁷ Indeed, by most measures we have one of the highest incarceration rates in the world.⁸ Beyond this, each year our jails cycle through approxi-

passage reads:

Statements, indictments, bills are circulated, shuffled between judges, prosecutors, the Attorney General, the Lord Chancellor’s office; each step in the process clear, logical, and designed to create corpses by due process of law. George Rochford will be tried apart, as a peer; the commoners will be tried first. The order goes to the Tower, ‘Bring up the bodies.’ Deliver, that is the accused men, by name Weston, Brereton, Smeaton and Norris, to Westminster Hall for trial.

Id.

⁵ Conversation with Adam Shlahet, Director of the Moore Advocacy Center at Fordham Law School.

⁶ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/B5H5-2CCR>].

⁷ Peter Wagner & Wanda Bertram, “What Percent of the U.S. is Incarcerated?” (*And Other Ways to Measure Mass Incarceration*), PRISON POL’Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> [<https://perma.cc/4JHX-ZH8T>].

⁸ ROY WALMSLEY, *World Prison Population List*, INST. FOR CRIM. POL’Y RSCH. (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

mately ten million people, the vast majority to await trials for nonviolent crimes.⁹ We are at a point where one in every three adults in America has a criminal record,¹⁰ and where for every fifteen persons born in 2001, one will likely spend time in jail or prison.¹¹ And on and on. In a way, the numbers themselves become, well, numbing. Our eyes begin to glaze over. We may follow the trials of Kyle Rittenhouse, or Harvey Weinstein, or Derek Chauvin, or Elizabeth Holmes. But as for the millions of others who are convicted, or the more than ten million who shuffle through jails, including those exposed to and dying from COVID-19? Those undifferentiated defendants are just bodies. We speak of “assembly-line justice: robotically convicting defendants and imposing one-size-fits-all punishments.”¹² One pictures defendants as bodies on a conveyor belt while police officers, prosecutors, and judges stand on either side keeping the bodies moving until they finally enter prison to be “housed.” Even defense lawyers work the conveyor belt, though we might call them “unwilling actors,” to borrow Robert Cover’s term.¹³ In any event, the destination remains the same: prison, or what I have elsewhere called “invisible cities.”¹⁴

So, for some readers, describing defendants as bodies may not seem new. What hopefully is newer—what hopefully will give readers pause—is the argument I want to make. And that argument, at bottom, is this: That perhaps counterintuitively, it is precisely the rules we have created to protect the rights of defendants that contribute to stripping them of individuality. Put differently, the reduction of arrestees to bodies becomes possible—I am tempted to say becomes perfected—by rules we have come to think of as pro-defendant.

To make this argument, I begin in Part I by setting forth the numerous ways we reduce arrestees to bodies. Much of this process, I ar-

[<https://perma.cc/57ZA-6RV6>].

⁹ Zhen Zeng, *Jail Inmates in 2016*, U.S. DEP’T OF JUSTICE, BUREAU OF JUST. STATS. 1 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/M4M2-HX2X>] (noting that jails “reported 10.6 million admissions in 2016”).

¹⁰ *Barriers to Work: People with Criminal Records*, NAT’L CONF. OF STATE LEGISLATURES (June 17, 2018), <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/M3C3-NCZZ>]; AMERICANS WITH CRIMINAL RECORDS, THE SENTENCING PROJ. (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/22JR-3EDY>].

¹¹ Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974–2001*, U.S. DEP’T OF JUSTICE, BUREAU OF JUST. STATS. 1 (2003), <https://www.bjs.gov/content/pub/pdf/piusp01.pdf> [<https://perma.cc/Z9Y4-56J2>].

¹² Issa Kohler-Hausman, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 615 (2014).

¹³ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986).

¹⁴ Bennett Capers, *Defending Life*, in LIFE WITHOUT PAROLE: THE NEW DEATH PENALTY? 167, 177 (Charles Ogletree, Jr. & Austin Sarat eds., 2012).

gue, is accomplished by prodding, encouraging, and even coercing arrestees to remain silent.¹⁵ Mute. Think of *Miranda* “rights.”¹⁶ *You have the right to remain silent. Anything you say can and will be used against you in a court of law.* In fact, this encouragement to sit silently, and stand silently, and simply be silent permeates every stage of the criminal process. It happens upon arrest and continues through each pretrial hearing. It certainly continues throughout any trial. And it continues, in many ways, post-conviction—through sentencing and appeals and beyond. It is so pervasive that a visitor from another planet—or for that matter a visitor from a civil law country¹⁷—might be tempted to ask, “Can the subaltern speak.”¹⁸

For me, this prompts two further questions. First, what happens when we silence defendants? Second, what do we lose when we silence defendants? Part II takes up these questions and attempts to answer them. But really, the goal of Part II is to gesture towards a better system, one where defendants are allowed, even encouraged, to speak. And in which we are encouraged to listen.

I. SILENCING DEFENDANTS

When I was a federal prosecutor, I took it for granted that defendants would sit silently at trial. For most of my defendants, to testify would be to increase their chances of conviction, since their testifying would open the door to evidence that otherwise was excluded, such as

¹⁵ To be clear, I am not the first to call attention to how various rules silence defendants. See, e.g., Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851 (2008); Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who is a Victim?*, 87 BROOKLYN L. REV. 1299 (2022). However, my ultimate goal, to be explored in a subsequent paper, is slightly different. It is to limn out the ways we silence defendants, and surface the benefits that could redound to everyone’s benefit if we encouraged defendants to speak, and if we took the effort to listen to them.

¹⁶ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁷ It is far more common in civil law countries for defendants to speak during trial. In fact, because civil law countries tend not to bifurcate the issues of guilt and sentencing, as is done in the United States, jurors learn a significant amount about the defendant. As James Whitman notes:

During the very opening minutes of a French or German trial, the presiding judge, to the dismay of Americans, questions the accused about the “course of his life before the crime with which he has been charged,” while the jurors (in France) or the lay assessors (in Germany and Italy) look on.

James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 939 (2016).

¹⁸ This is of course a play on Gayatri Chakravorty Spivak’s seminal provocation. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

evidence of any prior convictions.¹⁹ Most defendants, either at the urging of their defense attorneys or on advice from other defendants, kept quiet at the defense table, most of them expressionless. It was only years later that I began to think about defendant silence differently. Maybe I started thinking of it differently because teaching Criminal Procedure and Evidence year after year prompted me to see connections that had eluded me as a prosecutor. Maybe it was just that I had grown used to reading cases differently than most people.²⁰ Or maybe, as I turned against prosecution and began to wonder more about the hundreds of people I put away,²¹ I realized how reducing them to bodies through silence worked to my benefit in terms of securing a conviction but worked to our disadvantage in understanding why defendants turn to crime.

Whatever the case, once I began thinking about silence, what struck me is how pervasive it is in the criminal process. Silence somehow existed amid the “sound and fury” of the criminal process, and I had failed to notice just how much silence there was when it comes to defendants. The experience, in many ways, reminded me of Toni Morrison’s epiphany while reading literature.

It is as if I had been looking at a fishbowl—the glide and flick of the golden scales, the green tip, the bolt of white careening back from the gills; the castles at the bottom, surrounded by pebbles and tiny, intricate fronds of green; the barely disturbed water, the flecks of waste and food, the tranquil bubbles traveling to the surface—and suddenly I saw the bowl, the structure that transparently (and invisibly) permits the ordered life it contains to exist in the larger world.²²

I had watched and taken for granted that defendants remained silent at trial. I had even benefited from their silence. But I had not seen “the bowl,” that structure that encourages, induces, and even coerces silence so that the system can continue undisturbed in the larger world.

This first Part is about that silence.

¹⁹ See *supra* note 17 and accompanying text.

²⁰ See Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9 (2006).

²¹ For more on my turn “against prosecutors,” see I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563 (2020).

²² TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 17 (1992).

A. Pretrial

“You have the right to remain silent.” Those words are so well-known, from TV shows and films, they barely need any other introduction. Indeed, *Miranda v. Arizona* has been called one of the most well-known decisions in the Court’s history.²³ And it is a case that is generally celebrated. The intent of the Court’s decision, after all, was to level the playing field between the state and the arrestee, who too often was pressed into making incriminating remarks notwithstanding the Fifth Amendment’s privilege against self-incrimination. As the Court put it, “An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.”²⁴ To serve as a counterweight to “informal compulsion exerted by law-enforcement officers during in-custody questioning,”²⁵ *Miranda* insisted that a suspect must be advised of his rights as a precondition to the admissibility of his statements. As such, *Miranda* is usually thought of as rights enhancing.²⁶

But there is another way of looking at *Miranda*. *Miranda* also begins the process where silence is encouraged. To speak risks freedom, liberty, and on occasion even death. After all, *anything* you say *will* be used against you in a court of law. Concerned about “the potentiality for compulsion”²⁷ to speak, *Miranda* erected in its place an informal directive to remain silent. To shut it and keep it shut. Defendants may disregard this directive. After all, the deliverer or the warning, the messenger, is trained to want the opposite: speech. But the directive is nonetheless there, and a wise defendant listens. And shuts it.

To some, reading *Miranda* this way may seem as if it’s going “far to seek disquietude.”²⁸ To be clear, I am not arguing that we abandon *Miranda* warnings. Nor do I mean to suggest that *Miranda*’s costs to suspects (the encouragement to remain silent, to shut it and keep it shut) necessarily outweigh the benefits (avoiding self-incrimination). Viewed in isolation, I suspect *Miranda* “protections” are a net good. My concern, however, is not *Miranda* in isolation but rather *Miranda* as just one of a constellation of rules. My concern is with the cumulative

²³ See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 24.01 (4th ed. 2006).

²⁴ *Miranda*, 384 U.S. at 461.

²⁵ *Id.*

²⁶ But see Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 673 (1992) (arguing *Miranda* presents only the illusion of enhancing rights, when in fact it legitimates the status quo).

²⁷ *Miranda*, 384 U.S. at 457.

²⁸ WILLIAM WORDSWORTH, PRELUDE, Book Five, v.52 (1805).

effect of these rules through the expressive messages they send. My concern is that in aggregate, they disadvantage not only defendants, but all of us.

Consider how other rules supplement and reinforce the expressive message of silence. Again, *Miranda* warnings tell a suspect that anything he says can and will be used against him in court. In the federal system at least, the arrestee is then taken “without unnecessary delay before a magistrate judge,”²⁹ who is required by the Federal Rules of Criminal Procedure to in effect repeat *Miranda*. Rule 5 requires the judge to advise the defendant of his “right not to make a statement, and that any statement may be used against the defendant.”³⁰ And of course, their attorneys are often telling them the same: “Shut it and keep it shut.” As one book puts it, the defense lawyer’s principal task at this stage “is to prevent the government from obtaining evidence that could be inculpatory of the client and used by the investigator or prosecutor to justify issuance of a formal criminal charge.”³¹ Indeed, the defense lawyer likely also advises the defendant to “shut it” in general since “the government may later learn of statements he makes, even to trusted friends,”³² since calls from jails can be recorded,³³ and since even a cellmate might be a jailhouse snitch.³⁴ The defense lawyer may even encourage a type of attorney-client silence, since knowing too much might ethically tie the defense lawyer’s hands.³⁵

²⁹ FED. R. CRIM. P. 5(a)(1)(A).

³⁰ FED. R. CRIM. P. 5(d)(1)(E).

³¹ KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 6 (1985).

³² Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and Criminal Law*, 69 N.C. L. REV. 687, 690 (1991); see also *Hoffa v. United States*, 385 U.S. 293, 293 (1966) (finding no Fourth Amendment violation where, without a warrant, law enforcement deployed an informant who masqueraded as defendant’s friend to elicit incriminating information).

³³ Relying on implied consent, courts have long held that monitoring inmates’ telephone communications does not violate the Fourth Amendment, so long as the inmate is aware of the monitoring program. See, e.g., *United States v. Balon*, 384 F.3d 38, 47–48 (2d Cir. 2004). Consent will be inferred where automated warnings inform the inmate of the recording policy, or posted signs are available to alert the inmate. See, e.g., *United States v. Morin*, 437 F.3d 777, 779 (8th Cir. 2006). Personal cellphones are classified as illegal contraband in jails and prisons, further contributing to a norm of silence. For more on the banning of personal cellphones, see Hannah Riley, *Just Let People Have Cellphones in Prison*, SLATE (Feb. 15, 2021), <https://slate.com/news-and-politics/2021/02/cellphones-in-prisons.html> [<https://perma.cc/DNG7-MQEE>].

³⁴ See, e.g., *Kulhmann v. Wilson*, 477 U.S. 436, 439, 459 (1986) (finding no violation of the right to counsel where jailhouse informant instructed to “keep his ears open” and later testified as to incriminating remarks an inmate made to him); see also *Bey v. Morton*, 124 F.3d 524, 525 (3d Cir. 1997) (reaching similar conclusion with respect to corrections officer to whom defendant made incriminating statements).

³⁵ Although an attorney is charged with zealously representing her client, that zealous representation may conflict with the attorney’s ethical obligations, including obligation to the court. For example, an attorney is ethically restrained from assisting her client in presenting false evidence, including false testimony.

There is one more thing to say before moving on to the trial or plea. Other than the formality of saying “not guilty” upon being arraigned on the indictment or information, the defendant is made to sit silent. Instead of the defendant speaking, his lawyer speaks for him. For defendants detained without bail, or unable to afford bail, the marshals shuffle them into court to sit at defense table, but it is the defense lawyer who makes his appearance and answers for him. For defendants released on bail, at every pretrial proceeding the defendant arrives in court on his own and sits at the defense table while the case is called in his name, but again it is the same thing: the defense counsel speaks while the defendant remains silent. Even when it comes to discussion of “rights,” like the constitutional and statutory right to a speedy trial³⁶ or even the decision about whether to go to trial or plead, it is the defense counsel who speaks. Under the Due Process Clause, we insist on the defendant’s right to appear at every proceeding of note.³⁷ And yet in many ways, his appearance is superfluous, a mere formality. Or rather, it is the presence of his body that the rules care about. Nothing more.

B. Trials and Pleas

Should the defendant proceed through either of the two doors the prosecutor holds open for him—to proceed to trial or to proceed to plead guilty—other rules and norms kick in that continue to lull the defendant into remaining silent and existing as just a body, an object rather than a subject. Again, at trial, his lawyer will invariably speak for him while he sits mute. We make it notoriously difficult for a defendant to represent himself. Since *Gideon v. Wainwright*³⁸—on its face another rights-enhancing case insofar as it interpreted the Sixth Amendment as requiring the state to provide defense counsel—we keep defense counsel at the ready. Though in reality, the inducement to speak through counsel has likely been there since the defendant was first arrested, since the *Miranda* warning. *You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.* It has definitely been there since the first appearance in court, at least in the federal system, where the magistrate advises each arrestee of his right to an attorney, whether he can afford one or not, and appoints counsel.³⁹ Or as the Offices of the United States Attorneys put it, “arrangements

³⁶ See U.S. CONST. amend. XI; 18 U.S.C. §§ 3161–74.

³⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 130–31 (1934); see also FED. R. CRIM. P. 43.

³⁸ 372 U.S. 335 (1963).

³⁹ See FED. R. CRIM. P. 5(d)(1)(B); 18 U.S.C. § 3006A.

are made for [the defendant] to have an attorney.”⁴⁰ *Gideon* made it official, and gave birth to public defender offices as we know them.⁴¹ Quoting *Powell v. Alabama*,⁴² the Court in *Gideon* even repeated the notion that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁴³

Not only have we arranged things so that the defense attorney speaks, and the defendant remains silent. We have also erected hurdle after hurdle to self-representation, especially at the trial stage. Although in *Faretta v. California*,⁴⁴ the Court acknowledged that “the right to self-representation—to make one’s own defense personally”—is “necessarily implied by the structure of the [Sixth] Amendment,”⁴⁵ the Court also required that a defendant first “waive” their right to counsel and that they “be made aware of the dangers and disadvantages of self-representation.”⁴⁶ *Faretta* insisted the defendant must “knowingly and intelligently”⁴⁷ forego the benefits of counsel. *Faretta* made clear that even if a defendant manages to jump these hurdles after these efforts to discourage him, the trial court can still insist that counsel sit with him by appointing “standby counsel.”⁴⁸ In short, even when *Faretta* was decided, the right to self-representation was conditional upon a stern warning from the trial court. And since *Faretta*, the Court has made a defendant’s “right” to self-representation harder, not easier.⁴⁹

So it is the defense lawyer who speaks at trial, not the defendant. It is the defense lawyer who conducts jury selection, makes opening statements, and addresses the jury. Indeed, the lawyer may even advise the client to remain expressionless, since jurors may interpret any fidgeting or facial movements as signs of guilt.⁵⁰ And it is the defense lawyer who questions the state’s witnesses. This is so taken for granted that we become discombobulated when defendants actually take steps to

⁴⁰ *Initial Hearing / Arraignment*, OFFS. OF THE U.S. ATT’YS, <https://www.justice.gov/usao/jst/tice-101/initial-hearing> [<https://perma.cc/PY48-9J34>].

⁴¹ See generally SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* (2020).

⁴² 287 U.S. 45 (1932).

⁴³ *Gideon*, 372 U.S. at 344–45.

⁴⁴ 422 U.S. 806 (1975).

⁴⁵ *Id.* at 819.

⁴⁶ *Id.* at 835.

⁴⁷ *Id.*

⁴⁸ *Id.* at 834 n.46.

⁴⁹ For more on the Court’s retrenchment post-*Faretta*, see generally Erica Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 B.U. L. REV. 1147 (2010).

⁵⁰ Laurie L. Levinson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 582–83 (2008); see also Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 882–85 (2019).

question their accusers, to in fact exercise what was likely the original understanding of the Sixth Amendment right to confront witnesses.⁵¹

Most defendants likely accept as a given that their lawyers will do the talking. After all, every message they have received—from television, from the news media, from judges and prosecutors, from their appointed lawyers—is that the lawyer speaks. Who hasn’t heard the expression, “He who represents himself has a fool for a client”? Still, of the many defendants who accept this greater role for their lawyers, and lesser role for themselves, a few at least want to take the stand in their own defense. To explain their side of the story. But even here a host of rules exists to give them pause, to encourage them to stay seated where they are, to just remain silent, to just remain bodies. Consider Rule 609 of the Federal Rules of Evidence, some version of which appears in almost every state.⁵² Under the rule, any defendant who testifies opens the door to evidence that normally would be inadmissible, namely evidence of any prior felony convictions within the last ten years, and potentially misdemeanor convictions as well. Anna Roberts puts it this way:

Like Odysseus, defendants must attempt to sail between Scylla and Charybdis, choosing whether to waive their right to testify, and thus either plead guilty or remain mute at trial, or to take the witness stand and risk the demolition of their testimony through the use of their criminal records. Odysseus made it to his destination: it just took a while. But for many defendants the result is disastrous: all too often, the result of impeachment—actual or threatened—is virtually automatic conviction.⁵³

Of course, this is just one of several rules or decisions that have the effect, whether intended or not, of discouraging defendants from speaking. One could add the Court’s decision in *Griffin v. California*,⁵⁴ another seemingly rights-enhancing decision which bans prosecutors from commenting on a defendant’s decision not to testify.⁵⁵ After all, it communicates to defendants that they won’t be penalized for remaining

⁵¹ In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court concluded that the Framers intended the Sixth Amendment’s right of confrontation to include the right to confront any testimonial hearsay declarants. However, what is too often elided in contemporary discussions of the right is that having a defense counsel was rare at the time the Sixth Amendment was ratified. In other words, in 1791, it was the defendant himself who normally confronted witnesses against him, not an attorney. JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 253 (2003); cf. Levinson, *supra* note 50, at 589.

⁵² Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1987 (2016).

⁵³ *Id.* at 1978–79.

⁵⁴ 380 U.S. 609 (1965).

⁵⁵ *Id.* at 613.

seated and silent. The risk for defendants, when one considers *Griffin* in tandem with rules like Rule 609, is in speaking.

These are just some of the rules that communicate this message. A defendant considering whether to testify will find that he may subject himself to “special scrutiny” jury instructions. Since the Court’s decision in *Reagan v. United States*,⁵⁶ it has become routine for many jurisdictions to warn the jury that, in evaluating the defendant’s testimony, they may consider his interest in the outcome of the case.⁵⁷ As Vida Johnson points out, such instructions contribute to silencing defendants.⁵⁸ And should the defendant be found guilty, the fact that he testified is likely to subject him to additional punishment at sentencing.⁵⁹ Even the defendant who correctly believes he’ll be acquitted if he tells his side of the story still faces a big risk. The law still dissuades him. Even if he testifies and is acquitted, there is nothing to prevent the state from, in theory at least, now charging him with perjury.

Again, viewed in isolation, these rules may seem protective of defendants’ rights. But viewed in aggregate, they send a message that the defendant hears loud and clear: shut it and keep it shut. Indeed, returning to evidentiary rules, perhaps the biggest silencers are the rules of relevancy, specifically Rules 401, 402, and 403, which normally bar any mitigating explanation a testifying defendant might want to offer about why he committed the crime. Imagine a defendant who steals a loaf of bread to feed her children. Should she elect to testify, her admission that she stole the loaf of bread would be admissible because it “is of consequence in determining” guilt or innocence.⁶⁰ But if she also proceeds to explain that she stole the bread to feed her children? Should the prosecutor object to this part of her testimony, the objection could easily be sustained, the evidence excluded, and the jury instructed to disregard. Her reasoning may be relevant to sentencing, the judge might tell her, but it is not relevant to guilt.

The fact of the matter is that very few defendants choose trial. That we have constructed rules where a defendant’s role at trial is merely to be present, a mere body, the state’s first exhibit, may explain in part why so many defendants waive one of the few rights spelled out in the Constitution, their “right to a speedy and public trial, by an impartial jury.”⁶¹ In fact, nearly 97 percent of all convictions are now the result of pleas, a number so staggering that the Court finally acknowledged that

⁵⁶ 157 U.S. 301 (1895).

⁵⁷ See *id.* at 304–05.

⁵⁸ Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 338 (2020).

⁵⁹ *Id.* at 337.

⁶⁰ FED. R. EVID. 401.

⁶¹ U.S. CONST. amend. VI.

plea bargaining “is the criminal justice system.”⁶² Yet even for defendants who plead guilty, silence is still the norm. Although we call a defendant’s entering of a plea of guilty a “plea colloquy,” the word colloquy is certainly a fiction since a defendant’s lines are usually scripted. Read Rule 11 of the Federal Rules of Criminal Procedure, or any treatise discussing the requirements of the plea colloquy,⁶³ and one will quickly see how one-sided the colloquy is. The judge must advise the defendant of his right to plead not guilty, of his right to a jury trial, of his right to counsel, of his right to be protected from self-incrimination should he go to trial—silence, again—and a whole series of other rights that he would be waiving by entering a plea of guilty.⁶⁴

In the federal system, where I practiced, the judges would follow each articulation of a right with a perfunctory question, “Do you understand,” to which the defendant had been prepped by his lawyer to give a rehearsed response: “Yes.” The judge would inquire whether the defendant’s plea was voluntary, again to be met with a perfunctory “yes.” Was the plea agreement with the government the complete agreement? “Yes.” To satisfy Rule 11’s requirement that there be a factual basis for the plea,⁶⁵ the court would then ask the prosecutor for an offer of proof, and after hearing this, finally say to the defendant, “Tell me, in your own words, what you did to make you guilty,” or words to that effect. But everyone understood what response was expected. Something brief, let’s make this quick. The request was for the defendant to describe what he did to make him guilty, not why. Any straying into why would result in a stern glare from the court, a sharp tug on a sleeve from the defense lawyer, then a barely whispered rebuke to “just say what you did.” The defense lawyer might even add, “Save the rest of it for sentencing.” The defendant would then say a few words limited to what he did. The judge would accept the plea, and the defendant would be escorted away.

Maybe some of the defendants actually believed they would be able to go into “the rest of it” at sentencing. But as shown below, more often than not, they would soon learn differently. Even at sentencing, they were expected to be silent bodies.

⁶² *Missouri v. Frye*, 566 U.S. 134 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

⁶³ See, e.g., CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 178 Advising and Questioning Defendant (5th ed. 2021).

⁶⁴ FED. R. CRIM. P. 11.

⁶⁵ *Id.* at 11(b)(3).

C. Post-Conviction

A defendant certainly could have reason to expect that at sentencing, he would finally be allowed to have his say. It has even been said that sentencing “is one place in the criminal process where every convicted defendant has the chance to speak.”⁶⁶ Consider again the federal process. Rule 32 of the Federal Rules of Criminal Procedure requires the sentencing judge to “address the defendant personally in order to permit the defendant to speak to present any information to mitigate the sentence.”⁶⁷ As the Court pointed out in *Green v. United States*,⁶⁸

The design of Rule 32(a) did not begin with its promulgation; its legal provenance was the common-law right of allocution. As early as 1689, it was recognized that the court’s failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence.⁶⁹

Indeed, in oft-quoted language, the Court noted, “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.”⁷⁰ Thus it is statutory error, though not constitutional error,⁷¹ for a judge to fail to invite the defendant to speak.

But even here, a defendant is likely to find his attempt to speak constrained. For starters, though the court is required to invite the defendant to speak, the invitation is limited. As courts have made clear, an invitation to speak does not mean “a defendant’s right to address the sentencing court is unlimited. The exercise of his right may be limited both as to duration and as to content. He need be given no more than a reasonable time; he need not be heard on irrelevancies or repetitions.”⁷²

⁶⁶ Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2643 (2007).

⁶⁷ FED. R. CRIM P. 32.

⁶⁸ 365 U.S. 301 (1961).

⁶⁹ *Id.* at 304.

⁷⁰ *Id.*

⁷¹ The year following its decision in *Green*, the Supreme Court made clear that while a failure to ask the defendant if he would like to speak violates Rule 32, it “is an error which is neither jurisdictional nor constitutional.” *Hill v. United States*, 368 U.S. 424, 428 (1962). Lower courts have distinguished *Hill* when confronted with situations where a defendant attempted to speak and was affirmatively denied the opportunity. See, e.g., *Ashe v. North Carolina*, 586 F.2d 334, 336–37 (4th Cir. 1978).

⁷² *Ashe*, 586 F.2d at 336–37; see also *United States v. Li*, 115 F.3d 125, 133 (2d Cir. 1997) (“[A]

Beyond this, a defendant is likely to find the offer to speak circumscribed by the stick the judge holds in one hand, and the carrot the judge holds in the other. The stick is that *after* the defendant speaks, the judge will decide the sentence.⁷³ The carrot is that *after* the defendant speaks, the judge has the authority to impose a lesser sentence based upon whether the defendant has shown “acceptance of responsibility.” In the federal system for example, the United States Sentencing Guidelines allow a district court to reduce a defendant’s offense level, for sentencing purposes, by two points “[i]f the defendant clearly demonstrates acceptance of responsibility for his offense.”⁷⁴ Moreover, in determining whether to award a two-point reduction for acceptance of responsibility, the Guidelines provide that the district court may consider several benchmarks, including whether the defendant truthfully admitted the conduct comprising the offense(s) of conviction.⁷⁵ So the defendant has the right so speak, but if he hopes to receive a lower sentence, the system encourages him to “truthfully admit[] . . . and not falsely deny[]”⁷⁶ his relevant conduct. He is certainly discouraged from offering an explanation, which might seem like making excuses. So as much as the defendant would like to say more, his lawyer and our rules encourage an apology, a plea for mercy, and then silence.

By this time, the defendant may sense that the real purpose of his supposed right of allocution is to “preserve the *appearance* of fairness in the criminal justice system”⁷⁷ and to “maximiz[e] the *perceived* equity of the process.”⁷⁸ The defendant, unless he receives a sentence of probation, is then usually carted off to jail or prison. There, he may have free rein to speak, if he wants to speak to other prisoners or cinderblock walls. Or, if he can afford the exorbitant cost, he is free to speak to authorized family members on authorized payphones, where he is likely to see a sign that says “Calls May Be Monitored and Recorded.” Even the defendant who is banking on another day in court through an appeal will soon realize his ability to speak is now entirely absent. As the

defendant’s right to allocution is not unlimited in terms of either time or content.”); *United States v. Muniz*, 1 F.3d 1018, 1025 (10th Cir.1993) (“[T]he judge does not have to let the defendant re-argue the case at sentencing.”); *United States v. Kellogg*, 955 F.2d 1244, 1250 (9th Cir.1992) (“Although the defendant has a right of allocution at sentencing, that right is not unlimited.”).

⁷³ FED. R. CRIM. P. 32 (i)(4)(A) (“Before imposing sentence, the court must . . . permit the defendant to speak.”).

⁷⁴ U.S. SENT’G GUIDELINES MANUAL § 3E1.1(a) (U.S. Sent’g Comm’n 1992).

⁷⁵ *Id.* at § 3E1.1 cmt. 1.

⁷⁶ *Id.*

⁷⁷ *United States v. Ward*, 732 F.3d 175, 181 (3d Cir. 2013) (emphasis added) (identifying appearance as the last of three purposes).

⁷⁸ *United States v. Barnes*, 948 F.2d 325, 328 (7th Cir. 1991) (quoting AMERICAN BAR ASS’N, 3 ABA STANDARDS FOR CRIMINAL JUSTICE, 18–459 (2d ed. 1980) (emphasis added)).

Supreme Court noted in *Price v. Johnston*,⁷⁹ a prisoner “has no absolute right to argue his own appeal or even to be present at the proceedings in the appellate court.”⁸⁰

Finally, the sentenced defendant, with his appeals exhausted, may hold out the hope for parole. But here too, we demand silence beyond an apology. Parole boards expect defendants to “accept responsibility and express remorse.”⁸¹ Nothing more. Any attempt to provide context can mean the denial of parole.

II. CONSEQUENCES

All of this leads me to pose two questions. First, what happens when we silence defendants? And second, what do we lose when we do this?

As to what happens, I can’t help but think the end effect of these rules, whether well-intentioned or not, is to dehumanize defendants, to reduce them to bodies, to mere objects. Close your eyes and imagine seeing a defendant at the defense table. If it’s easier, think Derek Chauvin, the police officer who was prosecuted for murdering George Floyd. Or Dzhokhar Tsarnaev, who faced the death penalty for his role in the Boston Marathon bombing. Think Ghislaine Maxwell, prosecuted for aiding and abetting Jeffrey Epstein in his trafficking of young girls for sex. But also imagine, if you can, any of the hundreds of faceless defendants tried each day, the defendants who do not make the news and who, when convicted, make up the bulk of the “invisible cities” that we call prisons. In the vast majority of cases, the defendant will sit mute at trial, in large part because of the rules we have put in place to encourage, cajole, and even compel silence. As the evidence is presented against him, the defendant sits there silently. And unless it happens to be part of the state’s evidence, it is very likely that throughout the trial, we will never once hear the defendant’s voice. It is often said that what separates humans from animals is complex language. Is it so hard to believe that when defendants are voiceless, it makes it easier to think of them as not human, as monsters, as merely bodies, and thus makes

⁷⁹ 334 U.S. 266 (1948).

⁸⁰ *Id.* at 270.

⁸¹ Tom Robbins, *He Says He’s No Murderer. That’s Why He’s Still in Prison*, N.Y. TIMES (Dec. 2, 2021), <https://www.nytimes.com/2021/12/02/nyregion/joseph-gordon-parole-murder.html> [<https://perma.cc/WE85-9C3M>](quoting Michelle Lewin, executive director of the Parole Preparation Project).

it so much easier to lock them away behind bars?⁸² And how about defendants of color, given that there seems to be “no exit from race,”⁸³ that we use “race as evidence,”⁸⁴ and that social cognition research shows that many people implicitly associate dark skin with criminality?⁸⁵ When we erect rules that encourage their silence, their voicelessness, and that deprive them of individuation,⁸⁶ doesn’t it make it all the easier to dismiss them? Banish them? Confine them? And forget them?

As to what we miss, here’s my supposition. When we silence defendants and reduce them to mere bodies, we lose out on learning why people offend, which in turn can help us reduce crime. When we silence defendants, we frustrate rehabilitation and perceptions of legitimacy. One of the core ideas behind rehabilitation is coming to terms with what one has done. Again, we make this part of sentencing: acceptance of responsibility. But can one truly rehabilitate and come to terms with what one has done if one is forbidden from discussing why? Ditto for perceptions of legitimacy, which so often turn on being heard, being able to have one’s say. But that is precisely what we deny defendants: the ability to truly have their say. We even frustrate restorative justice and the opportunity for victims to have their own right of confrontation. Imagine being a victim of a crime. For victims who want closure, that closure often comes with being able to speak to the defendant and have the defendant speak back, to explain why and how come. Our system is set up to discourage, and even prevent, this.

Aside from the loss of credibility and meaningful rehabilitation, our insistence on reducing defendants to mere bodies causes us to lose something more important. We lose our power. In part we lose our power to show mercy because we lack information to activate feelings of mercy. But more significantly, we lose our power to decide.⁸⁷ Or rather, we have been deprived of our power to decide. After all, these rules function in aggregate not only to discourage the defendant from speaking, but also to deprive us from hearing. Just consider: Historically, juries of peers were not only common; they were also there to hear everything. They would decide guilt or innocence based on all of the facts,

⁸² See Roberts, *supra* note 52, at 2002 (noting that in silencing defendants, we deny the defendant the ability “to let the jury know who he is”).

⁸³ See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 996 (2002).

⁸⁴ Capers, *Evidence Without Rules*, *supra* note 50, at 887.

⁸⁵ *Id.* at 885–93 (citing studies).

⁸⁶ For more on the science of individuation, especially how it might apply to Black defendants, see Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 874–77 (2016).

⁸⁷ On the historic role of jurors to decide blameworthiness, see Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 312–16 (2003).

including the “why” and the “how come” that the Rules of Evidence today exclude.⁸⁸ Beyond this, defendants themselves would speak. Indeed, during the colonial period, trials were for the most part a “lawyer-free’ contest between citizen accusers and citizen accused.”⁸⁹ The defendant was officially barred from testifying under oath but was free to make an unsworn statement to the jury without subjecting himself to cross-examination. In short, as the legal historian Lawrence Friedman put it, the defendant was “a courtroom player at his own trial.”⁹⁰ John Langbein adds, “[c]itizen accusers confronted the accused in altercation-style trial. . . . The accused conducted his own defense, as a running bicker with the accusers.”⁹¹

Indeed, it is significant that when the Sixth Amendment was ratified, counsel was envisioned as “an assistant rather than a master,”⁹² especially since even then “self-representation was the norm.”⁹³ Even with the rise of public prosecutors, most defendants lacked lawyers⁹⁴ and continued to represent themselves. As such, until at least the 1830s, it was not uncommon for criminal trials to open with an unsworn statement by the defendant,⁹⁵ who would then confront and question the witnesses against him. As for defendants who could afford lawyers, the lawyers likely played a limited role, primarily arguing legal questions but not addressing the jury directly.

It would be easy to view this history as “merely that: history. Dusty history. An interesting side note, or endnote, or footnote, but nothing more.”⁹⁶ But in fact, it shows both how different things were, and how different things could be. It shows that the system that exists today—in which defendants are for the most part voiceless bodies—is not pre-ordained. Gradually, we erected rules that collectively discourage defendants from speaking, and rules that gradually stripped knowledge from juries. In short, we have created a system in which jurors have less power. The state has benefited from this. But I’m not sure we, the people, have.

⁸⁸ The bulk of common law evidence rules—including rules that had the “net result” of “suppress[ing] great chunks of truth”—were developed in the nineteenth century. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 248 (1993). Prior to this and other changes in procedure, a jury would have known “the context of the crime and maybe even knew something of the crime itself.” *Id.*

⁸⁹ Levinson, *supra* note 50, at 589.

⁹⁰ FRIEDMAN, *supra* note 88, at 245.

⁹¹ LANGBEIN, *supra* note 51, at 253; *see also* Levinson, *supra* note 52, at 589.

⁹² Hashimoto, *supra* note 49, at 1168.

⁹³ *Id.*

⁹⁴ FRIEDMAN, *supra* note 88, at 245.

⁹⁵ DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800–1865* 49 (1999).

⁹⁶ Capers, *Against Prosecutors*, *supra* note 21, at 1581.

CONCLUSION

It may seem natural that we tend to treat criminal defendants as mere bodies, as objects, and that we accomplish much of this through rules that lull, or trick, defendants into becoming silent. For some, it may even seem just. After all, for perpetrators of violent crimes who treated their victims as mere objects, it may seem just that we in turn treat offenders the same. It may even accord with our retributive urges, on par with righting a wrong.⁹⁷ I hope not.

For starters, this would mean treating defendants as deserving to be “put in their place” before they have even been found guilty. Beyond this—indeed regardless of whether a person is factually guilty or not—we should be troubled when we silence persons. We should ask ourselves, “What are we afraid to hear?”

Answering that last question is for another day and is part of a larger project I am working on. For now, my hope is that I’ve at least accomplished a more limited goal. To explain that goal, allow me to return to Hilary Mantel’s novel, *Bring Up the Bodies*.

“The order goes to the tower, ‘Bring up the bodies.’ Deliver, that is, the accused men, by name, Weston, Brereton, Smeaton, and Norris, to Westminster Hall for trial.”⁹⁸ In the novel, the men are already mere bodies, even though they have yet to be tried. The rules of prosecution will be followed, Mantel tells the reader, but perhaps only for show. As she puts it, each step in the process is “clear, logical, and designed to create corpses by due process of law.”⁹⁹ This is the sense in which I began this project and why the title of novel served as inspiration for this essay.

But as I conclude, I realize that Mantel’s title is richer than I initially realized. Because in imagining the inner life of Thomas Cromwell and his role in the deaths of Anne Boleyn and others, Mantel is bringing to life, and allowing to speak, bodies long since shellacked in history.

And realizing this, I see that has been my goal all along as well. At bottom, this essay is about bringing up the bodies that we tend to ignore. The more than two million people behind bars right now. And the ten million or so that cycle through our jails each year. The goal is to make us see them. To allow them to speak. And ultimately, for us to listen.

⁹⁷ See Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1679–85 (1992); see also JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 124–28 (1998).

⁹⁸ MANTEL, *supra* note 1, at 364.

⁹⁹ *Id.*